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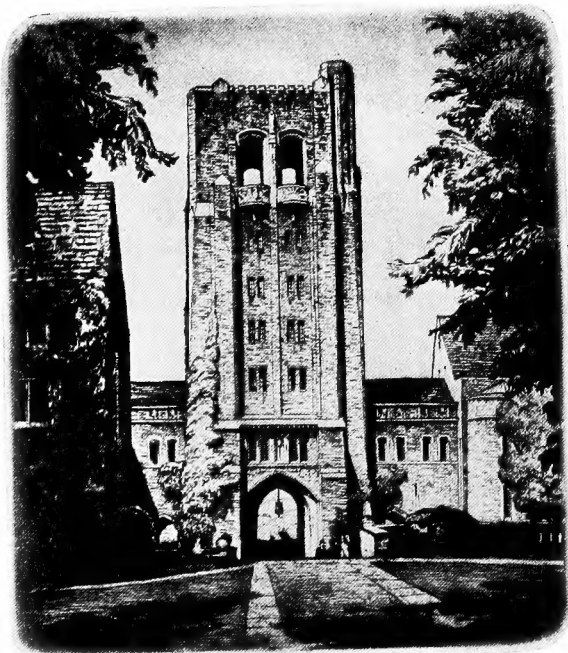
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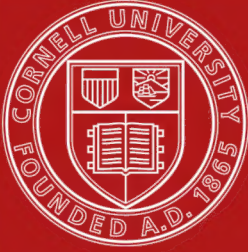


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A  
DIGEST  
OF  
PATENT CASES.

EMBRACING ALL PATENT CASES, DECIDED IN THE FEDERAL AND STATE  
COURTS FROM THE FOUNDATION OF THE  
GOVERNMENT, FROM

1789 TO 1888.

BY  
WILLIAM EDGAR SIMONDS,  
COUNSELLOR AT LAW.

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## NOTE OF PREFACE AND EXPLANATION.

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THE writing of this digest has been a part of my daily work for many years. This labor was not originally intended to result in a printed book, but in a digest for my own use ; and it is possible that the book might have been more nearly perfect if the intent to produce a book had prevailed from the first.

The book is intended, nevertheless, to be thorough and exhaustive ; it is certainly all original work ; nothing has been taken at second hand.

It will be observed that quotations are used most liberally. I have not used my own language whenever I could use that of the court ; the object of this is that the digest matter shall carry on its face evidence of accuracy and authenticity.

The classification is somewhat novel, but it has not been adopted for the sake of novelty ; it is the outgrowth of twenty years of practice in patent causes.

There is no room for expectation that the book will prove financially remunerative to me. If it shall prove to be a good working tool for lawyers I shall feel amply repaid.

W. E. S.

HARTFORD, CONN., Oct., 1888.





# DIGEST.

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## ABANDONMENT.

"ABANDONMENT," as used in this title, means the dedication of an invention to the public; courts have generally if not always used it as meaning the abandonment of a *completed* invention. The word has other connections or relations, as in "Abandoned Experiment" [see "Prior Use—Abandoned Experiment"], which means an attempt at the production of an invention given up before the stage of successful reduction to practice is reached; and in "Abandoned Application," which means the abandonment of an application for a patent; and which may or may not be a factor in evidencing the abandonment of an invention. More than two years' public use of an invention prior to application for patent therefor is sometimes spoken of as "Statutory Abandonment."

### "ABANDONMENT" IN THE PATENT ACTS.

Act approved March 3d, 1839.

SECTION 7. *And be it further enacted*, That every person or corporation who has or shall have purchased or constructed any newly-invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent. [Repealed July 8th, 1870.]

Act approved March 3d, 1863.

SEC. 3. *And be it further enacted*, That every patent shall be dated as of a day not later than six months after the time at which it was passed

and allowed, and notice thereof sent to the applicant or his agent. And if the final fee for such patent be not paid within the said six months, the patent shall be withheld, and the invention therein described shall become public property as against the applicant therefor: *Provided*, That in all cases where patents have been allowed previous to the passage of this act, the said six months shall be reckoned from the date of such passage. [Repealed July 8th, 1870.]

Act approved June 25th, 1864.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person having an interest in an invention, whether as the inventor or assignee, for which a patent was ordered to issue upon the payment of the final fee, as provided in Section 3 of an act approved March three, eighteen hundred and sixty-three, but who has failed to make payment of the final fee, as provided by said act, shall have the right to make the payment of such fee, and receive the patent withheld on account of the non-payment of said fee, provided such payment be made within six months from the date of the passage of this act: *Provided*, That nothing herein shall be so construed as to hold responsible in damages any persons who have manufactured or used any article or thing for which a patent, as aforesaid, was ordered to be issued. [Repealed July 8th, 1870.]

Act approved March 3d, 1865.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person having an interest in an invention, whether as inventor or assignee, for which a patent was ordered to issue upon the payment of the final fee, as provided in Section 3 of an act approved March three, eighteen hundred and sixty-three, but who has failed to make payment of the final fee as provided in said act, shall have the right to make an application for a patent for his

invention, the same as in the case of an original application, provided such application be made within two years after the date of the allowance of the original application. [Repealed July 8th, 1870.]

Act approved July 8, 1870.

SEC. 24. (This section provides for the patenting of a new and useful invention, "unless the same is proved to have been abandoned.")

SEC. 35. *And be it further enacted*, That any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who has failed to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application: *Provided*, That the second application be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent, as aforesaid, was ordered to issue, prior to the issue thereof: *And provided further*, That when an application for a patent has been rejected or withdrawn, prior to the passage of this act, the applicant shall have, six months from the date of such passage, to renew his application, or to file a new one; and if he omit to do either, his application shall be held to have been abandoned. Upon the hearing of such renewed applications abandonment shall be considered as a question of fact.

SEC. 61. (This section provides as a defence to an action for infringement of a patent the fact that the invention "had been abandoned to the public.") [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4886. (This section provides for the patenting of a new and useful invention "unless the same is proved to have been abandoned.")

SEC. 4897. Any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. But

no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact.

SEC. 4920. (This provides as a defence to an action for infringement of a patent the fact that the invention "had been abandoned to the public.")

#### CASES.

1. If the inventor suffers his invention to be used freely and fully by the public for years, he will be held to have made a gift of it to the public. *Whittemore et al. v. Cutter*, 1 Gall. 478.—STORY, 1813.

2. An invention once in public use, and abandoned to the public, cannot be exclusively appropriated afterward by an independent inventor. *Evans v. Eaton*, 1 Peters' C. C. 322.—WASH. 1816.

3. No disuse of a patented invention amounts to abandonment. *Gray et al. v. James et al.*, 1 Peters' C. C. 394.—WASH. 1817.

4. "No man is permitted to lie by for years and then take out a patent. If he has been practising the invention with a view of improving it, . . . that ought not to prejudice him." The intent of the delay is a question for the jury, also whether allowing use before patent does not amount to abandonment to the public. *Morris v. Huntington*, 1 Paine, 348.—THOMPSON, 1824.

5. "If an inventor makes his discovery public, looks on, and permits others to freely use it, without objection or assertion of claim to the invention, of which the public might take notice, he abandons." It makes no difference that the article was made by a particular individual, by private permission of the inventor. "It is possible that the inventor may not have intended to give the benefit of his discovery to the public; . . . it is not a question of intention, . . . but of legal inference." *Pennock et al. v. Dialogue*, 4 Wash. 538.—WASH. 1825.

6. Abandonment is a question of fact.—*Id.*

7. "If he" [the inventor] "asserts no exclusive right for years, with a full knowledge that the public are led by it to a general use, such use . . . amounts to strong proof that he waives the exclusive right." [Facts: Plaintiff made the invention in 1804; it was used some by the public to 1815; after 1815 in general use; patent taken in 1822.] *Mellus v. Sitsbee*, 4 Mason, 108.—STORY, 1825.



8. The inventor's "acts are to be construed liberally; . . . he is not to be estopped by licensing a few persons to use his invention to ascertain its utility, or by any such acts of peculiar indulgence and use as may fairly consist with the intention to hold the exclusive privilege."—*Ib.*

9. "If, before the patent is taken out, the inventor looks on and sees his invention going into general use, without objection on his part, the courts will treat his conduct as equivalent to an abandonment."—*Treadwell et al. v. Bladen*, 4 Wash. 703.—WASH. 1827.

10. "It is possible that, without . . . use by others, an unreasonable and causeless or faulty delay in taking out . . . patent might be justly, and upon legal principles, considered as amounting to abandonment."—*Ib.*

11. To make a discovery some time in the year, to put it into practical use during the latter part of the year, and to patent it by the 10th of January in the following year is not faulty delay.—*Ib.*

12. "An inventor may abandon his invention." "This inchoate right thus once gone cannot be resumed." *Pennock et al. v. Dialogue*, 2 Peters, 1.—SUP. CT. 1829.

13. The question of abandonment which generally arises is a question of fact. When all the facts are given, the court may state the deducible legal conclusion.—*Ib.*

14. It is not the object of the law to reward those least prompt to communicate their discoveries.—*Ib.*

15. The first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application.—*Ib.*

16. An inventor may take reasonable time to experiment and to prepare specification, model, and drawing. *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—BALDWIN, 1831.

17. Vigilance is necessary. If the invention becomes known to the public by fraudulent means, the inventor should assert his right immediately and take steps to legalize it. *Shaw v. Cooper*, 7 Peters' C. C., 292.—SUP. CT. 1833.

18. "No matter by what means an invention may be communicated to the public, . . . any acquiescence in the public use by the inventor will be an abandonment of the right."—*Ib.*

19. "If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it validity."—*Ib.*

20. "The acquiescence of an inventor in the public use . . . can in no case be presumed when he has no knowledge of such use." Acquiescence is presumed where the public use is

known or might be known to the inventor.—*Ib.*

21. Neither attempts to make improvements—not successful—nor a prior competing patent excuse delay in patenting.—*Ib.*

22. Three years' delay, with intervening public use, held fatal.—*Ib.*

23. Abandonment by silence in view of public use is not a question of intention.—*Ib.*

24. Public use after patent granted does not make toward abandonment.—*Ib.*

25. "It is quite competent for a patentee at any time, by overt acts, or by express dedication, to abandon and surrender to the public, for their use, all the rights secured by his patent, if such is his pleasure, clearly and deliberately expressed." *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

26. "If, for a series of years, the patentee acquiesces without objection in the known public use by others of his invention, or stands by and encourages such use, such conduct will afford a very strong presumption of such an actual abandonment or surrender."—*Ib.*

27. "A fortiori, the doctrine"—of presumptive abandonment—"will apply to a case where the patentee has openly encouraged or silently acquiesced in such use by the very defendants whom he afterward seeks to prohibit, by injunction, from any further use."—*Ib.*

28. "If such a defence"—that of abandonment, to be presumed from the acts of the patentee—"were not a complete defence at law, it would certainly furnish a clear and satisfactory ground why a court of equity should not interfere."—*Ib.*

29. "If he" [an inventor] "means to surrender his exclusive right in a qualified manner, . . . he should at the very time give public notice of the nature and extent of the public use."—*Ib.*

30. "The inventor, and the inventor alone, is competent to abandon his invention to the public, and no use by the public, except with his knowledge and consent, can be deemed an abandonment of his invention to the public." *Pierson v. Eagle Screw Co.*, 3 Story, 402.—STORY, 1844.

31. "Delay which may occur in the Patent Office, in making out the patent, cannot operate to the injury of the applicant." *Root v. Ball et al.*, 4 McLean, 177; *per curiam*, 1846.

32. If a caveat or application for patent, although originally informal, be followed up with reasonable diligence, and if, eventually, the patent is granted, it prevents any right becoming acquired by strangers interfering in the mean time. *Sparkman et al. v. Higgins et al.*, 1 Blatch. 205.—BETTS. 1846.

33. Before taking out a patent the giving of "a license by the inventor is not an abandonment." *McCay v. Burr*, 6 Penn. St. Rep. 147.—GIBSON, 1847.

34. An inventor made application for a patent in 1836, which was rejected, and afterward followed it up, at intervals, until he obtained his patent in 1843. The judge charged the jury, "That the proof of abandonment of his application would depend upon two circumstances: whether he meant to give it up—to give all up with regard to it—or whether, being needy, he gave up for a short time, for want of funds." *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

35. "An individual who has obtained a patent for a thing which he claimed to have invented cannot at any future time claim another patent for a substantial part of the same thing." *Smith v. Ely et al.*, 5 McLean, 76.—MCLEAN, 1849.

36. "There may be an abandonment by the inventor at any time, even within the two years before the application for his patent." *Pitts v. Hall*, 2 Blatch. 230.—NELSON, 1851.

37. "An abandonment or dedication may occur within the two years, and at any time down to the procurement of the patent. The mere use or sale, however, of the machine within the two years will not alone or of itself work an abandonment. There must be something more, because Section 7 of the act of 1839 permits the sale or use by the patentee at any time within two years before his application, without its operating to invalidate his right. The use or sale must be accompanied by some declarations or acts going to establish an intention on the part of the patentee to give to the public the benefit of his improvement."—*Id.*

38. Although a man may declare his intention to dedicate his improvement to the public, "he is entitled to the *locus penitentiae*, and . . . there must be something more than mere words to fasten on him the intention which, in judgment of law, works an abandonment of his invention. There must be acts." "The mere expression of an intention not to take measures for the purpose of securing to himself the exclusive enjoyment of this property, or the mere declaration of an intention to dedicate it to the public, cannot be regarded as equivalent to an actual declaration."—*Id.*

39. "Abandonment or dedication . . . operates in the nature of a forfeiture of a right, which the law does not favor, and which should be made out beyond all reasonable doubt."—*Id.*

40. An invention that is described but not

claimed in a patent is, after a lapse of six years, abandoned to the public so that it cannot be re-claimed by reissue. *Batten v. Taggart*, 2 Wall. Jr. 101.—KANE, 1851.

41. "The mere fact of making and selling an improvement or invention, or of putting it into public use, at any time within two years before the application for a patent, is not of itself an abandonment of the invention to the public." *McCormick v. Seymour et al.*, 2 Blatch. 240.—NELSON, 1851.

42. "Those who rely upon the ground that a party has forfeited a legal right secured to him in due form of law, for the purpose of defeating his enjoyment of that right, must make out the point clearly and satisfactorily, beyond all reasonable doubt or hesitation; because the law does not favor an abandonment, and throws upon the party who seeks to obtain the benefit of a forfeiture the burden of proving it beyond all reasonable question."—*Id.*

43. What is described but not claimed in a patent may properly be claimed afterward, in a new patent in the absence of statutory bar of public use. *Mini's Assignee v. Adams*, 3 Wall. Jr. 20.—GRIER, 1854.

44. What is described but not claimed in the patent may be described and claimed in a later patent to the same inventor. A description without claiming in the first patent does not work abandonment. *O'Reilly et al. v. Morse et al.*, 15 Howard, 62.—SUP. CT. 1853.

45. He who describes but does not claim in a patent features of construction does not thereby abandon such features of construction to the public so that he cannot afterward, in a subsequent patent, claim such features. *Battin et al. v. Taggart*, 17 Howard, 74.—SUP. CT. 1854.

46. "As the law stood . . . in October, 1834, . . . the public use of the invention with the consent of the patentee, or sale of it prior to the time of his application for a patent, operated as a forfeiture—as a dedication to the public." *Winans v. N. Y. & Harlem R. R. Co.*, 4 Fish. P. C. 1.—NELSON, 1855.

47. In 1834 and 1835 Walter Hunt invented an improvement in sewing-machines upon which successful experiments were repeatedly made; not long thereafter Hunt sold one half the invention to Arrowsmith and subsequently the other half. In 1846 Howe obtained letters patent on a conflicting improvement. In 1853 Hunt repurchased his invention and applied for a patent; Hunt was held to have abandoned his invention. *Hunt v. Howe*, 1 MacArthur's P. C. 366.—MORSELL, 1855.

48. "If the plaintiffs, after their invention

was perfected, acquiesced in its use in public for a less term than two years, without applying for a patent, and the jury shall be satisfied, from such acquiescence and the other facts of the case, that the plaintiffs, in fact, abandoned their invention, concluding not to patent it, but to dedicate it to the public use, they could not recall such dedication, or defeat such abandonment by a subsequent application for a patent, and their patent is therefore void." *Ransom et al. v. N. Y.*, 1 Fish. P. C. 252.—HALL, 1856.

49. "If, after the plaintiffs had made this invention, . . . they, in fact, deliberately abandoned it to the public use, and concluded not to patent it; if they dedicated it to the public use, no matter for what reason, then that dedication cannot be recalled, and they have no right to recover. . . . If the plaintiffs, subsequent to the date of their letters-patent, have abandoned their invention to the public, and waived and abandoned the exclusive privileges intended to be secured by such patent, they cannot recover in this action; and . . . the jury has a right to infer such an abandonment, from their acquiescence in the use of the invention by others, their neglect to assert their claims by suit or otherwise, their omission to sell license to use such invention, their neglect to make efforts to realize any personal advantage from their patent, and similar circumstances, if they think the evidence establishes such fact of abandonment; and . . . circumstances of that character may also be considered in connection with the other evidence upon the question of the originality of the plaintiffs' alleged invention."—*Id.*

50. "The owner of a patent has an undoubted right to surrender it to public use." *Wayne v. Holmes*, 1 Bond, 27.—LEAVITT, 1856.

51. "If an inventor, by his actions and consent, shows that he has made a dedication of his invention to the public, he cannot afterward disavow such a dedication, and obtain a patent." *Bell v. Daniels et al.*, 1 Bond, 212.—LEAVITT, 1858.

52. Abandonment, or dedication to the public, may be made as well after patent granted as before; but where the patent has actually been granted, it would undoubtedly require a strong case to prove abandonment.—*Id.*

53. If an invention "was publicly used for a long period by the inventor himself, not in the way of experiment, but for gain," such action constitutes abandonment.—*Id.*

54. Practical acquiescence in the claim of another to a patent is both an estoppel against and abandonment by him who thus acts. *Carrol*

*v. Gambrill*, 1 MacArthur's P. C. 581.—MORSELL, 1858.

55. "The relation borne to the public by inventors, and the obligations they are bound to fulfil in order to secure from the former protection and the right to remuneration, by no means forbid a delay requisite for completing an invention, or for a test of its value or success by a series of sufficient and practical experiments; nor do they forbid a discreet and reasonable forbearance to proclaim the theory of a discovery during its progress to completion, and preceding an application for protection in that discovery. The former may be highly advantageous, as tending to the perfecting of the invention; the latter may be indispensable, in order to prevent a piracy of the rights of the true inventor." *Kendall et al. v. Winsor*, 21 Howard, 322.—SUP. CT. 1858.

56. "It is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant with language—such, for instance, as an acquiescence with full knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a wilful or negligent postponement of his claim, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others. Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these."—*Id.*

57. "The real intent of an inventor, with respect to an assertion of surrender of his rights under the Constitution and laws of the United States, whether it be sought in his declarations or acts, or in the forbearance or neglect to speak or act, is an inquiry or conclusion of fact."—*Id.*

58. "By the application filed in the Patent Office the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent. It is conclusive evidence that the inventor does not intend to abandon it to the public. The delays afterward interposed, either by the mistakes of the public officers or the delays of the courts, where gross laches cannot be imputed to the applicant, cannot affect his right." *Adams v. Jones et al.*, 1 Fish. P. C. 527.—GRIER, 1859.

59. "If an inventor claims two distinct improvements in one machine, he may apply for

them jointly, and have a single patent for both. If he has made a mistake as to one of the improvements claimed, but is clearly entitled to a patent as to the other, he cannot be justly said to have abandoned either during a litigation as to his right to both."—*Ib.*

60. "The true meaning of the word 'abandonment' in the acts of Congress is an abandonment of the invention to the public—a dedication of his discovery to the free use of his fellow-beings." *Babcock v. Degener*, 1 MacArthur's P. C. 607.—MERRICK, 1859.

61. "Merely withholding" an "invention from the public . . . can never amount to an abandonment; however, it may, in connection with the circumstances, pile up difficulties, if too long continued, in the way of asserting and proving priority over another inventor who applies for a patent. It may raise up an equity in favor of the junior discoverer which will call for the fullest measure of proof on the part of the first inventor to disperse the cloud of distrust with which he has thereby enveloped his own case, but of itself cannot defeat his claim"—*Ib.*

62. In applications for patents the Commissioner has jurisdiction as to the question of abandonment. *Wickersham v. Singer*, 1 MacArthur's P. C. 645.—MERRICK, 1859.

63. Wickersham made an application for patent for improvement in sewing-machines February 13th, 1850. On the 20th the papers were returned to him for correction. March 15th he returned amended papers. April 5th, 1850, the papers were returned to him for further amendment. May 28th, 1851, he withdrew his application and took back the \$20 allowed by law. From that time to October 2d, 1858, he made no movement in the matter, and then filed another application. Meantime Singer procured patents covering the same subject-matter and put the improvements into use. During this interval of delay Wickersham applied for five different patents in this country and one in England, and made a visit to England in 1854. Wickersham was held to have abandoned his invention, two years' public use was found against him, and priority of invention was found in favor of Singer.—*Ib.*

64. What an inventor describes but does not claim, he does not thereby abandon, and may subsequently patent. *Hayden v. Suffolk Mfg Co.*, 4 Fish. P. C. 86.—SPRAGUE, 1862.

65. A patent was applied for December 11th, 1854, and issued September 11th, 1860. The same inventor applied for another patent June 15th, 1857, which was issued December 1st, 1857.

The patent first applied for and last issued described and claimed what was also embraced by the claim of the last applied for and first issued. The court held that the patent last issued was not thereby invalidated.—*Ib.*

66. Where an inventor delayed making his application for patent because he was in the employ of another party who held a controlling patent on the same general subject-matter; the facts were held not to constitute abandonment. *White et al. v. Allen*, 2 Clifford, 224.—CLIFFORD, 1863.

67. Two joint inventors filed their application in the Patent Office in June, 1847; the specification thereof was loose and imperfect; the matter was delayed in the Patent Office in one way and another till 1852, when the patent issued. Defendants claimed this to constitute abandonment. The court held otherwise, saying that inventors are "not to be held accountable for the delays in the Patent Office." *Sayles v. Chicago & N. W. R. R. Co.*, 1 Bissell, 468.—DRUMMOND, 1865.

68. Where a later patent claims what was described but not claimed in the earlier patent of the same party, and the two applications were pending at the same time, the issue of the first patent does not operate as an abandonment of the matters described but not claimed. *Suffolk Co. v. Hayden*, 3 Wall. 315.—SUP. CT. 1865.

69. Cummings applied for his patent on rubber base for artificial teeth in 1855, and the application was rejected in 1856. The patent was granted in 1864, having been revived but a short time previous. Meantime the invention had gone into general use. Thereof the court said: "Is it the law that because an inventor files his application, which is refused by the Office, he may sleep on his rights indefinitely, and that at any period in his lifetime, or that of his representatives, the application may be revived as against the public? I think not. *Prima facie*, I think he would have to show a reason why he should be so permitted. The judgment of condemnation by the Office advertises to the country, at least, that he stands in no better position than before the application was made. The country is advised, by the deliberation of the only tribunal provided by law for the ascertainment, at that stage of the invention, of his right, that he has none. More especially is he himself advised of that fact, for he is a party to the proceedings, and more immediately damnified by the rejection of the application. That rejection would at least be regarded, in the logic of equity, as a notice to him to proceed with diligence to traverse and reverse the judgment of the Office." *Goodyear*

*et al. v. Hills*, 3 Fish. P. C. 134.—CARTTER, 1866.

70. An inventor applied for his patent April 12th, 1855; it was rejected February 6th, 1856, and no appeal taken. He made a new application March 25th, 1856, on which patent was granted. He was held not to have abandoned. *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555.—CLIFFORD, 1866.

71. "It is not possible to hold that any use of the invention without the consent of the inventor, while his application for a patent was pending in the Patent Office, can defeat the operation of the letters-patent after they are duly granted. Such delays are sufficiently onerous to a meritorious inventor, if his patent is allowed to have full operation after it is granted; but it would be a very great injustice to hold that any delay which the inventor could not prevent should, under any circumstances, affect the validity of his patent."—*Id.*

72. The complainant sold a patented hard rubber compound for dental purposes, all complete except the application of heat, and labelled the packages to indicate that only licensees under the patent were permitted to use the compound. As a matter of fact, many who were not licensees bought and used the compound. Defendant pleaded abandonment. The court held that abandonment had not taken place. *Goodyear et al. v. Waite*, 3 Fish. P. C. 242.—NELSON, 1867.

73. The issue of a reissued patent is *prima facie* evidence that the original was never abandoned. *Hoffheins et al. v. Brandt*, 3 Fish. P. C. 218.—GILES, 1867.

74. "Undoubtedly an inventor may abandon his invention, and surrender or dedicate it to the public; but mere forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by actual practice, affords no just grounds for any such presumption." *Agawam Co. v. Jordan*, 7 Wall. 583.—SUP. CT. 1868.

75. "Abandonment to the public need not be two years before the date of the application for the patent; it may be afterward, although the presumption always is against an abandonment to the public by a patentee after he has applied for his patent. But he can do so; he can do so within two years; he can do so at any time. It is a matter that may be proved, but it is never to be presumed." *Am. H. & L. S. & D. M. Co. v. Am. T. & M. Co. et al.*, 1 Holmes, 508.—SHEPLEY, 1870.

76. "A person is sometimes said to have abandoned his invention when he gives up the idea; abandons it in the popular sense; relin-

quishes the intention of perfecting his invention, so that another person may take up the same thing and become the original and first inventor. But that is not the kind of abandonment that is referred to here. There is another kind of abandonment; and that is where a party, having made an invention, allows the public to use it, with his knowledge and consent; allows it to be incorporated into other machines with his knowledge and consent, and to be used by anybody without objection; as, for instance, if you invent a machine, put it into public use and sell it to everybody who chooses to buy it, and if you attach to that machine another invention of yours, and allow everybody who chooses to buy that and use it, without objection on your part, with your consent, with your permission, with your allowance, not for the mere purpose of experiment, but for the purpose of profit and gain, that would be an abandonment of it to the public, and you could not afterward rightfully, honestly, honorably, legally, take out a patent for that invention."—*Id.*

77. "In the sense in which 'abandonment' is used in this connection, it is dedication to the public, a giving up of the claim to monopoly in the invention, and it must be shown affirmatively." The burden is upon the defendants.—*Id.*

78. "If a person has once abandoned his invention or dedicated it to the public, then, as a matter of law, it has gone from him, and he has no power of revocation or resumption."—*Id.*

79. "There could hardly have been an abandonment without an intention to abandon." *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

80. "Forfeitures and abandonments are not favored. They must be clearly made out." *Singer et al. v. Braunsdorf et al.*, 7 Blatch. 521.—BLATCHFORD, 1870.

81. "A patent is never invalidated by the fact that the invention claimed in it was described, but not claimed, in a patent granted subsequently to the making of the application for the patent secondly issued, but before it was granted."—*Id.*

82. Complainants' patentee made his invention in 1835, and took his patent in 1851. The court held that "his poverty and not his will caused the delay," and of the invention said: "Where it had not been abandoned to the public, and had not been in public use or on sale with the consent and allowance of the inventor, no lapse of time, however protracted, barred an application for a patent, nor, after it had been granted, affected its validity." *Wood et al. v. Cleveland*

*Rolling Mill Co.*, 4 Fish. P. C. 550.—SWAYNE, 1871.

83. An inventor filed his application for patent July 23d, 1855, and on August 25th, 1856, on appeal to the Commissioner of Patents, it was finally rejected. It stood thus until the early part of 1867, when the specification was amended and its renewed consideration was urged upon the Patent Office. This effort resulted in the granting of the patent April 16th, 1867. Defendant contended that the application was not completed and prepared for examination within the two years as required by the act of 1861. As the law permitted an inventor to show to the Commissioner's satisfaction that the delay was unavoidable, the court held that it must be assumed that such evidence was presented to the Commissioner, and that the Commissioner's decision thereon was conclusive. *M'Millin et al. v. Barclay et al.*, 3 Pittsb. 377.—MCKENNAN, 1871.

84. Abandonment "must result from the intention of the patentee, expressly declared, or clearly indicated by his acts."—*Ib.*

85. If the lapse of two years between the date of application and the reissue of patent, and the applicant's conduct, "can be fully explained upon any other hypothesis, they ought not to be imputed to an intention on his part to abandon his invention. The proof of actual abandonment, after application is filed, ought to be indubitably clear. It ought not to rest upon doubtful or disputable inferences."—*Ib.*

86. An application for patent is conclusive evidence that the inventor does not intend to abandon his invention to the public, and "if an inventor has furnished, by his application for a patent, conclusive evidence that he does not intend to abandon his invention to the public, the disproof of his intention ought to be by evidence of equal weight and significance."—*Ib.*

87. "The abandonment of an application amounts to nothing, unless it is in such wise as to become an abandonment of the invention to the public." *Clark et al. v. Scott*, 9 Blatch. 301.—BLATCH, 1872.

88. "Lapse of time does not, *per se*, constitute abandonment. It may be a circumstance to be considered. The circumstances of the case, other than mere lapse of time, almost always give complexion to delay, and either excuse it or give it conclusive effect. The statute has made contemporaneous public use, with the consent and allowance of the inventor, a bar, when it exceeds two years. But, in the absence of that, and of any other colorable circumstance, we know of no mere period of delay, which ought,

*per se*, to deprive an inventor of his patent." *Russell & Erwin Mfg Co. v. Mallory et al.*, 10 Blatch. 140.—WOODRUFF, 1872.

89. A delay for the purpose of finding a manufacturer to test the utility of an improvement is excusable.—*Ib.*

90. An abandonment to the public may occur within less than two years. "No particular time is necessary, but the fact must be proved, and the lapse of two years does not establish it. There may be sufficient reasons why a delay of a much greater number of years will not so operate. On the question of abandonment, in either aspect, time, and circumstances, the acts and contemporaneous declarations of the party are all to be considered."—*Ib.*

91. It is not safe to rest a conclusion of abandonment on unsatisfactory testimony.—*Ib.*

92. An inventor made application for patent, July, 1851; in the same month the application was rejected; in November, 1851, he requested and received \$20 of the Government fee. In August, 1851, a second inventor applied for a patent on the same improvement, and received it in February, 1859; in October, 1866, said patent was reissued, suit was brought upon it, and it was held invalid on the ground that the inventor first mentioned was the prior inventor. In December, 1869, the inventor first mentioned renewed his application, and in November, 1870, the Commissioner of Patents rejected the claim on the ground of abandonment. The court sustained the Commissioner in his decision as to abandonment, holding that Section 35 of the patent law of 1870 did not help the case. *Marsh v. Sayles et al.*, 3 Bissell, 321.—DRUMMOND, 1872.

93. "The issue of the letters-patent by the Patent Office is *prima facie* evidence that there has been no voluntary abandonment of his invention to the public by the inventor, either before or after his application for letters-patent." *Johnson v. Fassman et al.*, 1 Wood, 138.—WOODS, 1872.

94. "After the issue of letters-patent, the abandonment must be shown to be positive, actual, and intentional by some act or declaration of the inventor, or be such gross laches as indicate unmistakably an intention to abandon the invention to the public."—*Ib.*

95. An application for patent was rejected April 16th, 1857, and the patent granted October 23d, 1866. During the delay of over nine years, patents were issued to others for devices coming within the patent first mentioned. The invention of the patent first mentioned was held not to have been abandoned.—*Ib.*

96. The inventor of the Nicolson pavement allowed six years to elapse, after putting down three forms of pavement, before he applied for his patent. In the absence of proof of intent to abandon, the court would not infer it. *Am. Nicolson Pavement Co. v. City of Elizabeth et al.*, 6 Fish. P. C. 424.—NIXON, 1873.

97. "The question of diligence [in prosecuting an invention] is not an absolute, but a relative one, and must be considered in reference to the subject-matter of the experiments."—*Ib.*

98. "Mere forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by actual practice, affords no just grounds for any such presumption" [that of abandonment]. *Jones et al. v. Sewall*, 3 Cliff. 563.—CLIFFORD, 1873.

99. "Abandonment or dedication of an invention to the public, being in the nature of a forfeiture of a right, is not favored in law."—*Ib.*

100. "Delays in the Patent Office, which an inventor cannot prevent, will not impair his title to his invention; nor can any use of the invention during such delays, if without his consent and allowance, afford any evidence to support the issue that the inventor abandoned the invention to the public."—*Ib.*

101. "No one but the inventor is competent to abandon his invention to the public. His acts and declarations, if explicit, are sufficient for the purpose, or he may accomplish the same end by continual acquiescence in the acts of others, of which it appears that he had knowledge; but the proof of knowledge must be beyond all reasonable doubt, as every presumption is the other way."—*Ib.*

102. "When a party practices his invention merely for the purpose of experiment or completion before he takes out a patent, the inference that he intends to surrender the invention to the public does not arise, and, consequently, a dedication to the public cannot be proved by evidence that shows only experimental practice by the inventor or his employes, whether in public or private. Such an inference is never favored, nor will it, in general, be sufficient to prove such a defence, unless it appears that the use, exercise, or practice of the invention was somewhat extensive and for the purpose of gain, evincing an intent on the part of the inventor to secure the exclusive benefits of his invention without applying for the protection of letters-patent."—*Ib.*

103. "Where the invention, by acts of the inventor, has gone into general public use and got beyond his control, without any effort on his

part to restrain its general use, . . . he cannot resume the ownership dedicated to the public, and . . . his right to a patent is forfeited."—*Ib.*

104. The grant of an original patent with certain claims raises no presumption that the inventor did not intend to make other claims which he subsequently does make in his reissue. *Eickemeyer Hat-Blocking Mach. Co. v. Pearce et al.*, 10 Blatch. 403.—BLATCHFORD, 1873.

105. An inventor's application was not filed in the Patent Office for more than two years after its execution, but the delay was wholly due to the remissness of his solicitor. "The complainant was ignorant of any neglect, and could not be held responsible for any delay that occurred." *Birdsall v. McDonald et al.*, 1 Bann. & Ard. 165.—SWAYNE & WELKER, 1874.

106. Cummings filed his caveat for dental vulcanite plate May 14th, 1852. He applied for a patent April 12th, 1855, which was rejected May 19th, 1856. In 1859 motion was made before the Commissioner for a rehearing, or for an appeal to the Board of Examiners, which was denied. March 25th, 1864, a renewed application was filed and patent was issued June 7th, 1864. There was evidence of the poverty of the inventor, and evidence of efforts to raise money to forward his application during these periods. The invention went into public use about 1860. Abandonment held not to have occurred. *Goodyear Dental Vulcanite Co. et al. v. Root*, 1 Bann. & Ard. 384.—HUNT, 1874.

107. "If an inventor, without substantial reason or excuse, abandons the use of his invention, and for nine years sleeps on his rights, and in the mean time others, in good faith, employ their industry, skill, and money in producing the same thing, and give the public the benefit thereof, putting it into extensive use and on sale, such a state of facts not only warrants the interference of abandonment by the first inventor, but it also creates, as between him and others, the same equity as would arise if such others had gone further and taken out a patent. Whether the device be patented, or has 'gone into use without a patent,' should make no difference. . . . This is not because the lapse of time, *per se*, deprives the inventor of his right, but because the circumstances giving character to the delay indicate abandonment; and also because the intervening rights of others make it inequitable that he should thereafter be permitted to assert any such exclusive title to the invention." *Consolidated Fruit Jar Co. v. Wright*, 12 Blatch. 149.—WOODRUFF, 1874.

107a. A delay in taking out a patent after the completion of an invention by reason of ex-



isting patents dominating the field does not work abandonment. *Webster et al. v. New Brunswick Carpet Co.*, 1 Bann. & Ard. 84.—NIXON, 1874.

108. Applicant filed application for patent February 6th, 1856. It was rejected. He filed new application March 25th, 1864, and on that his patent issued. Between these two applications the thing went into public use. The inventor was both poor and persistent. The court found abandonment not to have occurred. *Goodyear Dental Vulcanite Co. et al. v. Smith*, 1 Holmes, 354.—SHEPLEY, 1874.

109. Cummings filed a caveat on his invention of dental vulcanite plate May 14th, 1852; he applied for a patent April 12th, 1855, which application was rejected May 19th, 1855, again August 14th, 1855, and again February 6th, 1856; in 1859, motion for rehearing was denied. March 25th, 1864, renewed application was filed, and patent issued June 7th, 1864; meanwhile Cummings was poor and made efforts to raise money to prosecute his application; the invention went into public use in 1859. Cummings was held not to have abandoned. *Goodyear Dental Vulcanite Co. et al. v. Willis*, 1 Flippin, 388.—EMMONS, 1874.

110. "Where successive applications are made in the procurement of a patent, and there is no proof of actual abandonment, the subsequent application will be deemed a continuation of the first."—*Ib.*

111. The inventor applied for a patent in 1846, which was rejected July 27th, 1847, and then withdrawn. He made no subsequent effort to procure a patent. Nearly ten years afterward he assigned his right away for \$5, and the patent was taken August 12th, 1856. He was held to have abandoned his invention. *Lyman Ventilating & Refrigerator Co. v. Lalor*, 12 Blatch. 303.—BLATCH, 1874.

112. The explanation of one's invention does not work abandonment thereof. *Locomotive Engine Safety Truck Co. v. Penn. R. R. Co.*, 1 Bann. & Ard. 470.—STRONG, 1874.

113. "An express relinquishment of an invention to the public is not indispensable to an abandonment. It may be inferred from long delay, unexplained, or from acts of the inventor inconsistent with any other theory, but it cannot be presumed from mere delay to apply for a patent, when the inventor is all the while perfecting the invention and testing its merits."—*Ib.*

114. "Delays in the Patent Office which an inventor cannot prevent will not impair his title to his invention, nor can any use of his invention during such delays, if without his consent

and allowance, afford any evidence to support the idea that the inventor abandoned his invention to the public." *Henry v. Frankestown Soap-Stone Stove Co.*, 2 Bann. & Ard. 221.—SHEPLEY, 1876.

115. "Mere forbearance to apply for a patent during the process of experiments, and until the party has perfected his invention and tested its value by actual practice, affords no just grounds for any presumption of abandonment or dedication to the public."—*Ib.*

116. Andrews, the inventor of the driven well, was colonel of a regiment in the Civil War. He permitted the use of his improvement in his camp at Portland, N. Y., and provided material wherewith to construct wells for his regiment when it should move into hostile territory. This was held not to constitute abandonment. *Andrews et al. v. Carman*, 13 Blatch. 307.—BENEDICT, 1876.

117. For a statement of circumstances which excused a delay of some years in applying for a patent, see.—*Ib.*

118. Cummings applied for his dental plate patent April 12th, 1855; the third rejection of his application was made February 3d, 1856. He renewed his application some years afterward, and the patent was issued; in the mean time he had been poor and had sought to get means to prosecute his application. Held not to have abandoned. *Smith v. Goodyear Dent. Vul. Co. et al.*, 93 U. S., 486.—SUP. CT. 1876.

119. "Abandonment itself is a fact, and not a conclusion of positive law, statutory or common, arising from any predescribed state of facts." *Sprague et al. v. Adriance et al.*, 3 Bann. & Ard. 124.—WHEELER, 1877.

120. "He who is silent when he should speak must be silent when he would speak, if he cannot do so without a violation of law and injustice to others." But a patentee is not called upon to speak against the infringement of his patent unless the knowledge of the infringement is brought home to him.—*Ib.*

121. Waiting for nine years after invention before making application for patent unaccounted for, works abandonment to the public. *Consolidated Fruit Jar Co. v. Wright*, 94 U. S., 92.—SUP. CT. 1876.

122. "Inventors are a meritorious class. They are public benefactors. They add to the wealth and comfort of the community and promote the progress of civilization. A patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by the same sanctions. There is a like larger domain held in ownership

for the public. Neither an individual nor the public can trench upon or appropriate what belongs to the other. The inventor must comply with the conditions prescribed by law. If he fails to do this he acquires no title, and his invention or discovery, no matter what it may be, is lost to him, and is henceforward no more his than if he had never been in any wise connected with it. It is made thereupon, as it were, by accretion, irrevocably a part of the domain, which belongs to the community at large."—*Ib.*

123. Cochran's application for patent was made January 11th, 1859, and rejected February 8th, 1859; February 20th, 1860, application was withdrawn and \$20 refunded. May 6th, 1868, Cochran filed new application, which was rejected on the ground of abandonment, which decision was affirmed by the Commissioner and reversed by the Supreme Court for the District of Columbia; the Commissioner then declined to issue the patent, but after the passage of the act of July 8th, 1870, a new application was filed and patent issued. During the eight years between the first rejection and the second application Cochran took twenty-two patents, nine of them for fire-arms. He was occupied after 1859 in perfecting and developing other inventions than that in controversy. In 1865 he sold an English patent for \$18,000. During a portion of this interval he was poor, in debt, and in ill health, but he prosecuted his other inventions with energy. Patents were granted to other parties in 1865 and 1866 for the improvement in controversy. Cochran was held to have abandoned between the rejection of February 8th, 1859, and the application of May 6th, 1868. *U. S. Rifle & Cartridge Co. et al. v. Whitney Arms Co. et al.*, 14 Blatch. 94.—SHIPMAN, 1877.

124. "The granting of a patent is *prima facie*, but not conclusive evidence that the right to the invention had not been surrendered to the public."—*Ib.*

125. "The decision of the Commissioner in regard to abandonment, upon renewed applications which were made under Section 35, has no higher authority or more enlarged scope than his decision upon the same question upon an original application, and . . . all the defences which the statute authorizes may be made as well in respect to patents granted upon applications renewed after the act of 1870 as in respect to those issued upon original applications."—*Ib.*

126. "Lapse of time, *per se*, constitutes no abandonment, and . . . upon the defendants rests the burden of clearly establishing, by affirmative evidence, a positive and actual aban-

donment, or such laches as seem clearly to indicate an intent to abandon."—*Ib.*

127. "An abandonment of an invention to the public may be evinced by the conduct of the inventor at any time, even within the two years named in the law. The effect of the law is, that no such consequence will necessarily follow from the invention being in public use, or on sale, with the inventor's consent and allowance, at any time within two years before his application." *Elizabeth v. Pavement Co.*, 97 U. S., 126.—SUP. CT. 1878.

128. "Inventors may, if they can, keep their inventions secret, and if they do for any length of time, they do not forfeit their right to apply for a patent, unless another in the mean time has made the invention and secured by patent the exclusive right to make, use, and vend the patented improvement. Within that rule, and subject to that condition, inventors may delay to apply for a patent." *Bates et al. v. Coe*, 98 U. S., 31.—SUP. CT. 1878.

129. "Inventors may, if they can, keep their invention secret, and if they do for any length of time, they do not forfeit their right to apply for a patent, unless another in the mean time has made the invention and secured by patent the exclusive right to make, use, and vend the patented product. Within that rule, and subject to that condition, inventors may delay to apply for a patent." *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

130. The defence of abandonment cannot be made at a hearing on the merits unless the same was set up in the answer. *Williams v. Boston & Albany R. R. Co.*, 17 Blatch. 21.—WALLACE, 1879.

131. "Mere delay in enforcing equitable rights is not a defence to an action, except in cases where the statutes of limitation apply, or where the party has slept upon his rights and acquiesced for such a length of time that his claim has become stale. . . . Neither does mere delay or acquiescence establish an abandonment or dedication of the patent. There must be an acquiescence in the appropriation of the right of such character as reasonably to induce the belief that the owner intended to relinquish it to the public use."—*Ib.*

132. The inventor applied for a patent June 3d, 1848, and appointed an attorney, but did not give him usual authority. The application was rejected February 28th, 1849; the attorney withdrew the application in October, 1852, and received back \$20 of the fee. In February, 1854, the inventor instructed another solicitor to call up and prosecute this rejected application.

Through a misunderstanding this latter attorney did not learn how the case stood until September, 1854, and he stated to the inventor that the application was hopelessly abandoned. In 1869 the inventor heard that Mr. Fisher, then Commissioner of Patents, had revised the former rule of prosecution arising out of neglect for two years, and the inventor then intended to apply again, but heard that Congress was about to pass a law to meet such cases and he waited for that—*i.e.*, the law of 1870; the patent was issued April 29th, 1873. It was held that the inventor did not abandon his invention. *Woodbury Patent Planing Mach. Co. v. Keith*, 4 Bann. & Ard. 100.—LOWELL, 1879.

133. Failure for two years, without excuse, to prosecute an application for a patent works abandonment to the public of the invention. *Planing Mach. Co. v. Keith*, 101 U. S. 479.—SUP. CT. 1880.

134. "An inventor cannot without cause hold his application pending, during a long period of years, leaving the public uncertain whether he intends to prosecute it, and keeping the field of his invention closed against other inventors. It is not unfair to him, after his application for a patent has been rejected and after he has for many years taken no steps to reinstate it or to renew it or to appeal, that it should be concluded that he has acquiesced in the rejection and abandoned any intention of prosecuting his claim further. Such a conclusion is in accordance with common observation. Especially is this so when, during those years of his inaction, he has seen his invention go into common use, and neither uttered a word of complaint nor remonstrance, nor was stimulated by it to a fresh attempt to obtain a patent."—*Id.*

135. "It has sometimes been said that an invention cannot be held to have been abandoned unless it was the intention of the inventor to abandon it. But this cannot be understood as meaning that such an intention must be expressed in words."—*Id.*

136. By the court: "A question is made by the defendants whether an inventor is not to be presumed to abandon his design when he exhibits it in the drawings of a mechanical patent. I do not see why this consequence should follow until the design has been in use for two years; but I do not decide this point." *Burton v. Greenville*, 3 Fed. Rep. 642.—LOWELL, 1880.

137. What is described but not claimed in the original patent is not thereby dedicated to the public so that it cannot be claimed in a reissue. *Selden et al. v. Stockwell Self-Lighting Gas-Burner Co.*, 19 Blatch. 544.—BLATCHFORD, 1881.

138. "Nothing but a clear mistake or inadvertence and a speedy application for its correction is admissible when it is sought merely to enlarge the claim." "The right to have it corrected" is "abandoned and lost by unreasonable delay." "An omission to claim other devices or combinations apparent on the face of the patent is in law a dedication to the public of that which is not claimed." [In the case in hand the delay was fifteen years.] *Miller, E. & Co. v. Bridgeport Brass Co.*, 104 U. S. 350.—SUP. CT. 1882.

139. By the court: "If he was the author of any other invention than that which he specially describes and claims, though he might have asked to have it patented at the same time and in the same patent, yet if he has not done so, and afterward desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent." *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1881.

140. In the case of a reissue with enlarged claims "it is competent for the courts to decide whether the delay was unreasonable and whether the reissue was therefore contrary to law and will." *Miller, E. & Co. v. Bridgeport Brass Co.*, 104 U. S. 350.—SUP. CT. 1882.

141. An applicant for patent who allows his application to lapse by two years' non-action abandons thereby the application but not the invention. He can make a new application, but it will derive no support from the old one. *Lindsay v. Stein*, 20 Blatch. 370.—BLATCHFORD, 1882.

142. An inventor filed application for patent December 27th, 1865, which was rejected. An amendment to the application was filed May 5th, 1869, after evidence being laid before the Commissioner that the delay had been caused by the fact that the applicant had been "generally incapacitated for business by mental disorder." Thereupon the Commissioner allowed the patent, and the court held abandonment had not taken place. *Ballard et al. v. City of Pittsburg*, 12 Fed. Rep. 783.—McKENNAN, 1882.

143. "Nearly thirteen years elapsed before the application [for reissue] was made. If the matters described in the additional claims were a part of the original invention (as has been conceded), and were omitted through 'inadvertence, accident, or mistake,' it is impossible to believe that he did not discover the omission much earlier. In the language of the court in *Miller v. Brass Co.*, it plainly appears on the face of his patent, and must have been seen on opening the paper."

"The patentee knew what he had invented ; must necessarily have understood its scope and extent. He may not have comprehended all the uses to which it might eventually be applied.

"But to secure a different use simply does not require a different or additional claim. What he did not, he must be regarded, in view of his subsequent conduct, as intending to dedicate to the public. He cannot, therefore, after others have acted upon what he thus did, be allowed to change position, and thereby suppress their enterprises and destroy their business. This application of the equitable doctrine of estoppel has more than once been suggested by the Supreme Court, and is announced and applied in *Miller v. Brass Co.* above cited." *Combined Patents Can Co. v. Lloyd*, 11 Fed. Rep. 149.—BUTLER & McKENNAN, 1882.

144. "When a patent fully and clearly, without ambiguity or obscurity, describes and claims a specific invention complete in itself so that it cannot be said to be inoperative or invalid by reason of a defective or insufficient specification, a reissue cannot be had for the purpose of expanding or generalizing the claim so as to make it embrace an invention not described and specified in the original." *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1881.

145 Thirteen years after issue, complainant's patent was reissued with enlarged claims, evidently [from the language of the court] to cover something that had not originally occurred to the inventor, and to cover some business developed since the issue of the original patent. *Held*, that reissues with enlarged claims are lawful under "proper circumstances ;" but that by his delay the patentee had dedicated what he originally failed to claim to the public. *Combined Patents Can Co. v. Lloyd*, 21 O. G. 713.—BUTLER & McKENNAN, 1882.

146. By the court : "It was not necessary for the patentees, Rose and Matthews, to enumerate all the known functions of these frost-jackets on their original patent ; and as no claim was based upon them it could not be hurtful to enumerate them in the reissued patent. But the complainants, in their reissued patent, have split up and divided the elements of their invention, and claimed them separately, and not as a combination. Of course this enlarges the scope of their patent.

"The separate claims embrace fewer elements in combination than were embraced in the claim of the original patent. No one could infringe the original patent unless he used all the elements of the combination.

'Any one will infringe the reissue who uses

any of those elements which are now separately claimed. . . .

"It cannot be denied that each of these separate claims is much broader than the claim in the original patent, and they are put forth in the reissue fourteen years after the original patent was granted.

"The latter showed on its face that these broad claims were not made, and if the patentees were really the inventors of an independent jacket standing loosely on the elbow of the main, when apprised that it was not claimed in the patent they ought to have used due diligence in surrendering it and having the mistake corrected.

"The case clearly comes within the ruling lately made in *Miller v. The Bridgeport Brass Co.*" *Matthews et al. v. Boston Mach. Co. et al.*, 105 U. S. 54.—SUP. CT. 1882.

147. By the court : "I am much inclined to think that the mere fact that a new article is shown in the drawings of a patent for a machine would not of itself be an abandonment of the new article, which would properly be the subject of a different patent, until the statutory forfeiture of use for two years had been incurred." *Hatch et al. v. Moffitt*, 15 Fed. Rep. 252.—LOWELL, 1883.

148. Colonel Green, patentee of the driven well, put his invention into use for the benefit of his regiment in 1861. He took his patent in 1866. *Held*, that he abandoned his invention to the public. *Andrews et al. v. Hovey*, 5 McCrary, 181.—SHIRAS, 1883.

149. Colonel Green put his invention in driven wells into practical use for the benefit of his regiment in 1861. He applied for his patent in 1866. Being involved in personal troubles with one of his officers was held not to excuse the delay.—*Ib.*

150. Where a patentee's patents "are being used without his knowledge in such a manner that the business for the benefit of which the invention was made is not being injured or interfered with, and where his ignorance in regard to the use arises from an indifference to infringement by persons who, he supposes, are not in his line of business," the patentee is not chargeable with abandonment of his invention. *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1883.

151. A patentee may claim in his later patent what was described but not claimed in his earlier patent. So held in a case where the later patent was applied for after the issue of the earlier patent. *Vt. Farm. Mach. Co. et al. v. Marble Com'r*, 22 Blatch. 32.—WHEELER, 1884.

152. Complainant's patent in suit was for lapping two pieces of leather in making the seam of a boot—or any other work of the kind—running a line of rivets along, and then a line of stitching on each side of the line of rivets, so as to make a complete tight seam. Complainant had a prior patent showing the same seam with a strip of India rubber inserted. It was held that if the prior patent had been the patent of another person the later patent would be void, but that under the circumstances the second patent was in the nature of a claim which might have been made in the first patent, and was therefore valid. *Cahn v. Wong Town On*, 9 Sawyer, 630.—SAWYER, 1884.

153. A patentee cannot claim in a subsequent patent what he has shown but does not claim in his earlier patent. *Swift v. Jenks et al.*, 19 Fed. Rep. 641.—COXE, 1884.

154. Proof of abandonment ought to be satisfactory in its nature in order to be available. *Royer v. Chicago Mfg Co.*, 20 Fed. Rep. 853.—DRUMMOND, 1884.

155. "The right which the public has acquired to use the thing invented, by reason of the applicant for a patent failing to do something prescribed by Congress and the necessity for which Congress might, by previous legislation, have dispensed with, has never been held to be a vested right." *Graham et al. v. Johnston et al.*, 21 Fed. Rep. 40.—MORRIS, 1884.

156. A prior patent to the same patentee showing and describing but not claiming the improvement claimed in the patent in suit was mentioned by the court as if, as a matter of course, it did not affect the validity of the patent in suit. *Estey et al. v. Burdett*, 109 U. S. 633.—SUP. CT. 1883.

157. When a patentee's later patent claims what was described in his former patent, but the application for the later patent was on file when the earlier patent was granted, the earlier patent has no effect upon the validity of the later patent. *Railway Register Mfg Co. v. Broadway & Seventh Ave. R. R. Co.*, 30 O. G. 180.—WHEELER, 1884.

158. Complainant filed his application for patent October, 1877, and on December 2d, 1877, the patent was allowed with certain claims; but, as was claimed, by neglect of his solicitor the final fee to the Patent Office was not paid, and the right to the patent lapsed. Sometime in February, 1879, he renewed his application and asked that the original specification and drawings might be considered as a part of the renewed application, and thereon his patent was issued May 30th, 1879. Thereupon the court

said: "The application made by Weir in February, 1879, must, as it seems to me, be considered as the first application, the former application going for naught and leaving him to stand upon that application, as made at the time he renewed it, upon his old specifications and drawings." *Weir v. Morden*, 21 Fed. Rep. 243.—BLODGETT, 1884.

159. A patent was taken May 28th, 1867. The conception of the invention was made in 1860. By reason of poverty, sickness, and lunacy this delay was excused and the invention held not to have been abandoned. *Celluloid Mfg Co. v. Crofut et al.*, 24 Fed. Rep. 796.—NIXON, 1885.

160. A patentee by disclosing in his patent features of invention which he does not claim thereby dedicates such features to the public. (This was said of a second application made within two years of the date of the patent already granted.) *Hill et al. v. Com'r of Patents*, 33 O. G. 757.—CARTTER, 1885.

161. "If it were true that complainants had previously obtained a patent for this same invention, secured to them by the patent in suit, and that this prior patent had expired, it would doubtless be a complete answer to the bill, since a man cannot have two patents for the same invention. . . And this disability extends not only to what is claimed in the first patent but to that which is described therein as the patentee's invention. If a man cannot have a patent for what another has claimed or described in a prior patent, much less can he have one for what he himself has described, for he thus shows that he has anticipated himself." *Matthevs et al. v. Flower et al.*, 33 O. G. 887.—BROWN, 1885.

162. "One reason why a patentee cannot have a valid reissue to cover parts of his invention described but not claimed, when the omission to make the claim is not caused by inadvertence, accident, or mistake, is because the parts of the invention not claimed are, by this cause, abandoned to the public, and the right to claim them is gone." *Railway Register Mfg Co. v. Broadway & Seventh Ave. R. R. Co.*, 34 O. G. 921.—WHEELER, 1886.

163. "The defence of abandonment to the public is not confined to reissued patents, but is given generally by the statute to all patents."—*Id.*

164. The fact that a patentee has in his prior patent shown a feature analogous in function and operation to the patented feature of his later patent does not invalidate the later patent. *Willson v. Cubley et al.*, 35 O. G. 257.—BLODGETT, 1886.

165. "If it appears that the inventor, after

applying for a patent and thereby irretrievably committing himself to the proposition that his invention is ripe for introduction to the public, accepted the decision rejecting his application and cast aside his invention as of no longer any value to him, he thereby makes it forever public property, and it is not in his power to take it back and make it his own again." *Consolidated Fruit Jar Co. v. Bellaire Stamping Co.*, 35 O. G. 627.—SAGE, 1886.

166. "The decision of the Commissioner in favor of the applicant, upon the question whether the invention has been abandoned, is not conclusive, but may be contested and reviewed in a suit brought for the infringement of the patent." *U. S. Rifle & Cartridge Co. et al. v. Whitney Arms Co. et al.*, 118 U. S. 22.—SUP. CT. 1886.

167. "There may be an abandonment of the invention to the public as well after an application has been rejected or withdrawn as before any application is made. Such abandonment may be proved either by express declaration of an intention to abandon, or by conduct inconsistent with any other conclusion. An inventor whose application for a patent has been rejected, and who without substantial reason or excuse omits for many years to take steps to reinstate or renew it, must be held to have acquiesced in its rejection and to have abandoned any intention of further prosecuting his claim."—*Id.*

168. "A patentee cannot claim the same thing described by him in a prior patent in which there is no reservation, and what he omitted to claim and reserve in a prior patent in which the invention was described he dedicates to the public." *Adams v. Bellaire Stamping Co. et al.*, 36 O. G. 567.—JACKSON, 1886.

169. An application for patent was filed November 28th, 1865. On December 17th, 1869, a new claim was inserted and issued with the patent. For more than two years prior to the insertion of this claim, articles embodying all its elements had, with the knowledge and consent of the patentee, been bought and sold in the market. It was held that the right to make such claim had been abandoned. *Kittle v. Hall et al.*, 29 Fed. Rep. 508.—COXE, 1887.

170. Letters-patent for an improvement in lubricators were granted March 21st, 1882. What was claimed in the latter patent was described—without substantial difference—but not claimed in the earlier patent. It was held that the description without claim in the earlier patent worked abandonment. *Swift v. Jenks et al.*, 38 O. G. 1017.—COXE, 1887.

171. Of a reissue the Supreme Court said :

"There is no evidence of any attempt to secure by the original patent the invention covered by the first eight claims of the reissue, and those inventions must be regarded as having been abandoned or waived, so far as the reissue in question is concerned, subject, however, to have made a new application for a patent to cover them ; in other words, those eight claims are not for the same invention which was originally patented." *Parker & Whipple Co. et al. v. Yale Clock Co. et al.*, 41 O. G. 811.—SUP. CT. 1887.

172. Ten years' delay in applying for patent, while in possession of means, and not otherwise satisfactorily explained, works abandonment. *Carver et al. v. Weyrick et al.*, 31 Fed. Rep. 607.—GRESHAM, 1887.

173. "Description in a prior patent does not, of itself alone, invalidate a subsequent patent for the invention so described, applied for in due season." *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 31 Fed. Rep. 562.—WHEELER, 1887.

174. The Green driven-well patent was dated January 14th, 1868. He appears to have first made such a well in 1861. For a condition of facts which excused him as regards abandonment and as regards prior public use, see —. 121 U. S. 71, 39 O. G. 1826.—SUP. CT. 1887.

175. "The act of 1839, as has repeatedly been held, has no effect to invalidate a patent, unless there be proof of abandonment or a use of the invention for more than two years prior to the application for the patent."—*Id.*

## ABANDONED APPLICATION.

THIS title refers to the abandonment of an application for a patent. Its practical discussion in the courts has been mainly in connection with the question of two years' public use of an invention prior to the application for patent therefor ; and then the precise question has been whether there was reasonable continuity between consecutive applications for patents on the same invention so that they might be considered as one continuous application. The cases that pertain to this topic are therefore in the main comprised under the title of "Public Use—Two Years."

### "ABANDONED APPLICATION" IN THE PATENT ACTS.

Act approved March 3d, 1861.

SECTION 12. *And be it further enacted*, That all applications for patents shall be completed and prepared for examination within two years

after the filing of the petition, and in default thereof they shall be regarded as abandoned by the parties thereto; unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 32. *And be it further enacted*, That all applications for patents shall be completed and prepared for examination within two years after the filing of the petition, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

SEC. 35. *And be it further enacted*, That any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who has failed to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application: *Provided*, That the second application be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent, as aforesaid, was ordered to issue prior to the issue thereof: *And provided further*, That when an application for a patent has been rejected or withdrawn prior to the passage of this act, the applicant shall have six months from the date of such passage to renew his application, or to file a new one; and if he omit to do either, his application shall be held to have been abandoned. Upon the hearing of such renewed applications abandonment shall be considered as a question of fact. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4885. Every patent shall bear date as of a day not later than six months from the time at which it was passed and allowed and notice thereof was sent to the applicant or his agent; and if the final fee is not paid within that period, the patent shall be withheld.

SEC. 4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of

the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable.

SEC. 4897. Any person who has an interest in an invention or discovery whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact.

#### CASES.

See "Abandonment," paragraphs 31, 34, 58, 67, 83, 87, 103, 110, 123, 125, 133, 134, 141, 158, 169.

See "Application for Patent," paragraphs 44, 45, 57, 60, 68.

See "Public Use—Two Years," paragraphs 23, 39, 46, 52, 54, 56, 57, 58, 68, 70, 75, 78, 92, 93, 94, 105, 111, 137, 169, 185.

#### ABANDONED EXPERIMENT.

[SEE Prior Use—Abandoned Experiment.]

#### ADMINISTRATOR AND EXECUTOR.

##### "ADMINISTRATOR AND EXECUTOR" IN THE PATENT ACTS.

Act approved April 17th, 1800.

SECTION 2. *And be it further enacted*, That where any person hath made, or shall have made, any new invention, discovery, or improvement, on account of which a patent might, by virtue of the above-mentioned act, be granted to such person, and shall die before any patent shall be granted therefor, the right of applying for and obtaining such patent shall devolve on



the legal representatives of such person in trust for the heirs at law of the deceased, in case he shall have died intestate; but if otherwise, then in trust for his devisees, in as full and ample manner, and under the same conditions, limitations, and restrictions as the same was held, or might have been claimed or enjoyed by such person, in his or her lifetime; and when application for a patent shall be made by such legal representatives, the oath or affirmation, provided in the third section of the above-mentioned act, shall be so varied as to be applicable to them. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 10. *And be it further enacted*, That where any person hath made, or shall have made, any new invention, discovery, or improvement, on account of which a patent might by virtue of this act be granted, and such person shall die before any patent shall be granted therefor, the right of applying for and obtaining such patent shall devolve on the executor or administrator of such person, in trust for the heirs at law of the deceased, in case he shall have died intestate; but if otherwise, then in trust for his devisees. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 34. *And be it further enacted*, That when any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the heirs at law of the deceased, in case he shall have died intestate; or if he shall have left a will, disposing of the same, then in trust for his devisees in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime. . . . [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4896. When any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the heirs at law of the deceased, in case he shall have died intestate; or if he shall have left a will, disposing of the same, then in trust for his devisees, in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime; and when the application is made by such legal representatives, the oath or affirmation required to be made shall be so varied in form that it can be made by them.

(As to right of administrators and executors to take reissues, see "Reissue" in the Patent Acts.)

#### CASES.

1. By the court: "There is no express statutory provision authorizing the administrator of the patentee to apply for a renewal of the patent." [Said in 1843.] By the court [on motion to dissolve provisional injunction]: "Upon the whole, and for the purposes of this motion, I shall consider the extension of the patent as having been legally granted." *Brooks et al. v. Bicknell et al.*, 3 McLean, 250.—MCLEAN, 1843.

2. The grant of an extension of a patent to an administrator is within the statute of 1836. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

3. Extension of a patent in the name of the administrator is within the spirit and policy of the act of 1836. *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

4. The ownership of a patent in the hands of an administrator is a unit extending throughout the United States which he has power to sell within a State the same as any other personal property of the estate, and the right may be conveyed in parts so as to satisfy purchasers.—*Ib.*

5. An administrator is competent to apply for and receive a patent. *Woodworth v. Sherman*, 3 Story, 171.—STORY, 1844.

6. An administrator may properly apply for and receive an extension of the letters-patent of the deceased. *Wilson v. Rousseau*, 4 Howard, 646.—SUP. CT. 1846.

7. Where a patent issues to an administrator, that is sufficient evidence of the grant of administration, and it is not competent for a court to further inquire into the matter. *Woodworth et al. v. Hall et al.*, 1 W. & M. 248.—WOODBURY, 1846.

8. An administrator may lawfully surrender a patent for reissue. *Smith et al. v. Mercer et al.*, 3 Penn. L. J. Rep. 526.—KANE, 1846.

9. An administrator may sue, as such, upon a patent which he holds as such, in any circuit court.—*Ib.*

10. Title derived through a foreign administrator is a good title. *Smith et al. v. Plympton et al.*, 4 West. L. J. 49.—KANE, 1846.

11. Where there is more than one administrator on the estate of a patentee and one of them makes an assignment of his patent, the assignment is valid. *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILSON, 1856.

12. "An administrator of a patentee residing in one state may commence an action in the United States Circuit Court of another state for the recovery of damages for an infringement, without taking out letters of administration in the latter state." *Goodyear et al. v. Hulihan et al.*, 2 Hughes, 492.—JACKSON, 1867.

13. "The administrator is a trustee holding the legal title, and the patent is not assets in his hands belonging to the personal estate of the intestate, but is a franchise granted to the administrator, for the benefit of the heirs at law or the devisees of the deceased inventor. There is, therefore, no reason for requiring him to qualify" under a state law.—*Ib.*

14. "The titles to patents for inventions are regulated by acts of Congress. By those acts the interest of the patentee passes to the personal representative in the state of the domicile, and remains in him until assignment to the parties beneficially interested therein, or to the vendee thereof in case of sale in course of administration." *Hodge et al. v. No. Mo. R. R.*, 1 Dillon, 104.—TREAT, 1869.

15. "Charles Goodyear, deceased, by his will appointed his son, Charles Goodyear, Jr., his wife, Fanny Goodyear, and James A. Dorr his executors. The will provided that a majority of the executors should decide all questions that might arise; that the acts of the majority should be as binding as the acts of all; that if at any time there should be but two, they might appoint a third; and that if there should be but one, he might appoint another. The manner of appointment in both cases was specified." Charles Goodyear, Jr., alone as executor, brought suit, and it was held that he had that right. *Ruber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

16. The rule as to administrators and executors in courts of equity is not different from the rule in the courts of law. "Neither can recognize the authority of an executor any more than that of an administrator, and neither will aid him to obtain possession and control of the estate, until he has fulfilled the conditions and given the guarantees of fidelity and solvency prescribed by the local law. A different rule could hardly fail to be followed by the most mischievous consequences."—*Ib.*

17. "It is difficult to see any solid objection to the power of" an "executor or administrator to make the surrender and obtain the reissue." *Carew et al. v. Boston Elastic Fabric Co.*, 3 Cliff. 356.—CLIFFORD, 1871.

18. A license to a person for a specified term of years passes to the licensee's administrator

upon his death. *Oliver et al. v. Morgan*, 10 Heiskel, 332.—NICHOLSON, 1872.

19. A defendant died pending suit; thereof the court said: "No injunction can issue against the defendant, and as there is no proof of infringement by the executor, none can issue against him. No discovery is prayed for against the executor, and there is no presumption of any knowledge by him of his testator's acts. When the title to the principal relief which is the proper subject of a suit in equity—the injunction and discovery—fails, the incident right to an account fails also." *Draper v. Hudson*, 1 Holmes, 208.—SHEPLEY, 1873.

20. Grant of letters of administration by a court having jurisdiction is conclusive as to the administrator's right to the grant. *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 1 Bann. & Ard. 177.—McKENNAN, 1874.

21. "The act of Congress [Brightley's Dig., Section 39] imposes upon a patent issued to the administrator of a deceased inventor, a trust in favor of his heirs. But it is not essential to the validity of the patent, or to the efficacy of the trust, that the persons to whose benefit the patent will inure should be named upon the face of it."—*Ib.*

22. "The act of Congress . . . provides that the administrator of the deceased inventor shall hold the patent granted to him, 'under the same conditions, limitations, and restrictions, as the same was held, or might have been claimed or enjoyed' by the inventor in his lifetime. The import of this provision is that, while the legal title to the invention is devolved upon the administrator, he must take and hold it subject to any equities existing as against the inventor in his lifetime."—*Ib.*

23. "The equitable liability of an infringer is clearly not determined by his death, and a bill of revivor against his personal representatives will lie to prevent the abatement of the suit brought in his lifetime to enforce it." *Smith v. Baker's Administrator*, 1 Bann. & Ard. 117.—McKENNAN, 1874.

24. Where A has an assignment under a patent which is of record, that record is constructive notice of A's rights, although the assignor may have conveyed her title as administratrix when she was, in fact, an executrix. *Newell et al. v. West et al.*, 13 Blatch. 114.—WALLACE, 1875.

25. An assignment of a patent made by an executrix, although she signs as administratrix, is valid to convey the title.—*Ib.*

26. The statutes of Massachusetts enacted

"that, on the application of an administrator, or executor, or any person interested in the estate, the Probate Court may order any part or all of the personal estate to be sold at public auction or at private sale, and, in that event, the administrator shall account therefor at the price for which it sells." An executrix made a sale of a patent without such an order. In the absence of any statutory limitation the court assumed that she had the same power that executors have at law.—*Ib.*

27. A man died leaving a wife and daughter. The wife was his executrix, and as such sold and assigned away a patent which he had. The daughter did not join in the assignment, and it was held that she need not join in order to make the transfer good.—*Ib.*

28. After a decree adjudging infringement and referring the case to a master for an accounting, the respondent died. It was "*Held*, 1. That although, as a general rule, actions for tort do not survive against the representatives of defendants deceased pending the suit, yet these proceedings in equity for infringement of patents are not strictly proceedings in tort. The respondent who infringes a patent is held in equity as a trustee of the owner of the patent, and compelled to account to him for the profits realized from the manufacture of the infringing machines or products. The infringer is also liable to the patentee for damages for such infringement, and both these causes of action are combined in the case in equity, as well as the prayer for perpetual injunction. 2. That in this case, the decree having settled the question of infringement, and the case having been referred to a master, before the death of the respondent, to ascertain the amount for which the decree should be rendered, which will embody either both or one of the claims of complainant, therefore, the action does survive." *Atterbury v. Gill*, 2 Flippin, 239 —WELKER, 1877.

29. Where, pending a suit against him, respondent dies, under Rule 56 the suit is not revived unless order to that effect is made.—*Ib.*

30. "The right to file a bill of revivor is confined to cases of representation of the party deceased by the mere appointment and operation of law. . . . On the other hand, there may be a priority of right and title, under the deceased, by a transfer or conveyance of that right to a person who is not in by mere operation of law, and is not the heir or personal representative of the deceased, and in such a case a bill of revivor will not lie." *Metal Stamping Co. v. Crandall*, 18 O. G. 1531.—WALLACE, 1880.

31. An administrator cannot be sued in that capacity as an infringer. *Thompson v. Canterbury*, 2 McCrary, 332.—MCCRARY, 1881.

32. Where a license runs to the administrators, executors, and assigns of the parties of the second part, it plainly provides for a devolution or transfer of the title in severalty. *Adams et al. v. Howard et al.*, 23 Blatch. 27.—WALLACE, 1884.

33. "A patent right, like any other personal property, is understood by Congress to rest in the executor and administrator of the patentee, if he has died without having assigned it." *Shaw Relief Valve Co. v. New Bedford*, 19 Fed. Rep. 753.—LOWELL, 1884.

34. On the death of a patentee the patent becomes the property of his heirs, to be disposed of by the administrator or executor. *Bradley et al. v. Drell et al.*, 19 Fed. Rep. 913.—ACHESON, 1884.

35. Ownership and interest in a patent descends to the administrator and not to the heirs, and is to be administered the same as all other personalty of the deceased. *Hewitt et al. v. Pa. Steel Co.*, 31 O. G. 1687.—BUTLER, 1885.

35 a. An assignment of a license by the widow of the deceased owner—it not appearing that she is administratrix—does not avail to pass the title to such license. *Creecy v. United States*, 21 N. & H. 3.—NORR, 1885.

36. It is expressly provided by the thirty-first section of the judiciary act of 1789, that the courts are authorized to hear and determine a cause and proceed to judgment therein for or against an executor or administrator, as the case may be, after the death of a party; and a bill of revivor is the proper mode of preserving and continuing the original suit. *Kirk v. Du Bois*, 28 Fed. Rep. 460.—MCKENNAN, 1886.

37. "A patentee's right of action for an infringement of his patent survives to his personal representatives; and it is well settled that his executor or administrator may not only sue on such cause of action, but may assign or transfer the same to another. A patent-right, with all the incidents arising from infringements thereof, is personal property, and goes upon the death of the patentee, assignee, or grantee, to his executor or administrator." *May v. Logan Co.*, 30 Fed. Rep. 250.—JACKSON, 1887.

## AGGREGATION.

SEE "Combination—Unpatentable."

## ALIEN INVENTOR.

## "ALIEN INVENTOR" IN THE PATENT ACTS.

Act approved April 17th, 1800.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all and singular the rights and privileges given, intended or provided to citizens of the United States, respecting patents for new inventions, discoveries, and improvements, by the act intituled "An act to promote the progress of useful arts, and to repeal the act heretofore made for that purpose," shall be, and hereby are, extended and given to all aliens who at the time of petitioning in the manner prescribed by said act, shall have resided for two years in the United States, which privileges shall be obtained, used, and enjoyed by such persons, in as full and ample manner, and under the same conditions, limitations, and restrictions, as by the said act is provided and directed in the case of citizens of the United States: *Provided always,* That every person petitioning for a patent for any invention, art, or discovery, pursuant to this act, shall make oath or affirmation before some person duly authorized to administer oaths before such patent shall be granted, that such invention, art, or discovery hath not, to the best of his or her knowledge or belief, been known or used either in this or in any foreign country, and that every patent which shall be obtained pursuant to this act, for any invention, art, or discovery, which it shall afterward appear had been known or used previous to such application for a patent, shall be utterly void. [Repealed July 4th, 1836.]

Act approved July 13th, 1832.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the privileges granted to the aliens described in the first section of this act, to extend the privilege of obtaining patents for useful discoveries and inventions to certain persons therein mentioned, and to enlarge and define the penalties for violating the rights of patentees, approved April seventeenth, eighteen hundred, be extended in like manner to every alien who, at the time of petitioning for a patent, shall be resident in the United States, and shall have declared his intention, according to law, to become a citizen thereof: *Provided,* That every patent granted by virtue of this act and the privileges thereto appertaining, shall cease and determine and become absolutely void without resort to any legal process to annul or cancel the same in case of a failure on the part of any patentee, for the space of one year from the is-

suing thereof, to introduce into public use in the United States the invention or improvement for which the patent shall be issued; or in case the same for any period of six months after such introduction shall not continue to be publicly used and applied in the United States, or in case of failure to become a citizen of the United States agreeably to notice given at the earliest period within which he shall be entitled to become a citizen of the United States. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 9. *And be it further enacted,* That before any application for a patent shall be considered by the Commissioner as aforesaid, the applicant shall pay into the Treasury of the United States, or into the Patent Office, or into any of the deposit banks to the credit of the Treasury, if he be a citizen of the United States, or an alien, and shall have been resident in the United States for one year next preceding, and shall have made oath of his intention to become a citizen thereof, the sum of thirty dollars; if a subject of the King of Great Britain, the sum of five hundred dollars; and all other persons the sum of three hundred dollars.

SEC. 15. (This act provides as a defence to an action for infringement of a patent: "That the patentee, if an alien at the time the patent was granted, had failed and neglected, for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent issued.") [Repealed July 8th, 1870.]

Act approved March 3d, 1837.

SEC. 12. *And be it further enacted,* That, wherever the application of any foreigner for a patent shall be rejected and withdrawn for want of novelty in the invention, pursuant to Section 7 of the act to which this is additional, the certificate thereof of the Commissioner shall be a sufficient warrant to the treasurer to pay back to such applicant two thirds of the duty he shall have paid into the Treasury on account of such application. [Repealed July 8th, 1870.]

[Statutory provisions regarding aliens in connection with "Caveats" and "Design" patents will be found under those titles.]

## CASES.

1. As to public use, citizens and aliens stand on the same footing. [Invention patented in 1832.] *Shaw v. Cooper*, 7 Peters' C. C. 292. — SUP. CT. 1833.

2. "The alien clause in Section 15 of the act of 1836 applied only to alien patentees, and not to

American patentees who became such as assignees of alien inventors, under Section 6 of the act of March 3d, 1837." *Tatham et al. v. Lowber et al.*, 2 Blatch. 49.—NELSON and BETTS, 1847.

3. On November 13th, 1844, one Mini, an alien not naturalized in the United States, took a patent, on the allegation that he was a citizen of the United States, the fees for citizens and aliens being widely different. Seven years afterward he procured a reissue in which the defect was attempted to be cured. It was held that the reissue was invalid. *Mini's Assignee v. Child*, 3 Wall. Jr. 20.—GRIER, 1854.

4. A patent taken by an alien, as the law was in 1844, on the basis of his being a citizen, the fees in the two cases being widely different, is void.—*Id.*

### ANNULMENT OF PATENT.

#### "ANNULMENT OF PATENT" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 5. *And be it further enacted*, That upon oath or affirmation made before the judge of the district court where the defendant resides, that any patent which shall be issued in pursuance of this act was obtained surreptitiously by, or upon false suggestion, and motion made to the said court, within one year after issuing the said patent, but not afterward, it shall and may be lawful to and for the judge of the said district court, if the matter alleged shall appear to him to be sufficient, to grant a rule that the patentee or patentees, his, her, or their executors, administrators, or assigns, show cause why process should not issue against him, her, or them, to repeal such patent; and if sufficient cause shall not be shown to the contrary, the rule shall be made absolute, and thereupon the said judge shall order process to be issued as aforesaid against such patentee or patentees, his, her, or their executors, administrators, or assigns. And in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the first and true inventor or discoverer, judgment shall be rendered by such court for the repeal of such patent or patents; and if the party at whose complaint the process issued shall have judgment given against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed by the court, and recovered in such manner as costs expended by defendants shall be recovered in due course of law. [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 10. *And be it further enacted*, That upon

oath or affirmation being made before the judge of the district court where the patentee, his executors, administrators, or assigns, reside, that any patent, which shall be issued in pursuance of this act, was obtained surreptitiously or upon false suggestion, and motion made to the said court, within three years after issuing the said patent, but not afterward, it shall and may be lawful for the judge of the said district court, if the matter alleged shall appear to him to be sufficient, to grant a rule, that the patentee, or his executor, administrator, or assign show cause why process should not issue against him to repeal such patent. And if sufficient cause shall not be shown to the contrary, the rule shall be made absolute, and thereupon the said judge shall order process to be issued against such patentee, or his executors, administrator, or assigns, with costs of suit. And in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such court for the repeal of such patent; and if the party at whose complaint the process issued shall have judgment given against him, he shall pay all such costs as the defendants shall be put to in defending the suit, to be taxed by the court, and recovered in due course of law. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

[See also "Interference" in the Patent Acts.]

#### CASES.

1. The proceeding authorized by Section 10, Chapter 11, of the act approved February 21st, 1793, is in the nature of a *scire facias* at common law to repeal a patent. *Stearns v. Barrett*, 1 Mason, 153.—STORY, 1816.

2. The Circuit Court has appellate jurisdiction in proceedings for repeal of patent—under Section 10, Chapter 11, act of 1793—where the matter in dispute exceeds \$300. [Jud. Act, 1789, Ch. 20, Sec. 22.]—*Id.*

3. In the proceeding for repeal of patent—authorized by Section 10, Chapter 11, act approved February 21st, 1793—the burden of proof is on the plaintiff.—*Id.*

4. In the proceeding authorized by Section 10, Chapter 11, act approved February 21st, 1793, prior refusal of the defendant to join in the arbitration provided for by Section 9 is not conclusive against him.—*Id.*

5. *Scire facias* issues at common law to repeal a patent obtained surreptitiously or upon false suggestion. *Wood et al. ex parte*, 9 Wheat. 603.—SUP. CT. 1824.

6. Under Section 10, act of February 21st,

1793, the proceedings antecedent to the rule absolute are to be made of record; after rule absolute, process in the nature of *scire facias* follows; thereupon pleadings *pro* and *con* are to be filed and issue joined; if an issue of fact arises, it is to be tried to the jury; if of law, to the court.—*Ib.*

7. A patentee cannot avoid his own patent by his own declaration simply. It may be avoided by adversary proceedings in court, or by a surrender and vacatur entered on the records, and, if not vacated for fraud, a new patent may be issued for the unexpired term. *Morris v. Huntington*, 1 Paine, 348.—THOMPSON, 1824.

8. A patent cannot be cancelled in a court of law, but may be annulled in chancery by a *scire facias*. *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

9. "No discretion is left to the court to annul a patent for any reason not contained in the acts of Congress."—*Ib.*

10. The proceeding provided for in Section 10 of the act of February 21st, 1793, applies only when the patent has been obtained by fraud. [Subsequently doubted by the same judge in the same case.] *Delano v. Scott*, 1 Gilpin, 489.—HOPKINSON, 1834.

11. In this proceeding the hearing on the return of the rule to show cause is a proceeding initial to a trial by jury, if the court find ground therefor.—*Ib.*

12. In this proceeding constructive notice of a previous patent is not sufficient to fix fraud on a subsequent patentee. The notice must be actual.—*Ib.*

13. In the proceeding provided for in Section 10 of the act of February 21st, 1793, the controversy is between the complainant and the patentee. The United States cannot be substituted as plaintiff. *Wood v. Williams*, 1 Gilpin, 517.—HOPKINSON, 1834.

14. Where a patent had issued to a party to whom it did not rightfully belong the court directed the party to surrender the patent to be cancelled. *Appleton v. Bacon et al.*, 2 Black. 699.—SUP. CT. 1862.

15. "Section 16 of the act of 1836 authorizes a court of equity, in cases of interference, to take jurisdiction and annul the patent issued to the party in the wrong. Beyond this the patent laws are silent upon the subject of the exercise of such authority. This review furnishes a strong implication that it was the intention of Congress not to allow a patent to be abrogated in any collateral proceeding, except in the particular instance mentioned, but to leave the remedy in all other cases to be regulated by

the principles of general jurisprudence." *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

16. After an extended patent had expired, a bill was filed asking for the vacation of the patent; the court held that "the extension having expired before the bill was filed, there is no equity to support the application to set it aside. The extension had ceased to be of any effect, and there remains nothing which can be the subject of a suit." *Bourne v. Goodyear*, 9 Wall. 811.—SUP. CT. 1869.

17. "The only authority conferred on" a United States Circuit Court "by any statute of the United States, to adjudge any letters-patent to be void, is that given by Section 16 of the act of July 4th, 1836 [5 U. S. Stat. at Large, 123], as extended by Section 10 of the act of March 3d, 1839 [*id.* 354]; such authority extends, by those provisions, no farther than to a case of two interfering patents, and to a case where a granting of a patent is refused by the Commissioner of Patents, or by the chief justice of the District of Columbia on appeal." *Merserole et al. v. Union Paper Collar Co.*, 6 Blatch. 356.—BLATCHFORD, 1869.

18. In a suit for the annulment of a patent, "the fact that the suit is instituted on behalf of the United States by the person who is district attorney, and that he acts as such in instituting the suit on behalf of the United States, must appear by the face of the bill or declaration, or the pleading will be held bad." *United States v. Doughty*, 7 Blatch. 424.—BLATCHFORD, 1870.

19. A patent cannot be annulled in collateral proceedings, it can only be annulled in some direct suit to impeach and set aside the patent. *Eureka Co. v. Bailey Co.*, 11 Wall. 488.—SUP. CT. 1870.

20. "No one but the Government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the Government has issued to an individual, except in cases provided for in Section 16 of the act of July 4th, 1836." *Mowry v. Whitney*, 14 Wall. 434.—SUP. CT. 1872.

21. "The nature of the Chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the Government."—*Ib.*

22. "Section 16 of the patent act of 1836 seems to have in view the same distinction made by the common law in regard to annulling patents; for while it authorizes individuals claiming under conflicting patents, or one

whose claim to a patent has been rejected because his invention was discovered by a patent already issued, to try the conflicting claim in chancery, and authorize the court to annul or set aside a patent so far as may be found necessary to protect the right, the suit by individuals is limited to that class of cases. And it is provided that the decree shall be of no validity except between parties to the suit. The general public is left to the protection of the Government and its officers."—*Ib.*

23. For an example of interference between two patents and annulment of one of them, see — *Sturges v. Van Hagen*, 6 Fish. P. C. 572.—BLODGETT, 1873.

24. A bill in equity was brought, under Section 58 of the patent act of 1870, for the repeal of certain letters-patent granted to the defendants, April 14th, 1874, which were alleged to be for the same invention as was covered by a patent granted to complainant May 12th, 1874, and, therefore, to constitute an interfering patent. The court, after a review of the case of *Mowry v. Whitney*, held the statute of 1870 to be broader in its application than that of 1836; that under it the court was authorized to review both patents on their merits, and to decree the cancellation, not only of either, but of both; and that it might do so on the ground of want of novelty in either, or both, or any other ground that would, in an action for infringement, affect the validity of either. *Foster v. Lindsay et al.*, 1 Bann. & Ard. 605.—TREAT, 1874.

25. There can be found no "precedent . . . for the suing out of a writ of *scire facias*, or the bringing of a bill in equity to repeal a patent by the attorney-general in the name and behalf of the United States, either with or without a relator." *Attorney-General v. Rumford Chemical Works et al.*, 2 Bann. & Ard. 298.—SHEPLEY, 1876.

26. "The jurisdiction conferred by acts of 1790 and 1793 upon the federal courts to repeal a patent, and which, without express grant, did not inhere in those courts, is nowhere conferred by the acts of 1836 or 1870, or in the revised statutes of 1874."—*Ib.*

27. "The decisions in the federal courts, sustaining proceedings in equity to vacate letters-patent granting lands, obtained by fraud, furnish no precedent in case of letters-patent for inventions."—*Ib.*

28. "In proceedings to repeal patents, 'the Attorney-General of the United States, as he is Attorney-General,' has no authority, as such, and in his own name, to file an information or commence proceedings by bill in equity. . . .

The information [if the court has jurisdiction to entertain it] should be in the name of the United States, and . . . should be filed by the Attorney of the United States, in the district in which the information is filed, 'in the name and behalf of the United States.' . . . The usual and proper mode is for the district attorney to file an information in the name and behalf of the United States, and probably only in that form could one be sustained, if objected to."—*Ib.*

29. A proceeding for the annulment of a patent by the Attorney-General of the United States is not, under the control of a private person, liable to be sued under the patent. *N. Y. & Balt. Coffee Polishing Co. v. N. Y. Coffee Polishing Co.*, 20 Blatch. 174.—BENEDICT, 1881.

30. "A bill in equity lies to set aside letters-patent obtained by fraud, but only between the sovereignty making the grant and the grantee." *U. S. v. Gunning et al.*, 18 Fed. Rep. 511.—WALLACE, 1883.

31. After the expiration of a patent, a suit was brought by the direction of the attorney-general to repeal it. A motion was made for an injunction to restrain the commencement or prosecution of such suits for infringement. Motion denied. *U. S. v. Colgate*, 22 Blatch. 412.—WHEELER, 1884.

32. Where it is sought to repeal a patent in the name of the United States, "when it is apparent that the name of the United States is only colorably used, and that the suit is really prosecuted by private persons," a demurrer to the bill will be sustained. *United States v. Frazer*, 22 Fed. Rep. 106.—BLODGETT, 1884.

33. It seems that if a man applies for a patent as an original and first inventor, when he knows he was not, or if to get the patent he alleges that the invention had not been in public use or on sale for two years prior to the application, when he had knowledge to the contrary, that such states of fact constitute the fraud which makes the patent repealable at the instance of the United States. *U. S. v. Gunning et al.*, 23 Blatch. 31.—WHEELER, 1884.

34. It seems that in an equity suit for infringement, where defendant owns and sets up an interfering patent, the complainant's patent may be declared void by the court, and the complainant enjoined from bringing or threatening further suits under it. *Sawyer v. Massey et al.*, 25 Fed. Rep. 144.—SPEAR, 1885.

35. "The Government, in the absence of any express enactments, has no power to bring a bill in equity to cancel a patent." *United States v. Am. Bell Tel. Co. et al.*, 41 O. G. 123.—COLT, 1887.

36. A victory in a Patent Office interference is *prima facie* sufficient to enable the victor to have the patent of his opponent annulled. *Chicopee Folding Box Co. v. Rogers*, 32 Fed. Rep. 695.—WALLACE, 1887.

### APPEAL.

THIS title (with the exception of the first case) pertains to the removal of cases from the United States Circuit Court to the United States Supreme Court, and embraces all modes of such removal without reference to the technical name of the proceeding.

#### "APPEAL" IN THE PATENT ACTS.

Act approved February 15th, 1819.

*Be it enacted, etc.* . . . That from all judgments and decrees of any circuit courts rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the Supreme Court of the United States. . . . [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SECTION 17. . . . From all judgments and decrees from any such court rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the Supreme Court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of circuit courts, and in all other cases in which the court shall deem it reasonable to allow the same. [Repealed July 8th, 1870.]

Act approved February 18th, 1861.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from all judgments and decrees of any circuit court rendered in any action, suit, controversy, or case, at law or in equity, arising under any law of the United States granting or confirming to authors the exclusive right to their respective writings, or to inventors the exclusive right to their inventions or discoveries, a writ of error or appeal, as the case may require, shall lie, at the instance of either party, to the Supreme Court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of such circuit courts, without regard to the sum or value in controversy in the action. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 56. *And be it further enacted*, That a writ of error or appeal to the Supreme Court of the United States shall lie from all judgments and decrees of any circuit court, or of any district court exercising the jurisdiction of a circuit court, or of the Supreme Court of the District of Columbia, or of any territory, in any action,

suit, controversy, or case, at law or in equity, touching patent-rights, in the same manner and under the same circumstances as in other judgments and decrees of such circuit courts, without regard to the sum or value in controversy. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 699. A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute :

First. Any final judgment at law or final decree in equity of any circuit court acting as a circuit court, or of the Supreme Court of the District of Columbia or of any territory, in any case touching patent-rights or copyrights.

#### CASES.

1. The Circuit Court has appellate jurisdiction in proceedings for repeal of patent—under Section 10, act of 1793—where the matter in dispute exceeds \$300. [Jud. Act, 1789, Ch. 20, [Sec. 22.] *Stearns v. Barrett*, 1 Mason, 153.—STORY, 1816.

2. Where a case comes to the Circuit Court on a *venire facias de novo*, formal objections to the mode of taking the case to the Supreme Court will be deemed to have been waived. *Evans v. Eaton*, 3 Wash. 443.—WASH. 1818.

3. "It is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, when it was not requested by either party at the trial." *Pennock et al. v. Dialogue*, 2 Peters' C. C. 1.—SUP. CT. 1829.

4. As to an appeal to the Supreme Court, under Section 17 of the patent act of July 4th, 1836, the court below is limited by Congress in its power to allow such appeal, and "must confine the indulgence to cases where it appears to the court to be 'reasonable.'" "It is discreet and reasonable to confine the appeals, even on patent questions under the patent laws, to such as involve important and not trifling matters connected with those laws, not merely technical ones; also to such as involve questions really doubtful." *Allen v. Blunt et al.*, 2 W. & M. 121.—WOODBURY, 846.

5. When a case comes to the Supreme Court upon a writ of error, under Section 17 of the General Patent Law of July 4th, 1836, the whole case, and not part of it, comes up to the Supreme Court, and the whole case is examined by that court. *Hogg et al. v. Emerson*, 6 Howard, 437.—SUP. CT. 1848.

6. "An appeal may be prosecuted only from a final decree." Where there is a reference to



the master to ascertain damages, and no statement as to costs, the decree is not final. *Bernard et al. v. Gibson*, 7 Howard, 650.—SUP. CT. 1849.

7. A writ of error can be taken to the Supreme Court from a circuit court upon an agreed statement between the parties. *Stimpson v. B. & S. R. R. Co.*, 10 Howard, 329.—SUP. CT. 1850.

8. The question as to the substantial identity of two machines is a question of fact which cannot be certified to the Supreme Court from a circuit court under the act of 1802, Chapter 31, Section 6. "That act evidently gives the jurisdiction only in cases where the judges of the Circuit Court differ in opinion on a point of law." *Wilson v. Barnum*, 8 Howard, 259.—SUP. CT. 1850.

9. Under Section 17 of the patent act of 1836, where a judge is sitting at a stated term, and a judge is sitting in chambers of the same, the latter may, in chambers, allow a writ of error. *Rote v. Silsby et al.*, 1 Blatch. 542.—NELSON, 1850.

10. The question, "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them singly, do or do not infringe the said amended letters-patent," was the question which a circuit court certified on division to the Supreme Court. Thereof the Supreme Court said: "The jurisdiction of this court to hear and determine a question certified from the Circuit Court is derived altogether from the act of 1802, Chapter 31, Section 6 [2 Stat. at Large, 159], and that act evidently gives the jurisdiction only in cases where the judges of the Circuit Court differ in opinion on a point of law." *Wilson v. Barnum*, 8 Howard, 259.—SUP. CT. 1850.

11. In a case at law a verdict was rendered December 13th, and bill of exceptions filed December 14th; no exceptions were taken at the trial. The Supreme Court said: "It must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. . . It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear by the certificate of the judge who authenticates it, to have been so taken." And thereupon the Supreme Court affirmed the judgment of the lower court. *Phelps v. Mayer*, 15 Howard, 160.—SUP. CT. 1852.

12. "It often happens that a court may decree in favor of a complainant, but not to the

extent prayed for in his bill, and he may have just cause of appeal on that account." *Corning et al. v. Troy Iron & Nail Factory*, 15 Howard, 451.—SUP. CT. 1853.

13. "The law gives the party aggrieved an appeal from a final decree of an inferior court; but it does not give the party who is not aggrieved an appeal from a decree in his favor because the judge has given no reasons, or recited no sufficient ones, for a judgment admitted by the appellant to be correct."—*Id.*

14. "To allow a second appeal to a court of last resort, on the same questions which were open to dispute on the first, would lead to endless litigation."—*Id.*

15. "When a complainant has a decree in his favor, but not to the extent prayed for in his bill, and the respondent appeals, if the complainant desires a more favorable decree he must enter a cross-appeal, that, when the decree comes before the appellate court, he may be heard. For when the decree is either affirmed or reversed by the appellate court, it becomes the decree of that court, and cannot be the subject of another appeal."—*Id.*

16. "A second appeal lies only when the court below, in carrying out the mandate of this court, is alleged to have committed an error. But on appeal from the mandate, it is well settled that nothing is before the court but the proceedings subsequent to the mandate. Whatever was formerly before the court, and was disposed of by its decree, is considered as finally disposed of."—*Id.*

17. Where a decree has been made by the Circuit Court, the case appealed to the Supreme Court, and the decision reversed by the Supreme Court and, with mandate to that effect, sent to the Circuit Court and the mandate not acted upon by the Circuit Court, there is no final decree in the Circuit Court from which appeal can be taken.—*Id.*

18. The Circuit Court made a decretal order as follows: "This cause came on, etc., and by consent of parties it is declared by the court: That the complainants are entitled to the perpetual injunction and the account prayed for by the bill." Thereof the Supreme Court said: "The account consented to was the account prayed for by the bill, and in the plain words of the bill—viz, 'that the defendants may be decreed to account for and pay over all such gains and profits as have accrued to them from using the said machine since the expiration of said original letters-patent.' 'This language is particularly clear and significant; such gain and profits, and such only, as have actually accrued

to the defendants ; and we are unable to perceive how, by such an assent, the appellants [the defendants below] could have been concluded against exceptions to anything and everything which might have been involved in that report, however illegal or oppressive." *Livingstone et al. v. Woodworth et al.*, 15 Howard, 546.—SUP. CT. 1853.

19. A patent suit was taken from the Circuit Court to the Supreme Court by writ of error, the blank in the transcript intended for taxation of costs not being filled in. The Supreme Court affirmed the decision of the Circuit Court, and the case went back to the Circuit Court ; thereupon the costs were taxed at less than \$2000, and it was sought to take the case again to the Supreme Court by writ of error. The Supreme Court held that a writ would not lie, for that "after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or re-examined upon the second ; and there is nothing, therefore, now before the court but the taxation of costs. . . .

"The sum taxed being less than \$2000, no writ of error will lie under the act of 1789. This act gives no jurisdiction to this court over the judgment of a circuit court, where the judgment is for less than that sum." *Sizer et al. v. Many*, 16 Howard, 98.—SUP. CT. 1853.

20. Where the report of the master is not objected to and the case is appealed to the Supreme Court, it is then too late to object to the report of the master. *Kinsman et al. v. Parkhurst*, 18 Howard, 289.—SUP. CT. 1855.

21. Where a writ of error is pending, an injunction will not be granted. *Day v. Harts-horn*, 3 Fish. P. C. 32.—PITTSMAN, 1855.

22. "A motion to amend, or to file an answer after default, is generally addressed to the discretion of the court. Under some circumstances, the court, for the purposes of justice, will go great lengths in opening a default and allowing a plea to be filed. But this is done or refused by the court in the exercise of its discretion, which is not subject to the revision of" the Supreme Court. *Dean v. Mason et al.*, 20 Howard, 198.—SUP. CT. 1857.

23. "The citation of the defendant was signed by the clerk of the court and not by the judge, who allowed a writ of error." Record was filed and the case docketed in the Supreme Court November 24th, 1856, and on December 4th defendant appeared by counsel in that court. The

Supreme Court said that the citation was irregular ; that the defendant in error was not bound to appear in the Supreme Court, and that plaintiff's motion to dismiss for a reason stated by him at a subsequent term came too late. *Chaffee v. Wayward*, 20 Howard, 208.—SUP. CT. 1857.

24. "If an appeal is taken in court at the time of rendering the decision, or during the term, no citation is necessary." *Silsby et al. v. Foote*, 20 Howard, 290.—SUP. CT. 1857.

25. Appeals taken within ten days after the decision is entered on the minutes of the clerk are regular, and stay execution in the court below.—*Id.*

26. A question being decided in the Circuit Court, and then coming to the Supreme Court, and the justices of the Supreme Court being divided thereupon, the decision of the lower court stands affirmed. *Silsby et al. v. Foote*, 20 Howard, 378.—SUP. CT. 1857.

27. "Bills of exception, when properly taken and duly allowed, become a part of the record, and, as such, cannot be contradicted." *Chaffee v. Boston Belting Co.*, 22 Howard, 217.—SUP. CT. 1859.

28. A decree in a circuit court "was that the complainants were entitled to a perpetual injunction and for an account of gains and profits, and that the cause be referred to a master to take and state the amount and report to the court." It was held that this decree could not be appealed from, because it was not final. *Humiston v. Stainthorp*, 2 Wall. 106.—SUP. CT. 1864.

29. "The equity of the statute, allowing a bill of exceptions in courts of common law, embraces all such judgments or opinions of the court arising in the course of a cause as are subjects of revision by an appellate court, and which do not otherwise appear on the record." *Heckers v. Fowler*, 2 Wall. 123.—SUP. CT. 1864.

30. "The appeal, and bond given in pursuance thereof, do not vacate or suspend the order of injunction ; they affect only the collection of the amount adjudged as damages and costs." *Whitney v. Mowry*, 2 Bond, 45.—LEAVITT, 1867.

31. The rights of parties in respect to taking appeals are determined by the date of the actual entry or of the signing or filing of the final decree. *Rubber Co. v. Goodyear*, 6 Wall. 153.—SUP. CT. 1867.

32. "In equity cases, the appellate jurisdiction of this [the Supreme] court attaches upon the allowance of the appeal. In order to make the appeal operate as a *supersedeas*, it is necessary for the appellant to give a good and sufficient security for the prosecution of the appeal, and for all costs and damages that may be adjudged

against him. This security is usually given by bond, with one or more sureties, and Section 23 of the Judiciary Act requires that it be taken by the judge who signs the citation on appeal. It is not required that the surety shall be in any fixed proportion to the decree. What is necessary is that it be sufficient, and when it is desired to make the appeal a *supersedeas*, that it be given within ten days from the rendering of the decree. The question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question, as well as every other in the cause, becomes cognizable here.

"It is, therefore, matter of discretion with this court to increase or diminish the amount of the bond, and to require additional sureties or otherwise as justice may require."—*Ib.*

33. Where, in a suit in the Circuit Court, complainants have bought in the patents under which suit was defended, and the defendants have become owners with complainants, there is no real litigation, and the Supreme Court will not proceed with the case. *Wood-Paper Co. v. Heft*, 4 Wall. 333.—SUP. CT. 1869.

34. "The patent law of February, 1861, gives to parties in suits arising under any law of the United States giving to inventors the exclusive right to their inventions or discoveries, a writ of error or appeal to the Supreme Court of the United States, without regard to the sum in controversy. The act of 1870 does not alter the right of appeal or to a writ of error in this respect." *Philip et al. v. Nock*, 13 Wall. 185.—SUP. CT. 1871.

35. The rules of the Circuit Court cannot be judicially noticed by the Supreme Court on appeal. *Packet Co. v. Sickles*, 19 Wall. 611.—SUP. CT. 1873.

36. When, in a bill of exceptions, the court places its action on "rules, with the construction of which, and the course of practice under them, it must be familiar, it would seem that the party assigning error on such rulings should be bound to exhibit in his bill of exceptions so much of the rule or rules as affects the question."—*Ib.*

36a. Where, in a circuit court, the defence of invalidity of reissue is not made, that defence cannot be made in the Supreme Court. *Klien v. Russell*, 19 Wall. 433.—SUP. CT. 1873.

37. Notwithstanding an appeal has been taken to the Supreme Court from a decree of a circuit court, it yet remains for the Circuit Court to enforce its decree for the payment of the master. Nor would the case be varied if the defendants had given a bond to the master to stay proceed-

ings to enforce payment of his compensation. *Myers et al. v. Dunbar et al.*, 12 Blatch. 380.—BLATCHFORD, 1874.

38. In order to obtain a *supersedeas* under the act of June 1st, 1872, where, in the language of Rule 29, "the decree is for the recovery of money not otherwise secured," the practice is to require a bond with one or more sureties for double the amount of the decree and costs, and such practice should not be departed from except in those cases where the appellee is made secure in other ways, and where such requirement under some such special circumstances will operate as a hardship upon the appellant. *Am. Nicholson Pavement Co. v. City of Elizabeth et al.*, 9 Bann. & Ard. 463.—NIXON, 1874.

39. In the matter last referred to, the bond in double the amount ought not always to be insisted on, as the law does not require that the security should be in any fixed proportion to the decree. It is only necessary that it should be sufficient.—*Ib.*

40. Where a case comes from the Circuit Court, and the applicant desires the proceedings before an arbitrator reviewed, the means for such a review must be embodied in the record. *Reedy v. Scott*, 23 Wall. 352.—CLIFFORD, 1874.

41. After an appeal had been taken from a circuit to the Supreme Court, the complainant applied to the Circuit Court to request the case to be sent back from the Supreme Court for a new hearing. It was held that the application should have been made to the Supreme Court. *Roemer v. Simon et al.*, 2 Bann. & Ard. 72.—NIXON, 1875.

42. No appeal lies from a mere decree respecting costs and expenses, and this rule will be applied wherever a case comes within the reason of the rule as well as within its exact terms. *Glendale Elastic Fabric Co. v. Smith*, 100 U. S. 110.—SUP. CT. 1879.

43. In sending a case from the Circuit to the Supreme Court, the Circuit Court made the following order: "And it is ordered by the court that the clerk of this court transmit to the Supreme Court of the United States the original exhibits, patent certificates, schedules, drawings, and models on file along with and as part of the record and transcript in this cause." In making up the transcript of the record the clerk below omitted all the affidavits filed with the bill of review, and sent up the originals. Appellant made motion that these records be printed for use in the Supreme Court. The following rule of the Supreme Court was in force: "No cause will hereafter be heard until a complete record

shall be filed containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court." The Supreme Court held that these original affidavits were no part of the transcript in the case, and the motion to print them was overruled. *Craig v. Smith et al.*, 100 U. S. 226.—SUP. CT. 1879.

44. The Supreme Court declines to consider papers that are not printed in the record.—*Id.*

45. By the Supreme Court: "The power of the courts below and of this court over the transmission of original papers to this court on appeal is, and should be, confined to such as require actual inspection as originals in order to give them their full effect in the determination of the suit."—*Id.*

46. A case will not be reviewed on appeal merely to settle costs of suit. *Union Paper Bag Mach. Co. et al. v. Nixon et al.*, 105 U. S. 766.—SUP. CT. 1882.

47. The Supreme Court will not interfere on motion with injunctions granted by the Circuit Court except in cases appealed before the adoption of Equity Rule No. 30. *White et al. v. Dunbar et al.*, 26 O. G. 353.—SUP. CT. 1883.

48. A question of infringement of a patent, when the same is a mixed question of law and fact, cannot be certified to the United States Supreme Court, by a lower court, for the decision of the former court. "The 'question' referred to must be a question of law, and must be capable of being presented in a single point." *Cal'f Art. Stone Paving Co. v. Moliter*, 5 Sup. Ct. Rep. 618.—SUP. CT. 1885.

49. The introduction of an original patent into the evidence, pending an appeal, is clearly irregular. *Thompson et al. v. Wooster*, 114 U. S. 104.—SUP. CT. 1885.

50. After an opinion on final hearing sustaining the patent, a motion for rehearing was made and heard, and an opinion was filed denying the motion, and a final decree referring to the proceedings upon the motion, as well as the prior proceedings, was entered. An appeal was then taken and allowed. Applicant desired the proceedings and opinion on the motion for a rehearing left out of the transcript. The court ruled that the whole seemed to be proper parts of the record to be transcribed within the meaning of the statute and the rules together. *Hoe et al. v. Kahler*, 35 O. G. 257.—WHEELER, 1886.

51. Where the court of one circuit has decided against the patentable novelty of a patented improvement upon one state of facts, and another circuit court has sustained the patent upon another state of facts, the latter court will not sus-

pend accounting to await the decision of the Supreme Court upon appeal taken in the former case. *Celluloid M'fg Co. v. Comstock & Cheney Co.*, 27 Fed. Rep. 358.—SHIPMAN, 1886.

52. A circuit court had fined the defendant for contempt of court in violating an injunction. When the case reached the Supreme Court the patent in suit was found invalid, and the appellant asked a review and a reversal of the orders imposing the fines. The Supreme Court granted it. *Worden et al. v. Searles*, 121 U. S. 14.—SUP. CT. 1887.

53. Where of three record appellants one moved to dismiss the appeal—saying, among other things, that he never actually joined in the appeal—and the other two appellants opposed the dismissal, the motion to dismiss was denied. *Marsh v. Shepard*, 120 U. S. 595.—SUP. CT. 1887.

54. A suit being brought in a state court against A, B, and C, the party A made no contest, and suffered a decree *pro confesso*. The parties B and C, being beaten, appealed to the Supreme Court of the state; from thence they took writ of error to the United State Supreme Court. A then sought to become a party to the suit. He was held not to have that right. *Marsh v. Nichols*, 120 U. S. 598.—SUP. CT. 1887.

## APPLICATION FOR PATENT.

### "APPLICATION FOR PATENT" IN THE PATENT ACTS.

Act approved July 4th, 1836.

SECTION 7. *And be it further enacted*, That on the filing of any such application, description, and specification, and the payment of the duty hereinafter provided, the Commissioner shall make, or cause to be made, an examination of the alleged new invention or discovery; and if, on any such examination, it shall not appear to the Commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to the application, if the Commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor. But whenever, on such examination, it shall appear to the Commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part

of that which is claimed as new had before been invented, or discovered, or patented, or described in any printed publication in this or any foreign country, as aforesaid, or that the description is defective or insufficient, he shall notify the applicant thereof, giving him, briefly, such information and references as may be useful in judging of the propriety of renewing his application, or of altering his specification, to embrace only that part of the invention or discovery which is new.

SEC. 13. . . . Whenever the original patentee shall be desirous of adding the description and specification of any new improvement of the original invention or discovery which shall have been invented or discovered by him subsequent to the date of his patent, he may, like proceedings being had in all respects as in the case of original applications, and on the payment of fifteen dollars as hereinbefore provided, have the same annexed to the original description and specification; and the Commissioner shall certify, on the margin of such description and specification, the time of its being annexed and recorded; and the same shall hereafter have the same effect in law, to all intents and purposes, as though it had been embraced in the original description and specification. [Repealed July 8th, 1870.]

Act approved March 2d, 1861.

SEC. 9. . . . So much of the thirteenth section of the act of Congress, approved July fourth, eighteen hundred and thirty-six, as authorizes the annexing to letters-patent of the description and specification of additional improvements is hereby repealed, and in all cases where additional improvements would now be admissible, independent patents must be applied for.

SEC. 12. *And be it further enacted*, That all applications for patents shall be completed and prepared for examination within two years after the filing of the petition, and in default thereof they shall be regarded as abandoned by the parties thereto; unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable. [Repealed July 8th, 1870.]

Act approved March 3d, 1863.

SEC. 3. *And be it further enacted*, That every patent shall be dated as of a day not later than six months after the time at which it was passed and allowed, and notice thereof sent to the applicant or his agent. And if the final fee for such patent be not paid within the said six months, the patent shall be withheld, and the invention therein described shall become public property as against the application therefor: *Provided*, That in all cases where patents have been allowed previous to the passage of this act,

the said six months shall be reckoned from the date of such passage. [Repealed July 8th, 1870.]

Act approved June 25th, 1864.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person having an interest in an invention, whether as the inventor or assignee, for which a patent was ordered to issue upon the payment of the final fee, as provided in section three of an act approved March three, eighteen hundred and sixty-three, but who has failed to make payment of the final fee, as provided by said act, shall have the right to make the payment of such fee, and receive the patent withheld on account of the non-payment of said fee, provided such payment be made within six months from the date of the passage of this act: *Provided*, That nothing herein shall be so construed as to hold responsible in damages any persons who have manufactured or used any article or thing for which a patent, as aforesaid, was ordered to be issued. [Repealed July 8th, 1870.]

Act approved March 3d, 1865.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person having an interest in an invention, whether as inventor or assignee, for which a patent was ordered to issue upon the payment of the final fee, as provided in section three of an act approved March three, eighteen hundred and sixty-three, but who has failed to make payment of the final fee as provided in said act, shall have the right to make an application for a patent for his invention, the same as in the case of an original application, provided such application be made within two years after the date of the allowance. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 31. *And be it further enacted*, That on the filing of any such application and the payment of the duty required by law, the Commissioner shall cause an examination to be made of the alleged new invention or discovery; and if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the Commissioner shall issue a patent therefor. . . .

SEC. 32. *And be it further enacted*, That all applications for patents shall be completed and prepared for examination within two years after the filing of the petition, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the ap-

plicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

SEC. 35. *And be it further enacted*, That any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who has failed to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application : *Provided*, That the second application be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent, as aforesaid, was ordered to issue, prior to the issue thereof : *And provided further*, That when an application for a patent has been rejected or withdrawn, prior to the passage of this act, the applicant shall have six months from the date of such a passage to renew his application, or to file a new one ; and if he omit to do either, his application shall be held to have been abandoned. Upon the hearing of such renewed applications abandonment shall be considered as a question of fact.

SEC. 52. *And be it further enacted*, That whenever a patent on application is refused, for any reason whatever, either by the Commissioner or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity ; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right applicant, shall authorize the Commissioner to issue such patent, on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requisitions of law. And in all cases where there is no opposing party a copy of the bill shall be served on the Commissioner, and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not.

SEC. 111. . . . All applications for patents pending at the time of the passage of this act, in cases where the duty has been paid, shall be proceeded with and acted on in the same manner as

though filed after the passage thereof. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4885. Every patent shall bear date as of a day not later than six months from the time at which it was passed and allowed and notice thereof was sent to the applicant or his agent ; and if the final fee is not paid within that period, the patent shall be withheld.

SEC. 4893. On the filing of any such application and the payment of the fees required by law, the Commissioner of Patents shall cause an examination to be made of the alleged new invention or discovery ; and if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the Commissioner shall issue a patent therefor. . . .

SEC. 4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon the failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it is shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable.

SEC. 4897. Any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. And upon the hearing of the renewed applications preferred under this section, abandonment shall be considered as a question of fact.

SEC. 4915. Whenever a patent is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity ; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had,

may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not.

#### CASES.

1. Certified copies of the patentee's letters-patent by the patent granting authority, containing applications and specifications, are admissible in evidence. *Pettibone v. Derringer*, 4 Wash. 215.—WASH. 1818.

2. In an application for patent appealed from the Commissioner to the Court of the District of Columbia, "If, after the judge shall have decided in favor of the applicant upon the points involved in his reasons of appeal, other sufficient reasons remain for refusing the claim for a patent, untouched by the decision of the judge, it would seem that the Commissioner might properly still reject it." *Arnold v. Bishop et al.*, 1 MacArthur's P. C. 36.—CRANCH, 1841.

3. In applications for patents, "the power and jurisdiction given by the patent laws to the Board of Examiners and to the judge are special and limited, and must be construed and exercised strictly." *Pomeroy v. Connison*, 1 MacArthur's P. C.—CRANCH, 1842.

4. The refusal of the Commissioner of Patents to revise the decision of his predecessors is not a proper subject for an appeal to the Court of the District of Columbia. *Janney, Edwin, In Re*, 1 MacArthur's P. C. 86.—CRANCH, 1847.

5. In appealing an application for patent from the Commissioner to the Court of the District of Columbia, vague and indefinite reasons of appeal will not suffice. *Winslow, J. A., In Re*, 1 MacArthur's P. C. 123.—CRANCH, 1850.

6. "The powers and authority of the Board of Examiners, provided for in Section 7 of the act of July 4th, 1836, were transferred to the judge by Section 11 of the act of March 3d, 1839; and so much of the act of 1836 as provided for a Board of Examiners is repealed by Section 12 of the act of March 3d, 1839. By Section 7 of the act of 1839, upon the filing of an application, etc., the Commissioner is to make, or cause to be made, an examination of the alleged new invention,

etc. This examination may be made by the Commissioner alone or with the aid of such examiners as he may assign for that business; but he cannot transfer to them, or any of them, his own power to decide. He cannot constitute them a Board of Examiners, known in law as such. They are but the assistants of the Commissioner in the discharge of his duties." *Aiken, Herrick, In Re*, 1 MacArthur's P. C. 126.—CRANCH, 1850.

7. Where an application for patent is appealed from the Commissioner to the Court of the District of Columbia, "the last official act of the Commissioner in the cause is to 'lay before the judge all the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of the appeal.' The case is no longer before the Commissioner. The applicant has no legal right to rely on these grounds." *Aiken, Herrick, In Re*, 1 MacArthur's P. C. 130.—CRANCH, 1850.

8. Where an application for patent is appealed from the Commissioner to the Court of the District of Columbia, "the reasons given by the Commissioner may be insufficient or irrelevant, and yet the decision may be correct. The insufficiency of the Commissioner's reasons is not, in itself, evidence that his decision was wrong, and consequently is no ground for reversing it."—*Id.*

9. Where an application for patent is appealed from the Commissioner to the Court of the District of Columbia, "the filing of the reasons of appeal is a proceeding in the Office over which the judge has no control. The proceedings in the Office are all under the superintendence and control of the Commissioner, who is uncontrolled in the discharge of the duties of his office, except so far as an appeal can be considered as valid which would not justify the Commissioner in refusing the patent. If the Commissioner has received and filed the reasons of appeal, the judge cannot order him to strike them out." *Matthews v. Wade*, 1 MacArthur's P. C. 143.—CRANCH, 1850.

10. Where an application is withdrawn and renewed in the same words, the two must be considered as one continued application.—*Id.*

11. Nothing preliminary to the issuing of a patent is a valid ground of appeal from the Commissioner unless made so by the law.—*Id.*

12. Where an application for patent is appealed from the Commissioner to the Court of the District of Columbia, the jurisdiction of the court is limited and confined to the reasons of the appeal. *Burlew v. O'Neil*, 1 MacArthur's P. C. 168.—MORSELL, 1853.

13. Where the Commissioner of Patents re

fuses an application for patent and sets a limit for appeal to the Court of the District of Columbia, the appeal must be taken within the time limited, or the right thereto fails.—*Greenough v. Clark*, 1 MacArthur's P. C. 173.—**MORSELL**, 1853.

14. An application for patent was appealed from the Commissioner to the Court of the District of Columbia, and the appellant alleged that the Commissioner had refused his permission to file certain evidence in the case; thereupon the judge gave applicant the said permission. *Fultz, H. H., In Re*, 1 MacArthur's P. C. 178.—**MORSELL**, 1853.

15. "In Section 7 of the act of 1836, giving the party the right of appeal to a board of examiners from the decision of the Commissioner, it is made the duty of the Commissioner to furnish to the Board of Examiners not only a certificate in writing of his opinion and decision, stating the particular grounds of his objections, and the part or parts of the invention which he considers as not entitled to be patented, but also such information as he may possess relative to the matter under their consideration. By the act of 1839, Chapter 88, this board was abolished, and instead thereof the appeal was authorized to be made to the judge of the District Court for the District of Columbia, Section 11 of which statute provides 'that at the request of any party interested, or at the desire of the judge, the Commissioner and the examiners in the Patent Office may be examined under oath in explanation of the principles of the machine or other thing for which a patent in such case is prayed for.' It is supposed, without the necessity of entering on any particular course of reasoning on the subject, that it must appear clear that the judge succeeded to the same authority that the board possessed, to require of the Commissioner and examiners like information to the full extent." *Seely, S., In Re*, 1 MacArthur's P. C. 248.—**MORSELL**, 1853.

16. Where an application for a patent is appealed from the Commissioner to the judge of the Court of the District of Columbia, references making against the validity of the invention cannot be there cited for the first time. *Jewett and Root, In Re*, 1 MacArthur's P. C. 259.—**MORSELL**, 1853.

17. Parol testimony is not admissible to prove the date of an application for patent. *Wayne v. Winter et al.*, 6 McLean, 344.—**McLEAN**, 1855.

18. Unless the prerequisites specified by statute in procuring a patent "are complied with, a party sued for an infringement of a patent may show that they have not been complied with,

and in that way defeat the action of the supposed inventor." *Ransom et al. v. New York*, 1 Fisher's Patent Cases, 252.—**HALL**, 1856.

19. Where an application for patent is appealed from the Commissioner to the judge of the Court of the District of Columbia, Section 11 of the act of March 3d, 1839, makes it incumbent on the Commissioner to give answer to the reasons of appeal. *Henry, G. G., In Re*, 1 MacArthur's P. C. 467.—**MERRICK**, 1856.

20. In an application for patent, where affidavits concerning utility are taken without authority of Commissioner, they cannot be considered. *Jackson, G. R., In Re*, 1 MacArthur's P. C. 485.—**MORSELL**, 1857.

21. In an application for patent the question of sufficiency of invention should not be rigorously considered. *Cole, R. H., In Re*, 1 MacArthur's P. C. 539.—**MERRICK**, 1857.

22. It is within the province of the Commissioner of Patents to refuse a patent for lack of utility. *Cushman, S. D., In Re*, 1 MacArthur's P. C. 569.—**MORSELL**, 1858.

23. As regards an appeal from the Commissioner to the judge of the Court of the District of Columbia, "while it was not the purpose of the patent laws to introduce into the practice of appeals the nice refinements and technicalities of special pleading, the emphatic language of the statute is not destitute of significance, and, according to the spirit of the act, no assignment can be sufficiently specific which does not, with that reasonable certainty which would satisfy an intelligent mind, point out the precise matter of alleged error; and if for no other object, manifestly in order that the Office, in response to the assignments of error, may present definite suggestions thereon for the consideration of the judge on appeal, and if need be, upon a clear error being pointed out, itself correct that error without the vexation of an appeal. But whatever was the motive of the Legislature, the requirement of law has been made, and must be respected by the appellants at the peril of losing all benefit by appealing." *Blackington v. Douglass*, 1 MacArthur's P. C. 632.—**MERRICK**, 1859.

24. As regards the prosecution of applications for patents in the Office, "no one has the right to assail the motives or integrity of a public officer, acting upon his responsibility to his fellow-citizens and under the solemn sanction of his oath of office, without some weightier occasion for the charge than a supposed illogical course of reasoning, or the announcement of a legal conclusion which to the mind of the assailant seems utterly untenable."—*Id.*

25. In applications for patents, "the Commis-



sioner has, within the terms of Section 11 of the act of 1839, discretion to fix the limits of appeal; he may clearly, while the case is before him, for good cause, at any time exercise that discretion." *Justice v. Jones*, 1 MacArthur's P. C. 635.—MERRICK, 1859.

26. "The law undoubtedly requires of the Commissioner to aid the inventor by information and suitable references in remedying a defective specification or claim, and to assist his judgment in determining whether he should withdraw or persist in a rejected application; but the manner of so doing is of necessity left to the sound discretion of the Commissioner; and whether the duty be well or insufficiently performed in a particular instance is not the subject of review, and from the nature of such cases cannot be passed upon by a judge on appeal." *Chambers, Matthew, In Re*, 1 MacArthur's P. C. 641.—MERRICK, 1859.

27. In applications for patents, the Commissioner has jurisdiction of the question of abandonment. *Wickersham v. Singer*, 1 MacArthur's P. C. 645.—MERRICK, 1859.

28. "The application for a patent at the Patent Office is not a judicial proceeding." *Potter et al. v. Stevens et al.*, 2 Fish. P. C. 163.—SMALLEY, 1861.

29. The presumption of originality arising from the granting of a patent, only extends back to the time when an application was filed in the Patent Office. *White et al. v. Allen*, 2 Clifford, 224.—CLIFFORD, 1863.

30. "The act of 1836 gives the applicant a right to change his application after receiving the suggestions of the Commissioner. Doubtless this right exists, and may be exercised independently of such suggestions, at any time before the Commissioner has given his formal judgment upon the application; and the inventor may 'persist in his application for a patent, with or without any alteration of his specification.' A change in the specification as filed in the first instance, or the subsequent filing of a new one, whereby a patent is still sought for the substance of the invention as originally claimed, or part of it, cannot in any wise affect the sufficiency of the original application or the legal consequences following from it. To produce that result the new or amended specification must be intended to serve as a new basis of a patent for a distinct and different invention, and one not contemplated by the specification, as submitted at the outset." *Godfrey v. Eames*, 1 Wall. 317.—SUP. CT. 1863.

31. "Applicants for patents may, by law and the usages of the bureau, amend their applica-

tions." *Read v. Bowman*, 2 Wall. 591.—SUP. CT. 1864.

32. Where, in an application for a patent, a substitute specification is filed, varying from the original substantially, it must be verified by supplemental oath or the patent is not valid. *Whitely v. Swayne*, 4 Fish. P. C. 117.—LEAVITT, 1865.

33. Where an applicant for patent has done all the law prescribes, the Commissioner of Patents must receive and file the application. *Commissioner of Patents v. Whiteley*, 4 Wallace, 522.—SUP. CT. 1866.

34. Where the Commissioner of Patents improperly refuses to receive an application, he can be compelled by *mandamus* to receive it.—*Id.*

35. "The law providing an appeal to the appellate judge" of the Supreme Court of the District of Columbia, "has reference to the contents of a patent, and not to a controversy between parties as to who owns it, where the patent has been granted." *Whitely v. Fisher*, 4 Fish. P. C. 248.—CARTER, 1870.

36. "The jurisdiction in that appeal" to the Supreme Court of the District of Columbia, "was made to relate to the fact whether a patent ought to issue by reason of its subject, whether it was novel, whether it was useful, whether it was the offspring of the party applying for it, or some element or constituent entering into its verity as a useful discovery. No higher scope ought to be given to it."—*Id.*

37. Suit for a refusal to issue a patent might lie against the Secretary of the Interior, but cannot lie against the Commissioner of Patents.—*Id.*

38. While an application for patent is pending, a court has no jurisdiction on the prayer of an applicant in favor of a patent already granted. *Hoeltge v. Hoeller et al.*, 2 Bond, 386, *per curiam*, 1870.

39. In an application for patent, it is the right of the applicant to amend and change his specification or claims at any time during the progress of the application. *Singer et al. v. Braunsdorf et al.*, 7 Blatchford, 521.—BLATCHFORD, 1870.

40. For an example of an application to a United States Circuit Court for a patent, see —. *Greely ex parte*, 1 Holmes, 284.—SHEPLEY, 1873.

40a. A rejected application for patent is not a prior publication or prior patent. *Brown v. Guilé et al.*, 23 Wall. 181.—BRADLEY, 1874.

41. When the Commissioner decides that the law has been complied with, "and grants the letters-patent, that cannot be subsequently impeached by evidence tending to show a want of compliance with the law, as giving notice, or paying fees, or performing the other acts requiring

to be done before the patent is granted, and the performance is to be proved to the satisfaction of the Commissioner, whose decision on these questions is final where he has jurisdiction." *Tarr et al. v. Folsom*, 1 Holmes, 313.—SHEP-LEY, 1874.

42. Rejected applications for patents are not prior publications, "because they lack the essential quality of a publication, in that they were not designed for general circulation, nor were they made accessible to the public generally." *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 1 Banning & Arden, 177.—McKENNAN, 1874.

43. Rejected applications are not under all circumstances inadmissible in evidence. "By themselves they are inconsequential, but when the inventor's idea is perfected by the practical adaptation of it, in the form of mechanism, they are valuable guides in ascertaining the date of the invention, the design of the inventor, and the principle, intended functions, and mode of operation of his mechanism, and they must, therefore, necessarily be considered in connection with it."—*Id.*

44. "If, intermediate the first and second application, the patentee manifests an actual intention to abandon the first, his patent will have relation to the last only. His actual intention severs the proceeding. The law deems the first application terminated, and as bearing no relation to the patent, which rests solely on the last one." *Pelton et al. v. Waters*, 1 Banning & Arden, 599.—EMMONS & SWING, 1874.

45. "Where successive applications are made in the procurement of a patent, and there is no proof of actual abandonment, the subsequent application will be deemed a continuation of the first." *Goodyear Dental Vulcanite Co. et al. v. Willis*, 1 Flippin, 388.—EMMONS, 1874.

46. "A written description of a machine, although illustrated by drawings, which has not been given to the public, does not constitute an invention, within the meaning of the patent laws. Evidence that such a description was made does not show, of itself, a prior invention. Such a description has not the same effect as a printed publication. It lacks the essential quality of such a publication, for, even though deposited in the Patent Office, it is not designed for general circulation, nor is it made accessible to the public generally, being so deposited for the especial purpose of being examined and passed upon by the Patent Office, and not that it may thereby become known to the public. Although it may incidentally become known, the deposit of it is not a publication of it, within the mean-

ing of the statute or the law. Moreover, although the description may be so full and precise as to enable any one skilled in the art to which it appertains to construct what is described, it does not attain the proportions or the character of a complete invention until it is embodied in a form capable of useful operation." *Lyman Ventilating & Refrigerator Co. v. Lator*, 12 Blatch. 303.—BLATCHFORD, 1874.

47. Although a board of examiners in chief in the Patent Office may allow a patent, the Commissioner has the right to withhold it. *Hull v. Commissioner of Patents*, 2 MacArthur, 125.—HUMPHREYS, 1875.

48. Although an examiner or the examiners in chief in the Patent Office may render a favorable decision upon an application for a patent, the Commissioner has authority to withhold the patent. *Hull v. Commissioner of Patents*, 2 MacArthur, 90.—WYLIE, 1875.

49. Rejected applications for patents are not admissible in evidence as anticipatory of a later patent. *Herring et al. v. Nelson et al.*, 14 Blatch. 293.—JOHNSON, 1877.

50. "The decision of the Commissioner in regard to the questions which have been committed to his exclusive jurisdiction is final. His decision is conclusive in regard to the sufficiency and competency of the formal acts and proofs which the statute provides shall be a prerequisite to the issuing of a patent. He is, moreover, made the tribunal which is to decide both in regard to the existence of those facts upon which a reissue is to be granted, and upon which an extension of patents issued prior to March 2d, 1861, is to be made. By Section 32 of the act of 1870, he is to judge of the sufficiency of the reasons for delay, exceeding two years, in prosecuting applications which shall thereafter be made. Upon these three subjects, which are submitted to him, his decision is conclusive." *U. S. Rifle & Cartridge Co. v. Whitney Arms Co. et al.*, 14 Blatch. 94.—SHIPMAN, 1877.

51. A rejected application for a patent is not admissible in evidence to impeach the novelty of a subsequent patent. *Rubber Step M'fg Co. v. Metropolitan R. R. Co. et al.*, 3 Bann. & Ard. 252.—SHEPLEY, 1878.

52. "Mere applications for patents cannot be considered on the question of novelty. To make the things described and shown in them available, there must be evidence that such things were actually constructed in working form." *Bariker v. Stowe*, 15 Blatch. 49.—BLATCHFORD, 1878.

53. Rejected applications for patents are in themselves no evidence of prior use. *Hovess et al. v. McNeal*, 15 Blatch. 103.—BLATCHFORD, 1878.

54. Where an original specification, in an application on which a patent issued, had been amended by filing substantially a new one, written by an attorney who had not received a power from the proper party, it was held that such informalities were cured by the issue of the patent, and that the action of the Commissioner thereon could not be inquired into in an action for infringement. *Hoe et al. v. Cottrell et al.*, 17 Blatch. 546.—SHIPMAN, 1880.

55. An amendment to an application for a patent made by the inventor's attorney after the inventor's death, and without the sanction of the administrator, is without authority. *Eagleton M'fg Co. v. West, Bradley & Carey M'fg Co.*, 18 Blatch. 218.—WHEELER, 1880.

56. An application for a patent will be presumed to correspond with the patent. *Webster Loom Co. v. Higgins et al.*, 105 U. S. 580.—SUP. CT. 1882.

57. An applicant for patent who allows his application to lapse by two years' non-action abandons thereby the application, but not the invention. He can make a new application, but it will derive no support from the old one. *Lindsay v. Stein*, 20 Blatch. 370.—BLATCHFORD, 1882.

58. "It is not indispensable that a petitioner should use the exact phraseology of the statute if he employs language which accurately conveys the legal meaning." *Gold & Stock Tel. Co. v. Wiley*, 17 Fed. Rep. 234.—SHIPMAN, 1883.

59. Where an inventor made an application for a patent on bed springs, and after his death the application was revived and amended by describing a feature of substance not described in the original application, the patent was held void. *Eagleton M'fg Co. v. West, Bradley & Cary M'fg Co.*, 111 U. S. 490.—SUP. CT. 1884.

60. Complainant filed his application for patent October, 1877, and on December 2d, 1877, the patent was allowed with certain claims; but, as was claimed, by neglect of his solicitor the final fee to the Patent Office was not paid, and the right to the patent lapsed. Some time in February, 1879, he renewed his application, and asked that the original specification and drawings might be considered as a part of the renewed application, and thereon his patent was issued May 30th, 1879. Thereupon the court said: "The application made by Weir in February, 1879, must, as it seems to me, be considered as his first application, the former application going for naught and leaving him to stand upon that application, as made at the time he renewed it, upon his old specifications and drawings." *Weir v. Morden*, 21 Fed. Rep. 243.—BLODGETT, 1884.

61. An application for patent having been twice rejected by the primary examiner on the ground that the application embodied two distinct subject-matters [in which case the Patent Office Rules give an interlocutory appeal to the Commissioner], and the Commissioner having refused to allow this question to go to the Board of Examiners in Chief, on appeal [contrary to the rules of the Office] applicant applied to the Supreme Court of the District of Columbia for a *mandamus* ordering the desired appeal. The court decided that this refusal of the Commissioner was simply an administrative act, not subject to revision by the court, and said: "The Patent Office has administrative supervision of the business of that Office, in its economies, its police, and its direction, and of necessity must have, and that authority is directly granted, and . . . as far as their administrative duties are concerned this court has nothing to do with them save by appeal, and then only in the discharge of their judicial act going into judgment." *United States v. Com'r of Patents*, 27 O. G. 717.—CARTTER, 1884.

62. Where, after the filing of an application for a patent, the applicant's solicitor changed the claim without authority, and so as to include a feature which the applicant did not invent, the change was held fatal to the patent. *Miligan v. Lalanc & Grosjean M'fg Co.*, 21 Fed. Rep. 570.—WHEELER, 1884.

63. "The correct performance of all those preliminaries on which the validity of an original patent or of a reissued patent depends is always examinable in the court in which a suit for its violation is brought." *Odel et al. v. Stout et al.*, 29 O. G. 862.—SAGE—MATTHEWS concurring, 1884.

64. "The statute of 1849 was evidently intended for the benefit of applicants entitled to take out a patent, and to enable them to right any errors which might be made by the Commissioner. The proceeding, where there are no interfering applicants, is practically one between the applicant and the Commissioner. It would not seem reasonable to construe such a statute as intended to preclude a new application, on new facts bearing either upon novelty or abandonment, to the Commissioner, after his action had been sustained by the appellate authority on a former application." *U. S. v. Colgate*, 32 Fed. Rep. 624.—WALLACE, 1884.

65. Where, pending an application for a patent, the claims have been changed, such change in the claims is proper where the specification fairly indicates all that was put into the changed claims. An inventor applying for a patent may,

before its issue, amend or enlarge his claims from time to time, in order to embrace everything which was specified at the start. And this may be done by the inventor's attorney. *Railway Register M'f'g Co. v. North Hudson County Railroad Co. et al.*, 24 Fed. Rep. 793.—NIXON, 1885.

66. "The Supreme Court has over and over again affirmed the principle that all questions of fact behind the patent are to be examined, heard, and conclusively determined by the Commissioner of Patents." *Railway Register M'f'g Co. v. No. Hudson C. R. Co. et al.*, 23 Fed. Rep. 593.—NIXON, 1885.

67. An inventor made application for patent; pending the application he disclaimed certain claims, and made a new application including those claims. In the new application he afterward made additional claims. The specific claims, which were originally parts of the subject-matter in the first application, afterward transferred to the second application, did not enter into any of the combinations of the said additional claims of the application. A patent issued on the second application, including the said additional claims. It was held that the said additional claims made in the second application were invalid. *Railway Register M'f'g Co. v. Broadway and Seventh Ave. Railroad Co.*, 34 O. G. 921.—WHEELER, 1886.

68. Where an applicant for a patent is rejected in the Patent Office, and for years acquiesces in the rejection, he abandons to the public the matter claimed. *Con. Fruit Jar Co. v. Bellaire Stamping Co.*, 36 O. G. 121.—SAGE, 1886.

69. A bill was filed against the Commissioner of Patents and the Secretary of the Interior for the purpose of obtaining a patent for certain claimed improvements alleged to have been made by Samuel Strong, which patent had been refused by the Commissioner in 1874, and finally refused in 1875. At various intervals down to 1885, there were irregular applications to successive commissioners to review the action of the preceding Commissioner, and finally there was another application of the same sort made by Samuel Strong in the year 1885. The court refused the application, holding that it was the duty of the applicant to have taken some one of the steps which the law provides for him within the two years after the final refusal in 1875, or otherwise, and in default thereof, the application was abandoned. *Kirk v. Commissioner of Patents et al.*, 37 O. G. 451.—MERRICK, 1886.

70. A provisional injunction against infringe-

ment may be granted before patent issued and while the application is pending. *Butler v. Ball*, 38 O. G. 420.—WELKER, 1886.

71. An application for patent was filed November 28th, 1865. On December 17th, 1869, a new claim was inserted and issued with the patent. For more than two years prior to the insertion of this claim, articles embodying all its elements had, with the knowledge and consent of the patentee, been bought and sold in the market. It was decided that the right to make such claim had been abandoned. *Kittle v. Hall et al.*, 39 O. G. 707.—COXE, 1887.

72. "The proceeding by bill in equity under Section 1915, on the refusal to grant an application for a patent, intends a suit according to the ordinary course of equity practice and procedure, and it is not a technical appeal from the Patent Office, nor confined to the case as made in the record of that Office, but is prepared and heard upon all competent evidence adduced and upon the whole merits; yet the proceeding is in fact necessarily a part of the application for the patent." *Gandy v. Marble, Com'r*, 122 U. S. 432.—SUP. CT. 1887.

73. Defendants sought to have complainants estopped by reason of the proceedings in the Patent Office pending the application for the patent in suit. Complainants' expert testified without objection that he was familiar with the history of the original patent; that the Patent Office requested a selection to be made from the two claims of the application, because they stated precisely the same invention, and such selection was made. The court held that there was no estoppel. *Ewart M'f'g Co. v. Bridgeport Malleable Iron Co.*, 31 Fed. Rep. 149.—SHIPMAN, 1887.

## ARMY OFFICER.

### CASES.

1. "If an officer in the military service not specially employed to make experiments, with a view to suggest improvements devises a new and valuable improvement in arms, tents, or any other kind of material, he is entitled to the benefit and to letters-patent for the improvement from the United States equally with any other citizen not engaged in such service, and the Government cannot, after the patent is issued, make use of the improvement any more than a private individual without the license of the inventor, or making compensation to him." *United States v. Burns*, 12 Wallace, 246.—SUP. CT. 1870.

ASSIGNMENT.

"ASSIGNMENT" IN THE PATENT ACTS.

Act approved February 21st, 1793.

It shall be lawful for any inventor, his executor or administrator, to assign the title and interest in the said invention, at any time, and the assignee, having recorded the said assignment in the office of the Secretary of State, shall thereafter stand in the place of the original inventor, both as to right and responsibility, to the assignees of assigns, to any degree. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SECTION 11. *And be it further enacted*, That every patent shall be assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right, under any patent, to make and use, and to grant others to make and use the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three-months from the execution thereof. [Repealed July 8th, 1870.]

Act approved March 3d, 1837.

SEC. 6. *And be it further enacted*, That any patent hereafter to be issued may be made and issued to the assignee or assignees of the inventor or discoverer, the assignment thereof being first entered of record, and the application therefor being duly made, and the specification duly sworn to by the inventor. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 33. *And be it further enacted*, That patents may be granted and issued or reissued to the assignee of the inventor or discoverer, the assignment thereof being first entered of record in the Patent Office; but in such case the application for the patent shall be made and the specifications sworn to by the inventor or discoverer; and also, if he be living, in case of an application for reissue.

\* \* \* \* \*

SEC. 36. *And be it further enacted*, That every patent or any interest therein shall be assignable in law, by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States; and said assignment, grant, or conveyance shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within

three months from the date thereof. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4895. Patents may be granted and issued or reissued to the assignee of the inventor or discoverer; but the assignment must first be entered of record in the Patent Office. And in all cases of an application by an assignee for the use of a patent, the application shall be made and the specification sworn to by the inventor or discoverer; and in all cases of an application for a reissue of any patent, the application must be made and the corrected specification signed by the inventor or discoverer, if he is living, unless the patent was issued and the assignment made before the eighth day of July, eighteen hundred and seventy.

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SEC. 4898. Every patent or any interest therein shall be assignable in law, by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof

CASES.

1. A, having made an invention and being about to apply for a patent, B contracted with him to purchase the same. B subsequently objected on the ground that C had a prior patent. A then described C's patent to B, and showed him wherein his invention differed therefrom. A, being right in his description, B was held to his contract. *West v. Morrison*, 2 Bibb, 376.—LOGAN, 1811.

2. Where A agrees to convey to B an interest in a patent as fully as the same shall be conveyed to A, and does so, A is under no obligation to give a warranty. *Morrill v. Worthington*, 14 Mass. 389, *per curiam*, 1817.

3. A mere nominal variation in the description of an invention in a conveyance of an interest in a patent will not avoid the conveyance. *Case v. Morey*, 1 N. H. 347.—WOODBURY, 1818.

4. An assignment made before patent was granted is valid. *Herbert v. Adams*, 4 Mason, 15.—STORY, 1825.

5. An assignment of a patent does not imply a warranty of the utility of the patented thing. *Van Ostrand v. Reid*, 1 Wend. 424.—SAVAGE, 1828.

6. A patent was granted for an improvement

made by the adaptation of a grinding apparatus to a shelling machine, and an assignment thereunder mentioned it as a grinding machine; the assignment was held to be good as to this point. *McDorrell v. Meredith*, 4 Wharton, 309.—GIBSON, 1829.

7. A, by writing, conveyed to B certain machines, "and likewise the patent right for Livermore and Jay, etc." Held to be an assignment of a patent-right. *Judkins et al. v. Earl et al.*, 7 Greenl. 9.—PARRIS, 1830.

8. Certified copies of recorded assignments are admissible in evidence. *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

9. The ownership in a patent in the hands of an administrator is a unit, extending throughout the United States, which he has power to sell within a state the same as any other personal property of the estate, and the right may be conveyed in parts, so as to satisfy purchasers.—*Id.*

10. Where A "sells" to B "the exclusive right to clean wool, etc., 'upon the machine invented or improved by' him, and 'for which improvements I am now preparing to obtain letters-patent of the United States;'" and "covenants to 'use all due diligence and effort to mature my said inventions and improvements for cleaning wool as soon as possible,' and to take out letters-patent therefor, and assign the same for cleaning wool to the complainants," the contract does not cover improvements entirely made in the future. *Nesmith et al. v. Calvert et al.*, 1 W. & M. 34.—WOODBURY, 1845.

11. An assignee cannot take any better right to a patent as regards a grant thereof than could the assignor; if the assignor was right, so will be the assignee. *Tatham v. Loring*, 5 N. Y. Legal Observer, 207.—STORY, 1845.

12. An assignment of a patent by the inventor does not carry the extension thereof to an assignee under the original term. *Brooks et al. v. Bicknell et al.*, 4 McLean, 64.—MCLEAN, 1845.

13. In an act of Congress extending a patent, it was provided "that all rights and privileges theretofore granted by said patentee, to make, construct, or vend the said invention, and not forfeited by the purchasers or grantees, shall inure to and be enjoyed by such purchasers or grantees respectively as fully and upon the same conditions during the period hereby granted as for the term that did exist when such sale or grant was made." The inventor had previously made an assignment "of all his right to the invention covered by the patent under the said patent, and any other patent issued or to be issued for the same invention, with all the rights

he might have enjoyed if the assignment had not been made." It was held that the assignee took the extended term, and that Congress has the constitutional right to extend a grant of a patent for the benefit of an assignee. *Blanchard Gunstock Turning Factory v. Warner*, 1 Blatch. 258.—NELSON, 1848.

14. "The assignment of a patent in whole or in part is authorized by the act of Congress, and it is required to be recorded in the Patent Office." After an assignment has been recorded, a duly-authenticated copy of it is *prima facie* evidence at least. *Parker v. Haworth*, 4 McLean, 370.—MCLEAN, 1848.

15. Where an assignment extended "to the full end of the term or terms for which the letters-patent are, or may be, granted for said improvements as fully and entirely as the same would have been enjoyed by me had this assignment not been made," it was held to carry the extended term. *Phelps v. Comstock*, 4 McLean, 353.—MCLEAN, 1848.

16. An assignment of a patent to be issued upon an application which stands rejected is proper and lawful. *Gay v. Cornell*, 1 Blatch. 506.—NELSON, 1849.

17. An assignment of a patent to be issued, made before that issue, is legal and proper. It vests the title in the assignee, although the patent may issue in the name of the assignor. *Gayler et al. v. Wilder*, 10 Howard, 477.—SUP. CT. 1850.

18. An invention may be sold and assigned as well before application for a patent as afterward. *Rathbone et al. v. Orr et al.*, 5 McLean, 131.—MCLEAN, 1850.

19. An inventor had taken a patent for making wrought nails or spikes, and assigned it to another party, using in connection thereto these words: "With all the improvements which he hath made or shall make in the same, in any other part of the United States, as the said parties of the second part shall deem expedient, during the term for which the same are or may be patented by the said party of the first part." The same inventor subsequently invented a bending lever for use in the same kind of manufacture. The court held that this was a covenant which bound the inventor to convey to the other party the said improvement upon a bending lever, and that the said other party was equitably entitled to the said later improvement as soon as made. *Troy Iron & Nail Factory v. Corning et al.*, 14 Howard, 193.—SUP. CT. 1852.

20. An assignment purported to be of a patent "for a horological cradle." The patent intended was for a *design* for a horological cradle.

The assignment was held good as regards this point. *Myers et al. v. Turner et al.*, 17 Ill. 179.—CATON, 1855.

21. Where there is more than one administrator on the estate of a patentee, and one of them makes an assignment of the patent, the assignment is valid. *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILSON, 1856.

22. One Chaffee made a written conveyance of his patent, containing words as follows: "Now, I [Chaffee] do hereby, in consideration of the premises, and to place my patent so that in case of my death, or accident or event, it may inure to the benefit of said Charles Goodyear, and those who hold a right to the use of said patent, under and in connection with his licensees, according to the understanding of the parties interested, nominate, constitute, and appoint said William Judson my trustee and attorney irrevocable, to hold said patent and have the control thereof, so as no one shall have a license to use said patent or invention, or the improvements secured thereby, other than those who had a right to use the same when said patent was extended, without the written consent of said Judson first had and obtained." The court held that by this conveyance the entire interest and ownership in the patent passed to Judson for the benefit of Goodyear and those holding rights and licenses under him. *Hartshorn et al. v. Day*, 19 Howard, 211.—SUP. CT. 1856.

23. Where a patent owner assigns his patent to another party upon the consideration of a payment of an annuity, and the annuity is not paid, that does not give the assignor a right to rescind the assignment.—*Id.*

24. "The general rule is, that, in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed, and more especially where there has been a part execution of the contract."—*Id.*

25. "The terms assignee and grantee are not used in the patent law of 1836 as synonymous terms, though the courts, without having their attention particularly called to the subject, have sometimes used them indiscriminately, and in their popular sense. They have, however, . . . separate and distinct meanings." *Potter et al. v. Holland*, 4 Blatch. 206.—INGERSOLL, 1858.

26. "An assignee is one who has transferred to him in writing the whole interest of the original patent, or an undivided part of such whole interest in every portion of the United States. And no one, unless he has such an interest transferred to him, is an assignee."—*Id.*

27. A written assignment of a patent made by B with the consent of A, who owns the patent, effectively conveys A's interest. *Sherman v. Champlain Transportation Co.*, 31 Vt. 162.—REDFIELD, 1858.

28. "As a general rule, an assignment of an interest in a patent must be in writing, for the reason that such transactions are required to be recorded, and in fact and reality are not authorized to be made in any other way."—*Baldwin v. Sibley et al.*, 1 Clifford, 150.—CLIFFORD, 1858.

29. A certified copy of the record of an assignment is admissible in evidence. *Lee et al. v. Blandy et al.*, 1 Bond, 361.—LEAVITT, 1860.

30. A prior unrecorded assignment is good against subsequent assignments without valuable consideration. *Saxton v. Aultman*, 15 Ohio St. 471.—WELCH, 1864.

31. Where a patent recites an assignment to the assignee, that is conclusive evidence of the assignee's title. *Hoppeins et al. v. Brandt*, 3 Fish. P. C. 218.—GILES, 1867.

32. An assignment of a patent carries with it a title to the reissue thereof. *Middletown Tool Co. v. Judd et al.*, 3 Fish. P. C. 141.—SHIPMAN, 1867.

33. An assignment, under the original term of a patent, was "for and during the term for which said letters-patent are or may be granted." This was held not to convey to the assignee a similar right under the extended term. *Wood v. Michigan Southern & Northern Indiana R. Co.*, 2 Bissell, 62.—MCDONALD, 1868.

34. "An assignee is one who holds, by a valid assignment in writing, the whole interest of a patent, or any undivided part of such whole interest throughout the United States." *Moore v. Marsh*, 7 Wall. 515.—SUP. CT. 1868.

35. An assignment which conveys all the assignee's "right, title, interest, 'claim, or demand whatsoever, in, to, or under' the patent, . . . conveys only the right to claims for infringement which should be committed after such assignment. . . . The words 'claim or demand whatsoever, in, to, or under' the patent, are not sufficient to cover claims for past infringements." *Dibble v. Augur*, 7 Blatch. 86.—BLATCHFORD, 1869.

36. "The act of Congress authorizes assignments only in writing, and legal ownership can be acquired only by written instrument." *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

37. A, owner of a patent, conveyed to B the entire interest in his patent except the right to manufacture said machines in certain counties. *Held*, that B was the proper party to bring suit

for infringement. *Chambers v. Smith et al.*, 5 Fish. P. C. 12.—MCKENNAN, 1870.

38. A certificate stating that a certain person is the owner of a certain part of the stock in patents of an incorporated company is not an assignment under the patents. *Hope Iron Works v. Holden et al.*, 58 Me. 146.—DANFORTH, 1870.

39. By a written conveyance, a person conveyed "all his property and estate, whatsoever and wheresoever, of every kind and description." It was held that this instrument conveyed all the maker's rights under patents, whatever they may have been. *Railroad Co. v. Trimble*, 10 Wall. 367.—SUP. CT. 1870.

40. A conveyance of interest in a patent by a receiver, appointed in proceedings where the court did not have jurisdiction of the patent owner, is null and void.—*Id.*

41. Where there is doubt as to the proper construction of an instrument, the conduct of the parties is entitled to great consideration; "but where its meaning is clear in the eye of the law, the error of the parties cannot control its effect."—*Id.*

42. An assignment of an interest in a patent which is abandoned by both parties is void from the beginning.—*Id.*

43. Where an agreement is made between two parties looking toward an assignment of an interest in the patent, and the future assignee abandons his right at one time thereunder, he cannot afterward reassert his right. *Kittle et al. v. Frost et al.*, 9 Blatch. 214.—BLATCHFORD, 1871.

44. In construing a conveyance under a patent, "parol testimony to show all the circumstances is admissible when the language may be susceptible of more than one meaning, such as their knowledge of the subject-matter of the contract, and all other facts that would throw light upon the intention of the parties." *May et al. v. Chaffee et al.*, 2 Dillon, 385.—NELSON, 1871.

45. "An assignment of an interest in an invention secured by letters-patent is a contract, and, like all other contracts, is to be construed so as to carry out the intention of the parties to it." *Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452.—SUP. CT. 1871.

46. "The title of an inventor to obtain an extension may be the subject of a contract of sale."—*Id.*

47. A conveyance under a patent set out that the assignors "do hereby bargain, sell, assign, convey, and transfer unto said company, its successors and assigns, all the inventions and improvements in the manufacture of composition brush-backs and handles, with suitable stiffeners,

made, contemplated, or hereafter to be made by us, or either of us." At the same time one of the assignors had pending an application for a patent on a hand-mirror very like in its construction to the brush-backs. This conveyance was held not to cover and include the hand-mirror. *Clark et al. v. Scott*, 9 Blatch. 301.—BLATCHFORD, 1872.

48. An assignment conveyed "all the right, title, and interest which I' [the patentee] have in the said inventions, or either of them, as secured to me by said letters-patent, . . . to the full end of the term for which said letters-patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made." The court held that "the words, 'to the full end of the term for which said letters-patent are or may be granted,' necessarily import an intention to convey both a present and a future interest." *Ruggles v. Eddy et al.*, 10 Blatch. 52.—WOODRUFF, 1872.

49. A written conveyance set out that the inventors "have applied, or intend to apply, for letters-patent," and it conveyed "all the right, title, and interest whatsoever, which we now have, or, by letters-patent, would be entitled to have and possess, in the aforesaid invention, the said invention being described in the specification as prepared and executed by us, for the obtaining of said letters-patent, the whole to be held and enjoyed by the said Henry Tanner, and his legal representatives, to the full extent and manner in which the same would have been, or could be, held and enjoyed by us, had this assignment not been made; and we do, by these presents, authorize the Commissioner of Patents to issue the said letters-patent to the said Henry Tanner, and his legal representatives, as the assigns of our whole right and title to the same, and to the new invention aforesaid." This was held to apply to the extended term. *Mowry et al. v. Grand St. & Newtown R. R. Co.*, 10 Blatch. 89.—BENEDICT, 1872.

50. "An assignment of the invention, without words importing an intention to convey both a present and a future interest, will not pass the right to an extension."—*Id.*

51. An insolvent patent owner must himself assign the patent in order to pass the right. An assignment by his trustee or the like will not answer. *Ashcroft v. Walworth et al.*, 1 Holmes, 152.—SHEPLEY, 1872.

52. An assignment under a patent conveyed the right "to the full end of the term for which said letters-patent are or may be granted, as fully and entirely as the same would have been



held and enjoyed by me had this assignment and sale not been made." This was held to apply to an extended term. *Thayer et al. v. Wales et al.*, 5 Fish. P. C. 448.—BENEDICT, 1872.

53. An inventor made an assignment of an extended term of his patent before the same was granted. It was held to become operative upon the grant of the extension. In this case the patentee was interested to the extent of one half of the proceeds from sales or use of the patented invention. *Gear et al. v. Grosvenor et al.*, 1 Holmes, 215.—SHEPLEY, 1873.

54. An assignment of a patent carried the right "to the full end of the term for which said letters-patent are or may be granted." This was held not to apply to an extended term.—*Ib.*

55. "An assignment of an interest in an invention, and letters-patent therefor, before the expiration of the original term, does not carry with it any interest in a subsequently extended term, unless the assignment contains a specific provision to that effect."—*Ib.*

56. The terms of an assignment conveyed to the assignee "all my right, title, and interest in and to the said letters-patent, in the following described territory," . . . "as fully and clearly as the same would have been held and enjoyed by me, if this assignment had not been made." The court held that it must construe this paper as not indicating, on the part of the assignor, an intention to convey territory that he had previously conveyed to other parties. *Turnbull et al. v. Weir Plough Co.*, 6 Bissell, 225.—DRUMMOND, 1874.

57. Where, by an assignment, a patent owner conveys away all his right, title, and interest in the patent, for certain described territory, and there is, at that time, only a residuary interest in the assignor, the assignment must be construed as conveying only that residuary interest.—*Ib.*

58. The "power of assignment has been so construed by the courts as to confine it to the transfer of an entire patent, an undivided part thereof, within and throughout a specified portion of the United States. One holding such an assignment is an assignee within the meaning of the statute, and may prosecute in the Circuit Court any action that may be necessary for the protection of his rights under the patent." *Littlefield v. Perry*, 21 Wallace, 205.—SUP. CT. 1874.

59. An agreement in an assignment or conveyance by which the assignee or grantee is to pay royalty and to forfeit the conveyance if he does not, does not make the conveyance a mere license.—*Ib.*

60. In an assignment or grant an agreement

that the assignor or grantor shall sue infringers does not reduce the conveyance to a mere license.—*Ib.*

61. Where A makes an assignment under a patent to B, not then having the right, but subsequently acquires that right, the conveyance to B becomes valid when A subsequently acquires the title.—*Ib.*

62. "A recorded assignment of a perfected invention, made before a patent has issued, carries with it the patent when issued, . . . and . . . reissues are not patents for new inventions, but amendments of old patents."—*Ib.*

63. "An assignment of an imperfect invention, with all the improvements upon it that the inventor may make, is equivalent in equity to an assignment of the perfected results."—*Ib.*

64. A convenance provided "that any and all letters-patent that may be obtained in this country and all other countries by virtue of said invention, or by reason of any improvement, of any modification of the same by either party, shall be owned by and between the parties to his agreement in equal shares, to wit: one undivided half to each, and all proceeds of sale or sales of any and every kind and character shall be shared by and between the parties share and share alike." Whipple, one of the parties to this conveyance, entered into a partnership with one Dickerson, and they realized over \$100,000 from inventions coming within the scope of the said conveyance; the court held that Whipple was chargeable to Ambler with one half of all that had been or might be realized from the use of the patent. *Ambler v. Whipple*, 20 Wall. 546.—SUP. CT. 1874.

65. British letters-patent were granted to James Ellis, of Bradford, England, and one Joseph Sladdin, for an invention of the said Sladdin of improvements in machinery. Sladdin and Ellis made an assignment of the British patent to David Bowlas, and conveyed to him "the said invention and letters-patent, and also . . . all letters-patent or extensions to be hereafter obtained on account of the said invention." On or about August 4th, 1868, Sladdin took letters-patent of the United States for the same invention. It was held that the British assignment was broad enough to divest Ellis and Sladdin of any interest in the invention described, and to vest the same in Bowlas. *Emmons et al. v. Sladdin et al.*, 2 Bann. & Ard. 199.—SHEPLEY, 1875.

66. "The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner

which the law requires. Such inchoate right, not only to the original letters-patent that may issue, but to any renewals or extensions, or to any letters-patent which may thereafter be issued at any time or in any place, may be conveyed by an instrument containing apt terms to show an intention to convey all the rights springing from the invention."—*Ib.*

67. "Whenever a patentee conveys his 'invention,' without any other language in the deed of conveyance restricting the right to use the invention by a limitation of time or place, he must be considered to have granted the right to any letters-patent which he may issue thereon."—*Ib.*

68. The operative words in an assignment were: "I have assigned, sold, and set over, in trust, and do hereby sell and set over, in trust, all my right, title, and interest of, in, and to the aforesaid reissued letters-patent, and the invention thereby secured." The assignee gave a license "to be exercised during the unexpired terms for which the said letters-patent are granted and may be hereafter extended, on the terms and conditions hereinafter specified." These were held not to have any effect under the extended term of the patent. *Waterman v. Wallace & Sons et al.*, 13 Blatch. 128.—SHIPMAN, 1875.

69. "It cannot . . . be admitted that the written declarations of a trustee, in a conveyance to a third person, of property which had previously been conveyed to the trustee by his *cestui que trust* can be used against the latter, to determine the intent of both parties in making the original conveyance, and to show the extent of the interest which the *cestui que trust* intended to convey by his deed."—*Ib.*

70. A party holding an assignment under a patent cannot maintain a right thereunder against another party equitably entitled to such assignment, when the first party took its assignment with knowledge of the second party's rights. *Newell et al. v. West et al.*, 13 Blatch. 114.—WALLACE, 1875.

71. "The inchoate right of an inventor to an extension of his patent may be the subject of a contract of sale, and a contract to convey such right will be enforced by a bill for specific performance."—*Ib.*

72. "Where an invention is assigned before it is patented, the assignor is estopped, upon obtaining the patent, from setting up any adverse title, and the doctrine applies with equal force when he has agreed to assign, because in such case the purchaser, upon tender of the purchase price, becomes the equitable owner of the patent."—*Ib.*

73. An assignment of a patent made by an executrix, although she assigns as administratrix, is valid to convey the title.—*Ib.*

73a. A man died leaving his wife and daughter. The wife was his executrix, and as such sold and assigned away a patent which he had. The daughter did not join in the assignment, and it was held that she need not join in order to make the transfer good.—*Ib.*

74. "Only a person who is invested with the entire ownership of a patent or an undivided part of the whole is to be regarded as an assignee." *Meyer et al. v. Bailey et al.*, 2 Bann. & Ard. 73.—McKENNAN, 1875.

75. An assignment in the nature of a quitclaim creates no warranty of validity of patent. *Gilmore v. Aiken et al.*, 118 Mass. 94.—GRAY, 1875.

76. "The interest in a patent may be assigned by operation of law in case of bankruptcy of the patentee." *Barnes v. Morgan*, 3 Hun, 703.—BRADY, 1875.

77. "It is not a fair construction of the assignment of a patent that the patentee shall first assign the entire right for a particular territory and get its whole value from his vendee, and after having thus received all the benefit he was entitled to under the transfer, sell single machines to be used in the same territory during the extended term. He will in this mode obtain the value of a right never conveyed to him." *Union Paper Bag Mach. Co. et al. v. Nixon et al.*, 1 Flippin, 491.—EMMONS and SWING, 1876.

78. "Inventions may be assigned before they are patented." *Cammeyer et al. v. Newton et al.*, 94 U. S. 225.—SUP. CT. 1876.

79. The assignment of an equitable interest in the proceeds of a patent need not be in writing. *Blakeney et al. v. Goode et al.*, 30 Ohio St. 350.—WRIGHT, 1876.

80. A contract selling an interest in or under a patent, which may be extended within a year but is not, is not within the statute which nullifies "an agreement that is not performed within the space of one year from the making thereof."—*Ib.*

81. On motion the court may compel a judgment debtor to execute the order of his receiver and make assignment of his letters-patent. *Clan Randal v. Wyckoff*, 41 N. Y. Superior, 527.—FREEDMAN, 1877.

82. As between an assignor and an assignee, an oral assignment is as good as any other. *Burke v. Partridge*, 58 N. H. 349.—FOSTER, 1878.

83. Isaac Adams, Jr., took a patent August 21st, 1866, in which he claims to "render gas tips and other similar articles anti-corrosive to

heat or moisture by surfacing them with nickel." One Cook bought this patent and assigned it to the defendants. Adams afterward took another patent for his process of plating with nickel. Defendants contended that in their ownership of the first patent they were entitled to the later patent. The court held otherwise. *United Nickel Co. et al. v. American Nickel-Plating Works et al.*, 4 Bann. & Ard. 74.—LOWELL, 1878.

84. A assigned a patent to B on condition that the assignment should be void unless certain notes which B gave to A were duly paid. The notes were not duly paid, and B reassigned to A, but previous to reassignment B granted a license to C. The license was held void. *Abbett et al. v. Zusi*, 5 Bann. & Ard. 38.—NIXON, 1879.

85. Where the parties interested have treated an assignment as conveying a certain interest, the court will not, at the instance of other parties, decide otherwise. *Edgerton et al. v. Breck et al.*, 5 Bann. & Ard. 42.—LOWELL, 1879.

86. Where the two parties to a suit claim under the same patent, and the conveyance of each points to the title of the other party, such pointing is notice of the other party's title. *Prime et al. v. Brandon Mfg Co.*, 16 Blatch. 453.—WHEELER, 1879.

87. "The bankrupt law [rev. stat. U. S., Sec. 5046] vested all patent rights at once in the assignee. His title was like that which the administrators would have required if the bankrupt had died without bankruptcy proceedings being in force. It accrued by the operation of the law, and such titles need not be recorded."—*Id.*

88. "The provisions of the bankrupt law not only vested the title to patent rights which the bankrupt had in the assignee, but all rights in equity, and choses in action, which would cover the whole." [Rev. stat. U. S., Sec. 5046.]—*Id.*

89. Where complainants and defendants were both concerned in making assignments that were made to deceive the Patent Office in extension proceedings, the court will leave the parties in those respects where it finds them.—*Id.*

90. The execution of an assignment by a person who signs his name, with the addition of "President," conveys that person's interest, but not the interest of the company. *Campbell v. James et al.*, 17 Blatch. 42.—WHEELER, 1879.

91. An assignee in insolvency does not acquire a legal title to a patent unless the insolvent makes a due assignment to him. *Gordon v. Anthony et al.*, 16 Blatch. 234.—BLATCH, 1879.

92. "All interests in patents are assignable by instrument in writing. No particular form is

required, but still there must be some operative words expressing at least an intention to assign." *Campbell v. James et al.*, 18 Blatch. 92.—WHEELER, 1880.

93. "Whosoever assumes to sell a patent assumes to sell that property, and assumes that he had it to sell." "A warranty of title or right draws to it any after-acquired right or title of the warrantee." *Faulks et al. v. Kamp et al.*, 17 Blatch. 432.—WHEELER, 1880.

94. Where an assignment of a patent only assumes to convey the "right, title, and interest" of the assignor, there is enough in such an expression to put the assignee upon inquiry as to what such "right, title, and interest" is. *Hamilton v. Kingsbury et al.*, 17 Blatch. 460.—BLATCH, 1880.

95. An assignment which covers and includes "improvements to be subsequently invented or patented . . . in, or of, or in aid of, the inventions and improvements patented," does not cover subsequently invented devices which are not infringements of the original patent. *Stebbins Hy. El. M'fg Co. et al. v. Stebbins*, 4 Fed. Rep. 445.—BLATCHFORD, 1880.

96. An assignment conveyed all the assignor's right, title, and interest in the patent, "excepting thirty-two or thirty-three counties heretofore sold and assigned." *Held*, not void for uncertainty, in that "this reservation is such as is capable of being made certain by competent evidence showing what counties had been actually conveyed." *Washburn & Moen M'fg Co. et al. v. Haish*, 10 Bissell, 65.—BLODGETT & DRUMMOND, 1880.

97. A reissue to an assignee raises a presumption of title in the assignee.—*Id.*

98. "The patent having been granted to the plaintiff, he is to be presumed to be still the owner of it."—*Id.*

99. Heath, the inventor in complainant's patent, filed his application for patent June 3d, 1871. July 20th, 1871, he assigned his patent, then to issue, to the party from whom complainant derived title, and requested that the patent issue to said party. The assignment was not recorded till November 18th, 1871, the patent issuing meanwhile, October 10th, 1871. On May 27th, 1872, he made another assignment of the same subject-matter to a third party, which was recorded June 1st, 1872. *Held*, that complainant had a good title to sue on. *U. S. Stamping Co. v. Jewett*, 18 Blatch. 469.—BLATCH, 1880.

100. When a patent issued to the complainant, and there existed an assignment from him to another, which was claimed to be broad enough to include the patent in question, and there was

a dispute between the complainant and such other as to such assignment, the court refused to solve doubts in favor of the defendant, who was a third party, as regards such assignment. *Graham v. Geneva Lake Crawford M'fg Co.*, 11 Fed. Rep. 138.—DYER, 1880. *Graham v. McCormick et al.*, 10 Bissell, 39.—DRUMMOND, 1880.

101. A patentee made a grant to complainants of two counties under his patent, which grant was not duly recorded in the Patent Office. The patentee subsequently made an assignment to the defendants, with operative words as follows: "Do hereby grant and convey to the said — all my right, title, and interest in and to said letters-patent in the following described territory." It was held that defendants did not take the said two counties. *Turnbull et al. v. Weir Plough Co. et al.*, 9 Bissell, 334.—DRUMMOND, 1880.

102. For a state of facts which deprived an assignee of the right of reverter of the patent, see —. *Buckley et al. v. Sawyer M'fg Co.*, 2 McCrary, 350.—TREAT, 1881.

103. An assignment of a patent not specially referred to in an assignment gives an equitable title only. *Wright, Jr., v. Randel et al.*, 19 Blatch. 495.—BLATCHFORD, 1881.

104. For a set of circumstances where defendant's legal title to a patent was upheld as against complainant's equitable title, on account of lack of actual notice to defendants, see —.—*Id.*

105. The granting of a reissue to the plaintiff is sufficient proof of his title to sue. *Wooster v. Clark et al.*, 9 Fed. Rep. 854.—BLATCHFORD, 1881.

106. The absence of the seal of a corporation from an assignment does not render it invalid or void, for the law does not require a seal to such an instrument. *Gottfried v. Miller*, 104 U. S. 521.—SUP. CT. 1881.

107. A patent owner having assigned the patent to two persons jointly, in trust, one of such assignees has no power to make an assignment of interest in the patent. *Westcott et al. v. Wayne Agricultural Works et al.*, 11 Fed. Rep. 298.—GRESHAM, 1882.

108. "The mere assignment of a patent would give the assignees no right to damages or profits already accrued." *Merriam v. Smith et al.*, 11 Fed. Rep. 538.—LOWELL, 1882.

109. By the court: "I think that the assignment to make and sell includes necessarily the right to use the thing patented, because without the right to use, the right to make and sell would be a barren right." *Turnbull et al. v. Weir Plough Co. et al.*, 9 Bissell, 334.—DRUMMOND, 1880.

110. By the court: "Under the statute of this

state, the assignments of the patent, duly acknowledged before a notary, were sufficiently proved; but it was not incumbent upon the complainant to prove the signatures of the assignees." [This was the state of New York.] *N. Y. Pharmaceutical Ass'n v. Tilden et al.*, 21 Blatch. 190.—WALLACE, 1883.

111. An inventor made application for a patent in 1887, and assigned away an undivided interest in the patent to issue thereon. The application was rejected and never renewed. Congress gave a patent to the heirs of the inventor in 1878. *Held*, that the assignee of 1852 took no interest in the patent of 1878. *Fire Ex. M'fg Co. v. Graham*, 16 Fed. Rep. 543.—HUGHES, 1883.

112. Complainant's invention was patented and assigned to defendant under an agreement that complainant should pay the value thereof, to be determined by an arbitration, which arbitration defendant sought, but complainant would not have. Complainant sought an injunction to prevent defendant exercising any right under such patent. *Held*, that complainant had no case against defendant. *Perkins v. U. S. Electric Light Co.*, 24 O. G. 204.—WALLACE, 1883.

113. A woman who is a resident of New York can alone, without her husband, make a legal assignment of a patent. *Fetter et al. v. Newhall*, 21 Blatch. 445.—WHEELER, 1883.

114. "The reissue patent ran directly to the orator, and was founded upon assignments entitling him to it, and the production of it would show *prima facie* that all the preliminary steps had been taken." *Wooster v. Muser et al.*, 20 Fed. Rep. 162.—WHEELER, 1884.

115. "No guaranty of title is binding against the setting up of unfounded claims." *Shaw v. Soule et al.*, 20 Fed. Rep. 790.—WHEELER, 1884.

116. A trust assignment executed in and under the laws of the state of New York, prevented either of the parties of the first part from transferring any interest in the legal title to the patent during the unexpired term to third persons, and in the event of the death of either party, prevented his legal representatives from doing so; to this extent it appeared to suspend the power of alienation for a period longer than the two lives who created the trust. The court held that "such a restriction upon the right of joint owners to deal with their property is not objectionable," and the statutes prohibiting perpetuities have no application to the case.—*Id.*

117. The conveyance by which complainants held their title to the patent in suit did not transfer to complainants the right to vend to others the privilege of making the patented arti-

cle. But that right was not reserved in the instrument, and as complainants were vested with the exclusive right to make the article in the United States, as well as to use and vend it, the patentees were held to have nothing left which they could transfer, and the complainants were held to be assignees under the patent. *Pickhardt et al. v. Puckard*, 23 Blatch. 23.—WALLACE, 1884.

118. "The rule that a receiver cannot convey a title to a patent unless the owner of the legal title join, as held in *Gordon v. Anthony*, 16 Blatch. 234, does not apply to the transfer of a mere equitable title." *Adams et al. v. Howard et al.*, 23 Blatch. 27.—WALLACE, 1884.

119. A, being an inventor, and applicant for patent, assigned his patent, yet to issue, to B. B assigned to C. C assigned to D. All the assignments were recorded before the patent issued. The patent issued to B. On demurrer it was held that the patent was valid; that D had a good title, and might sue thereon. *Consolidated Electric Light Co. v. Edison Electric Light Co. et al.*, 23 Blatch. 412.—WALLACE, 1885.

120. "The patent may issue to the person who, by the records of the Office, is assignee of the patent, although not technically the assignee of the inventor."—*Ib.*

121. "It is not mandatory . . . that the patent run in form to the person who is the owner of the invention, according to the records of the Office, at the time when the patent issues."—*Ib.*

122. "Inasmuch as the grant" of a patent "runs to the grantee named in the patent, and his assigns, and operates, therefore, in favor of the ultimate assignee, to convey him a record title as completely as if he had been named in the patent, and as it is not essential that the grantee named be one who owns the invention when the patent issues, it should be held that a patent is valid when issued to any assignee of record."—*Ib.*

123. In a contract one party "further covenanted that if he did not purchase and pay for the said letters-patent within one year from the date of the agreement, as before provided, he would, at the expiration of the year, cease from the manufacture of said tilts, and would turn over and surrender promptly to the Connollys all patterns gotten up by him for the manufacture of tilts embracing said improvements, and would assign to them the entire right, title, and interest in any and all improvements upon the invention shown and described in the said letters-patent, or relating thereto, which he might make or patent." Thereof the court said: "The fair import of the language used is that

only those improvements should become the property of the complainants which were made upon the invention or patent before the termination of the contract." The Connollys' patent was upon tilting chairs. The improvement made by the said covenanting party was in rocking chairs, and were held not within the agreement. *Bunker et al. v. Stevens*, 26 Fed. Rep. 245.—NIXON, 1885.

124. "The assignment of an extension before the same is granted vests the extension in the assignee." *Adams et al. v. Bridgewater Iron Co.*, 34 O. G. 1045.—COLT, 1886.

125. A party owned the title of record to a patent for over six months, and conveyed it, for a money consideration, to another party, whose title was also recorded in the Patent Office. It was held that the latter title could not be attacked on the ground of fraud on the part of the party first mentioned. *Racine Seeder Co. v. Joliet Wire-Check Rower Co.*, 27 Fed. Rep. 367.—BLDGERT, 1886.

126. Where a conveyance under a patent carries the whole title, reserving to the grantor a right in the nature of a license, the paper is an assignment. *Hobbie et al. v. Smith et al.*, 27 Fed. Rep. 656.—COXE, 1886.

127. An assignment by an inventor of his "right, title, and interest in said improvement," without more, does not carry to the assignee a title to an extension of the original patent. *Johnson v. Willcox & Gibbs Sewing-Mach. Co.*, 23 Blatch. 531.—WALLACE, 1886.

128. "When an assignment is made pending an application, or in contemplation of an application for letters-patent, it is fair to assume that the parties contract with reference to the legal title which they expect will then be granted."—*Ib.*

129. "The word 'invention' or 'improvement,' when used in reference to a pending application, naturally refers to the subject-matter of the expected grant, and would seem more appropriately to refer to that alone than to a possible future title which may be granted out of personal consideration for the inventor."—*Ib.*

130. Two patentees, Kearney and Tronson, gave to one John H. Immer a paper, as follows: "To all whom it may concern: This certifies that John H. Immer is fully authorized and empowered to make any contract with the Central Railroad of New Jersey that may be binding on our part, for the sale of the patent-right on spark arrester, as secured to us by letters-patent 113,528, dated April 11th, 1871, and re-issue 5184, dated December 10th, 1872, he having one third equal interest with ourselves in the

said patent." *Held*, that the true intent was that Immer was entitled to one third the proceeds of sales; this paper was held not to be an assignment. *Kearney et al. v. Lehigh Valley R. R. Co.*, 27 Fed. Rep. 699.—NIXON, 1886.

131. A patent was granted to one Sweet. One Smith assumed to make a conveyance thereunder. The instrument, in the first clause, described Smith as party of the first part. The second clause recited that Smith, by power of attorney from Sweet, became the attorney of Sweet. The third clause recited that one Machesney desired to purchase, and that Smith assigned and set over all the right, title, and interest that said Sweet has. Then followed a clause that Smith had set his hand and seal to the instrument which was signed "J. E. Smith," and a seal was affixed. Thereupon the court said: "The assignment must be held to be inoperative to pass the title of Sweet, upon the well-settled rule that a sealed instrument, when executed by one acting as an attorney, must be executed in the name of the principal. It is true that an assignment of a patent for an invention is valid without a seal. This is so because the statute which creates the property in inventions, and regulates the manner of transferring the title, only requires an assignment to be in writing. But such an assignment is a muniment of title to incorporeal property, and, whether under seal or not, the question whether, when executed by an attorney, it is in form to bind the principal, is to be determined by the rule applicable to deeds and formal instruments under seal." *Machesney v. Brown et al.*, 29 Fed. Rep. 145.—WALLACE, 1886.

132. A conveyance read as follows: "I hereby sell, assign, transfer, and set over unto the said Asa L. Shipman's Sons, their successors and assigns, all the right, title, and interest, claim or demand, of any character or description, legal or equitable, which I have in, to, under, or by virtue therefor aforesaid, the same being the entire interest in said letters-patent." This conveyance was defeasible by a payment to be made on a certain date. Meanwhile it was held to be an assignment carrying a title on which suit might be brought. *Waterman v. Mackenzie et al.*, 29 Fed. Rep. 316.—COXE, 1886.

133. It seems that the assignment of a bankrupt's patent, made by his duly-appointed assignee, is a legal assignment. *Kittle v. Hall et al.*, 29 Fed. Rep. 508.—COXE, 1887.

134. An assignment made by the administrator of Edwin May, deceased, conveyed "all the right, title, interest, claims, and demands whatsoever, which the estate of said Edwin May, de-

ceased, has in, to, by, under, and through the said improvements and the letters-patent and extensions thereof." It was held that this assignment did not carry with it the right of action for infringement of patent while Edwin May was the sole owner thereof. *May v. Juneau Co.*, 30 Fed. Rep. 241.—BUNN, 1887.

135. Where A, an inventor, has made application for patent and assigned his patent to issue to B, and the assignment has not been recorded, and meanwhile C, with full knowledge, takes an assignment from A and gets the patent to issue in C's name, B is entitled to have the patent assigned to him. *Pontiac Knit Boot Co. v. Merino Shoe Co.*, 31 Fed. Rep. 286.—WEBB, 1887.

136. An assignment which refers to an application for patent, and conveys an undivided part "of the full and exclusive right to the invention, as fully set forth and described in the invention," covers all that is so described, even though such application may afterward be split up into different applications. *Puetz v. Bransford*, 31 Fed. Rep. 458.—THAYER, 1887.

137. "A naked assignment, to assign in gross a man's future labors as an author or inventor—in other words, a mortgage on a man's brain—binds all future products, does not address itself favorably to our consideration." But if such an agreement is based upon a valuable consideration, and is in connection with a basic patent or machine, it is a valid agreement. *Aspinwall Mfg Co. v. Gill et al.*, 40 O. G. 1133.—BRADLEY, 1887.

138. An assignment used the following language: "I, the said George F. McGinnis, as administrator of the estate of Edwin May, deceased, have sold, assigned, transferred, and set over, and do hereby sell, assign, transfer, and set over unto the said Sarah May, all the right, title, interest, claims, and demands whatsoever which the said estate of said Edwin May, deceased, has in, to, by, under, and through the said improvements, and the letters-patent and extensions thereof therefor aforesaid." This was held to carry the right to sue for part damages and profits. *May v. Saginaw Co.*, 32 Fed. Rep. 629.—BROWN, 1887.

139. An assignment of a patent, after conveying the same, proceeded, "with all the improvements I may hereafter make, without further cost." This was held to be a valid contract, and carry with it all improvements in that line which the patent owner afterward made. *Aspinwall Mfg Co. v. Gill et al.*, 32 Fed. Rep. 697.—BRADLEY, 1887.

140. "If the assignment of improvement to be made in future does not convey a legal inter-

est in a patent taken out for such future improvement, yet, if valid at all, it certainly conveys an equitable interest, entitling the assignee to call upon the holder of the legal interest for an assignment thereof to the extent of the equity."—*Id.*

141. "Assignments in future improvements upon a machine, in connection with the assignment of a patent for such machine, are valid."—*Id.*

142. For an example of an assignment of a patent held good against a prior contract assigning the same, see —. *N. Y. Paper Bag Mach. Co. v. Union Paper Bag Mach. Co.*, 32 Fed. Rep. 783.—*BUTLER*, 1887.

143. A conveyance under a patent was in the following words: "The party of the first part has sold, assigned, and transferred, and by these presents does sell, assign, and transfer to the party of the second part, all his right, title, and interest in and to the said improvements, as secured to him as aforesaid, for, to, and in all parts of the United States and territories lying east of the Rocky Mountains; . . . the same to be held and enjoyed by the said party of the second part within and throughout the above-specified territory, but not elsewhere, for his own use and behoof, to the end of the term for which said letters-patent were granted." This was held to give the assignee a right to sue. *Seibert Cylinder Oil-Cup Co. v. Beggs*, 32 Fed. Rep. 790.—*LACOMBE*, 1887.

## ATTORNEY.

### CASES.

1. Where a party is employed as an attorney for Patent Office work, he is at liberty to be employed in the same capacity by different parties in relation to the same general subject-matter. *Hoffheins et al. v. Brandt*, 3 Fish. P. C. 218.—*GILES*, 1867.

2. As to whether restitution may be compelled from an agent employed to sell his partner's patent, when he acts fraudulently in reference thereto, see —. *Jeffries v. Weister et al.*, 2 Sawyer, 135.—*SAWYER*, 1871.

3. Where a party, by his own conduct and action, enables his agent to make a contract with another party which is wrongful, so far as the first party and the agent are concerned, the party first mentioned will have to abide by the action of the agent. *Larabee et al. v. Peoria, Pekin & Jacksonville R. R. Co.*, 3 Bann. & Ard. 180.—*DRUMMOND*, 1877.

4. Where one party is actually the agent or attorney of another, it is not material whether the agent signs his own name as agent or signs the name of the principal, following with his own name as agent.—*Id.*

5. In an attempt to secure a rehearing and new trial, it would be unsafe and unjust, not only to the complainant, but also to the solicitor, to assume that the solicitor has not done his full duty, without proof to that effect. *Ingersoll v. Benham et al.*, 3 Bann. & Ard. 179.—*WHEELER*, 1877.

6. Where an original specification, in an application on which a patent is issued, had been amended by filing substantially a new one, written by an attorney who had not received a proper power from the proper party, it was held that such informalities were cured by the issue of the patent, and that the action of the Commissioner therein could not be inquired into in an action for infringement. *Hoe et al. v. Cottrell et al.*, 17 Blatch. 546.—*SHIPMAN*, 1880.

7. An amendment to an application for a patent made by the inventor's attorney after the inventor's death, and without the sanction of the administrator, is without authority. *Eagleton M'fg Co. v. West, Bradley & Cary M'fg Co. et al.*, 18 Blatch. 218.—*WHEELER*, 1880.

8. "An answer in equity is required for discovery as well as for grounds of defence, and evidence cannot be given by an attorney; therefore an answer cannot be made by an attorney," and an answer thus made is irregular. *Wooster v. Muser et al.*, 20 Fed. Rep. 162.—*WHEELER*, 1884.

9. Where, after the filing of an application for a patent, the applicant's solicitor changed the claim without authority, and so as to include a feature which the applicant did not invent, the change was held fatal to the patent. *Milligan v. Lalance & Grosjean M'fg Co.*, 21 Fed. Rep. 570.—*WHEELER*, 1884.

10. Where, pending an application for a patent, the claims have been changed, such change in the claims is proper where the specification fairly indicates all that was put into the changed claims from time to time in order to embrace everything which was specified at the start. And this may be done by the inventor's attorney. *Railway Register M'fg Co. v. North Hudson County R. R. Co. et al.*, 24 Fed. Rep. 793.—*NIXON*, 1885.

11. Where a man, without authority, revived the application for patent of another person, signing as attorney, and the other person afterward ratified this action, such action was held to be null and void until the date of the ratification.

*Con. Fruit Jar Co. v. Bellaire Stamping Co.*, 35 O. G. 627.—SAGE, 1886.

12. A local solicitor for the defendant in one hundred and sixty-four cases, under the vulcanite patent, in Maine, New Hampshire, and Massachusetts, charged for services and disbursements \$6228.82, being \$49.67 for each successful case, and \$9.84 for each unsuccessful case, less than \$2 in each case coming out of the real complainant, the Goodyear Dental Vulcanite Company, the balance being recovered as costs. The court held that the amount was reasonable. *Celluloid M'fg Co. v. Chandler*, 27 Fed. Rep. 9.—WEBB, 1886.

13. As regards the prosecution of an application for a patent, the applicant is bound by the acts of his attorney. *Dobson v. Lees*, 30 Fed. Rep. 625, *per curiam*, 1887.

### CAVEAT.

#### "CAVEAT" IN THE PATENT ACTS.

Act approved July 4th, 1836.

SECTION 12. *And be it further enacted*, That any citizen of the United States or alien, who shall have been a resident of the United States one year next preceding, and shall have made oath of his intention to become a citizen thereof, who shall have invented any new art, machine, or improvement thereof, and shall desire further time to make the same, may, on paying to the credit of the Treasury, in manner as provided in the ninth section of this act, the sum of twenty dollars, file in the Patent Office a caveat, setting forth the design and purpose thereof, and its principal and distinguishing characteristics, and praying protection of his right till he shall have matured his invention; which sum of twenty dollars, in case the person filing such caveat shall afterward take out a patent for the invention therein mentioned, shall be considered part of the sum herein required for the same. And such caveat shall be filed in the confidential archives of the office, and preserved in secrecy. And if application shall be made by any other person within one year from the time of filing such caveat, for a patent of any invention with which it may in any respect interfere, it shall be the duty of the Commissioner to deposit the description, specifications, drawings, and model, in the confidential archives of the Office, and to give notice, by mail, to the person filing the caveat, of such application, who shall, within three months after receiving the notice, if he would avail himself of the benefit of his caveat,

file his description, specifications, drawings, and model; and if, in the opinion of the Commissioner, the specifications of claim interfere with each other, like proceedings may be had in all respects as are in this act provided in the case of interfering applications. [Repealed July 8th, 1870.]

Act approved March 2d, 1861.

... The three months' notice given to any caveator, in pursuance of the requirements of the twelfth section of the act of July fourth, eighteen hundred and thirty-six, shall be computed from the day on which such notice is deposited in the post-office in Washington, with the regular time for the transmission of the same added thereto, which time shall be endorsed on the notice. [Repealed July 8th, 1870.] (This act makes a caveat fee \$10, and provides that it shall not apply on an application for patent.)

Act approved July 8th, 1870.

SEC. 40. *And be it further enacted*, That any citizen of the United States, who shall have made any new invention or discovery, and shall desire further time to mature the same, may, on payment of the duty required by law, file in the Patent Office a caveat setting forth the design thereof, and of its distinguishing characteristics, and praying protection of his right until he shall have matured his invention; and such caveat shall be filed in the confidential archives of the Office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof; and if application shall be made within one year by any other person for a patent with which such caveat would in any manner interfere, the Commissioner shall deposit the description, specification, drawings, and model of such application in like manner in the confidential archives of the Office, and give notice thereof, by mail, to the person filing the caveat, who, if he would avail himself of his caveat, shall file his description, specification, drawings, and model within three months from the time of placing said notice in the post-office in Washington, with the usual time required for transmitting it to the caveator added thereto, which time shall be endorsed on the notice. And an alien shall have the privilege herein granted, if he shall have resided in the United States one year next preceding the filing of his caveat, and made oath of his intention to become a citizen. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4902. Any citizen of the United States who makes any new invention or discovery, and desires further time to develop the same, may, on payment of the fees required by law, file in



the Patent Office a caveat setting forth the design thereof, and of its distinguishing characteristics, and praying protection of his right until he shall have matured his invention. Such caveat shall be filed in the confidential archives of the Office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof; and if application is made within the year by any other person for a patent with which such caveat would in any manner interfere, the Commissioner shall deposit the description, specification, drawings, and model of such application in like manner in the confidential archives of the Office, and give notice thereof, by mail, to the person by whom the caveat was filed. If such person desires to avail himself of his caveat, he shall file his description, specifications, drawings, and model within three months from the time of placing the notice in the post-office in Washington, with the usual time required for transmitting it to the caveator added thereto; which time shall be endorsed on the notice. An alien shall have the privilege herein stated, if he has resided in the United States one year next preceding the filing of his caveat, and has made oath of his intention to become a citizen.

## CASES.

1. Although a patent may be issued to another while applicant's caveat is on file, with no notice to the caveator, the patent is not thereby invalidated. *Cochrane v. Waterman*, 1 MacArthur's P. C. 52.—CRANCH, 1844.

2. The filing of a caveat does not prevent the running of time as regards the defence of two years' public use. *Bell v. Daniels et al.*, 1 Bond, 212.—LEAVITT, 1858.

3. A caveat is not proof that the improvement described was not perfected, in a patentable sense, at the time of filing the caveat. *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

4. It seems that, in construing a patent, the inventor's previous caveat may be taken into consideration. *Goodyear et al. v. Mullee et al.*, 5 Blatch. 429.—BLATCH, 1867.

5. A caveat which does not show a mode of reducing the suggested invention to practice will not avail to carry the afterward patented invention back to the caveat. *Renwick et al. v. Cooper et al.*, 10 Bissell, 201.—BLATCH, 1872.

6. The obvious design of a caveat "is to afford to inventors an opportunity of perfecting their discoveries and inventions." *Am. Nic. Pavement Co. v. City of Elizabeth et al.*, 6 Fish. P. C. 424.—NIXON, 1873.

7. A caveat mistakenly filed as for a sole in-

vention does not preclude a subsequent joint patent. *Hoe et al. v. Kahler*, 20 Blatch. 430.—BLATCH, 1882.

## CHAMPERTY.

## CASES.

1. An agreement between a patent owner and another party, whereby the latter is to sue and collect for infringements at his own costs and make definite payment to the former, is void for champerty and is against the policy of the law. *Wintermute v. Humphrey et al.*, 10 West. L. J. 52.—STILLWELL, 1851.

2. A patent owner gave to another person the exclusive right to collect damages and profits for infringement of the patent, the latter to bear all the expenses except that, in case of failure to recover, the patent owner was liable to pay the taxable costs. The party to whom this right was given was to have half the gross amount collected. This contract was held to be void for champerty and maintenance. *Gregerson v. Im-lay*, 4 Blatch. 503.—SHIPMAN, 1861.

## CHEMICAL EQUIVALENT.

CHEMICAL Equivalent. [See "Equivalent, Chemical."]

## CLAIM.

## "CLAIM" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 2. This section provides that the specification shall "distinguish the invention or discovery from other things known or used." [Repealed February 21st, 1873.]

Act approved February 21st, 1793.

SEC. 3. This section provides that the applicant for patent shall deliver "a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same. And in the case of any machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of the principle or character by which it may be distinguished from other inventions;

and he shall accompany the whole with drawings and written references, where the nature of the case admits of drawings." [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 6. This section provides that the applicant shall deliver "a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of any machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention or discovery." [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 26. This section provides that the applicant for patent "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery; and said specification and claim shall be signed by the inventor and attested by two witnesses." [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4888. This section provides that the applicant for patent in his specification "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

#### CASES.

1. If a patent is for the whole machine, when the improvement is of a part of the machine only, which, as a whole, previously existed, the patent is too broad and is void. *Woodcock v. Parker et al.*, 1 Gall. 437.—STORY, 1813.

2. A combination of old parts, or an added effect, will not support a patent for a new machine. *Whittemore et al. v. Cutter*, 1 Gall. 478.—STORY, 1813.

3. "If a patent be taken out for an entire machine, when the invention consists only of an improvement on such machine," the patent is not void, but "the patentee is not entitled to more than his improvement." *Goodyear v. Matthews*, 1 Paine, 300.—LIVINGSTON, 1814.

4. An inventor of an improvement on a machine is only entitled to a patent for the improvement. If he patent the whole machine, his pat-

ent is void. *Odiorne v. Winkley*, 2 Gall. 51.—STORY, 1814.

5. The specification is in part for descriptive purposes, but a claim made therein cannot define the extent of the monopoly; that must appear in the body of the patent [in the grant signed by the government officials]. *Evans v. Eaton*, 1 Peters' C. C. 322.—WASH. 1816.

6. It is essential to distinctly define the invention in order to know whether it ought to be patented, and to know what will infringe. *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

7. Whether an invention is distinctly defined is a question of law upon the construction of the terms of the patent.—*Id.*

8. Oliver Evans's patent for improvement in the art of manufacturing flour, etc., dated January 22d, 1808, cannot be sustained as a claim for improvements, because it does not point out in what the improvements consist. *Evans v. Hettick*, 3 Wash. 408.—WASH. 1818.

9. Oliver Evans's patent of January 22d, 1808, is for (1) the combination of the machines, (2) the several machines, (3) improvements on the several machines.—*Id.*

10. A patent may be good as to a part, though unsound as to another part. *Evans v. Eaton*, 3 Wash. 443.—WASH. 1818.

11. A specification must point out in what the improvement consists. This cannot be done by parol evidence.—*Id.*

12. A specification must define the invention. If the court cannot say what the patent claims, it is void for ambiguity. *Barrett et al. v. Hall et al.* 1 Mason, 447.—STORY, 1818.

13. It seems that the extent of the grant may be defined in the specification. *Evans v. Eaton*, 3 Whart. 454.—SUP. CT. 1818.

14. If a thing which is claimed, no matter how important, be not new, the patent is void. *Moody v. Fiske et al.*, 2 Mason, 112.—STORY, 1820.

15. The patent must point out in what the invention consists. *Dixon v. Moyer*, 4 Wash. 68.—WASH. 1821.

16. The patent must distinguish the old from the new. *Isaacs v. Cooper et al.*, 4 Wash. 259.—WASH. 1821.

17. A patentee ought to describe what his own improvement is, and to limit his patent to such improvement. *Evans v. Eaton*, 7 Wheat. 356.—SUP. CT. 1822.

18. If the patentee fully describe the construction of his machine and then claim it in general terms, without a precise discrimination of the difference from prior machines, that is sufficient.—*Id.*

19. "The improvement patented must be the improvement invented." *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALD, 1831.

20. Defects and obscurities in description will be overlooked if the court can make out the thing patented.—*Id.*

21. If the court cannot make out the limits of the invention without resorting to conjecture, the patent is void. A tautologous phrase may be disregarded. *Ames v. Howard*, 1 Sumner, 482.—STORY, 1833.

22. Ambiguities and uncertainties which do not prevent the court from ascertaining the limits of the invention are not fatal. *Ryan et al. v. Goodwin et al.*, 3 Sumner, 514.—STORY, 1839.

23. In making a claim, "no precise form of words" need be used. "It is sufficient if the court can ascertain, by fair interpretation, what he [the patentee] intends to claim, . . . even though the expressions are inaccurately or imperfectly drawn." *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

24. By the court: "This claim, then, for 'the particular method for the application of the principle,' although inartificial, may be reasonably interpreted as expressive of a distinct claim of each particular method set forth." "I deem the patent, then, to be a claim for each distinct machine."—*Id.*

25. Although in its title a patent be professedly for "a new and useful improvement" [in the singular number], a plurality of claims, covering different parts, may be made in the patent. *Pitts v. Whitman*, 2 Story, 609.—STORY, 1843.

26. "A patentee should describe with reasonable certainty his invention. Several reasons exist for this. One is, the act of Congress itself requires that he 'shall particularly specify and point out the part, improvement, or combination which he claims as his own invention,' act of July 4th, 1836. . . . And another is, that unless this is done, the public are unable to know whether they violate the patent or not." *Davoll et al. v. Brown*, 1 W. & M. 53.—WOODBURY, 1845.

27. "We can resort to the introduction to the specification, as well as the summing up at the close, to ascertain the true extent of the claim." *Hovey v. Stevens*, 1 W. & M. 290.—WOODBURY, 1846.

28. "Where there is a summary, setting out a claim to some particular novelty, that is to govern. But if it refers to other parts of the specification and drawings, those parts are to be examined in connection with it, in order to ascertain what is claimed in the summary as the

new improvement." *Hovey v. Stevens*, 3 W. & M. 17.—WOODBURY, 1846.

29. Whatever the patentee's particular mode is "must be plainly stated; because the public, when making or using similar machines, has a right to know, first, what he claims to have patented or invented as new—whether new parts or combinations only, and, if new parts, what new ones? and if new combinations, of what old parts? So the persons whom a patentee prosecutes have a right to know clearly what they have to defend against—a claim of new parts or new combinations? and if of either, the specific parts which are set up as new, or which are set up as brought into a new combination." "So the act of Congress requires this. What is claimed as new or an improvement is to be set out substantially, in order that the Commissioner of Patents may judge if it be new, so as to issue a patent, and courts may see whether it is new in the trials contesting it. It is necessary to be done also to see if he claims anything before known or not; or, in other words, too much." "Hence saying that the patentee has made an improvement in certain machinery, without distinguishing what it is, or what part is new, has been adjudged to be bad."—*Id.*

30. The improvement "must not only be distinguished, but so distinguished as to be intelligible, unambiguous, accurate." The courts will "be as indulgent to patentees in describing their claims as is consistent with the rights of the public and of other inventors, and the imperative requirements by Congress." In order to obtain clearness and exactness, they should not be confined to technical language, but encouraged to make use of words in popular use. "Nor in most cases are they to be restricted to any particular part of their specification, but may resort for light to all portions of it and the drawings."—*Id.*

31. "If a patent cover matter not patentable, the whole patent is void." *Blake v. Sperry*, 2 N. Y. Leg. Ob. 251.—JUDSON, 1843.

32. "When a patent is obtained for parts of a machine involved with other parts which may have been used before, it is essential that the new parts should be so distinctly pointed out that the claim may not cover any parts which are old."—*Id.*

33. "It is essential that the part improved should be so distinctly stated as to be distinguished from every other part of the machine." *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

34. "Unless the thing claimed to be invented is so described as to be known in the language

of the statute from every other thing, the patent is void. But this must be determined by the court."—*Id.*

35. There are reasons for requiring exactness in a claim, to wit: that when the specification is presented, the Commissioner of Patents may be enabled to judge correctly whether the improvement claimed is new or too broadly claimed. Also to enable courts, when it is contested before them, to form a like judgment. Also so that the public, while the term continues, may be able to understand what the patented thing is, and refrain from its use unless licensed. *Hogg et al. v. Emerson*, 6 Howard, 437.—SUP. CT. 1848.

36. "The propulsive effect of vortical motion of water in a reaction wheel, operating by its centrifugal force, and so directed by mechanism as to operate in the appropriate direction, . . . is a valid subject of claim, and properly to be secured by letters-patent." *Parker v. Hulme*, 7 West. L. J. 417.—KANE, 1849.

37. What an inventor "does not, or certainly what, in the misty future, he cannot describe, he must be presumed not to have invented." *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

38. Plaintiff's patent in suit was for a travelers' lock, and a claim thereof was: "What I claim as my invention, and desire to secure by letters-patent, is the combination of the bar A, having the edges EE, with the stop or rest B, having the lips F and G constructed and arranged as described. I further claim the combination of the cap D with the bar A, the effect of the cap being to fill up the space between the edge of the door when closed, and the casing as described, all for the purposes and constructed in the manner substantially as set forth in the accompanying specifications and drawings." The drawings annexed showed the lip G as turned on the end of the brace C. The claim was erroneous in calling the lip G part of the rest B. The question was whether the error was fatal. It was held not to be fatal. *Kittle v. Merriam*, 2 Curtis's C. C. 475.—CURTIS, 1855.

39. "It is sufficient if what is claimed as new appears with reasonable certainty on the face of the patent and specifications, or by necessary implication." *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILSON, 1856.

40. Although parts described in a patent may be old, if they are not distinctly claimed it is not necessary to expressly state that they are old. *Winans v. N. Y. & Erie R. R. Co.*, 1 Fish. P. C. 213.—HALL, 1856.

41. The requirement of certainty in a claim

is for the purpose of enabling the public to understand precisely what has been secured to the patentee. *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

42. A patent for a sewing-machine claimed a combination consisting of three elements—namely, "a table or platform; . . . a sewing mechanism proper, . . . and a mechanical feed automatic. . . ." This was held to be a proper claim. *Potter et al. v. Holland*, 4 Blatch. 238.—INGERSOLL, 1858.

42a. A claim was: "3. The upright stationary bolt, or bolt and scourer combined, with its top or cover, or in combination with claims 1 and 2 and 4, or either of them, or their equivalents, to produce like results in the flouring process." Thereof the court said: "The third claim is good for nothing on account of its uncertainty." *Carr v. Rice*, 4 Blatch. 200.—NELSON, 1858.

42b. A claim was: "4. The use of the revolving, distributing, scouring, and blowing cylinder of beaters and fans, by which the material is distributed, scoured, and the flour blown through the meshes of the bolting cloth." This claim was held void, as being a "claim to a legal result."—*Id.*

43. The claim in plaintiff's patent was: "I claim the clamps 6 6 to prevent end expansion, and the levers 7 7 working on fixed fulcrums, when in operation, all substantially and for the purpose set forth in the foregoing specification." Thereof the court said: "The plaintiff's claim is not for a combination, but for two distinct improvements in the art of bending wood." *Morris v. Barrett et al.*, 1 Bond, 254.—LEAVITT, 1859.

44. The claim of the application for the patent in question was: "What I claim as my invention, and desire to secure by letters-patent, is the hulling and breaking cylinder B, provided with the serrated arms *bb*, or their equivalents, and driven at different speeds, as herein specified, in combination with the containing cylinder A, constructed and operating substantially as described." The machine was a corn breaker. The only point of novelty was the adjustment of the size of the holes in the outer cylinder so as to permit the due escape of the hominy by means of the requisite adjustment of the parts to the velocity of movement of the cylinder, from one rate of revolution to another rate at different stages of the manufacture; it was held that the claim did not cover the real improvement. *Davis, William, In Re*, 1 MacArthur's P. C. 628.—MORSELL, 1859.

45. A claim was: "What I claim as my in-

vention, and desire to secure by letters-patent, is the application to circular saw frames, of rocker boxes and swing frame, as herein set forth, and suspending said frame in position by means of the driving belt, as above described, for the free and successful operation of the saw by the motion before mentioned." The court held this claim to be a single claim for a combination of all the elements mentioned. *Lee et al. v. Blandy et al.*, 1 Bond, 361.—LEAVITT, 1860.

46. The claim in complainant's patent was: "The forming of the seam," etc. This was held to be a claim for the mechanism. *Howe v. Morton et al.*, 13 M. L. R. 70.—SPRAGUE, 1860.

47. A claim for "imparting a coexisting movement to two reciprocating catch pieces in the operation of trip, cut-off valves," is in terms "for an effect or function, and therefore not patentable." *Sickles v. Falls Co.*, 4 Blatch. 508.—NELSON, 1861.

48. The existence of two claims for the same thing in the same patent does not render the patent void. *Tompkins v. Gage et al.*, 5 Blatch. 268.—SHIPMAN, 1865.

49. The claim in complainant's patent upon a camera was: "Bringing the different portions of a single plate or several plates successively into the field of the lens of the camera." Thereof the court said. "Patent of the complainants is not for a principle or result, but for a means described for accomplishing the result, and, consequently, is valid." *Wing v. Richardson*, 2 Clifford, 449.—CLIFFORD, 1865.

50. A patent may properly have various claims of invention. *Swift et al. v. Whisen et al.*, 2 Bond, 115.—LEAVITT, 1867.

51. "Ambiguity, which defies construction to elucidate, is fatal, and it is unimportant whether it had its origin in the *mala fides* of the patentee or in the haste or incompetency of the draftsman." *Blake v. Stafford*, 6 Blatch. 195.—SHIPMAN, 1867.

52. "The claim governs the patent, and in order to ascertain what is patented, reference must be had to the claim." *Haselden v. Ogden*, 3 Fish. P. C. 378.—SHERMAN, 1868.

53. Although a claim may be in form functional and for a result, as for "the discharging," etc., it will be construed as a claim for "the particular organization and devices described, by means of which the specified result is produced, and therefore valid and effectual to the extent of the actual invention of the patentees." *Seymour et al. v. Osborne et al.*, 3 Fish. P. C. 555.—HALL, 1869.

54. "An inventor must be taken to know of

what his invention consists, and his patent does not secure to him the exclusive right to anything more than he claims to have invented. If his specification is imperfect, through mistake or inadvertence, the law enables him to obtain a reissue so as to conform to the truth in this respect." *Rich v. Close*, 8 Blatch. 41.—WOODRUFF, 1870.

55. "In the construction of a claim, reference is to be had to the descriptive portion of the specification, or to any other portion of it, to ascertain the true interpretation of the claim. But where the claim is such as to leave no room for construction, where it is clear and explicit, and especially where there is nothing in the specification which shows that the patentee did not mean just what the plain language of the claim imports, we are not aided by and have no need of aid from such specification."—*Id.*

56. The claim of the patent in suit was for: "An apparatus for recovering gold and silver, substantially as herein specified." As the vessel might be of suitable form, and as the discovery of suitable precipitating ingredients was not invention, it was held that the claim was altogether too vague and general, and was invalid. *Shaw & Wilcox Co. v. Lovejoy*, 7 Blatch. 232.—BLATCHFORD, 1870.

57. The claim in complainants' patent was: "1. The application of means to the instrument by which the air may be agitated to produce a tremulous note, substantially as described." Thereof the court said: "There is no ground for the position that the first claim of the patent is void, as claiming to patent a principle. It is a claim to the described means of agitating the air." *Hitchcock et al. v. Iremaine et al.*, 8 Blatch. 440.—BLATCH. 1871.

58. "Section 9 of the act of March 3d, 1837, . . . is designed to allow a patentee to recover on one claim of his patent, notwithstanding other claims in it are void for want of novelty. But it requires that the parts claimed without right, and the parts rightfully claimed, shall be definitely distinguishable, as matter of fact, on the face of the claims—that is, be definitely distinguished from each other in the claims." *Rumford Chemical Works v. Lauer* (also *Hecker*), 10 Blatch. 122.—BLATCH. 1872.

59. "Claiming the arrangement of a combination, when the arrangement is such as to produce a given mechanical result of the combination, is not a claim to a function. The result is not claimed irrespective of the means of producing it. The means alone are claimed, and claimed only when specially arranged to produce a given result. This is very far from claiming a func-

tion." *Renwick et al. v. Pond*, 10 Blatch, 39.—BLATCHFORD, 1872.

60. In complainant's patent for horse-rake the claim was: "'The arrangement of the rake-head *E* and treadles *HJ* and *GK*, or either, in relation to each other and the axle *B*, substantially as and for the purposes set forth.'" It was held by the court that the patentee might not be able to thus claim an alternative combination, if the separate combinations would not make an operative machine; but if either or both would, then he might so claim. *Brown v. Whittemore et al.*, 5 Fish. P. C. 524.—LOWELL, 1872.

61. Although a patentee's invention may be broader than his claim, still the matters not claimed are public property. *Evarts et al. v. Ford*, 6 Fish. P. C. 587.—BLODGETT, 1873.

62. "In order to ascertain what it is that is patented, we look to the claim." *Brown v. Hinkley et al.*, 6 Fish. P. C. 370.—LONGYEAR, 1873.

63. "Where a specification by ambiguity and a needless multiplication of nebulous claims is calculated to deceive and mislead the public, the patent is void." *Carlton v. Bokee*, 17 Wall. 463.—SUP. CT. 1872.

64. "One void claim . . . does not vitiate the entire patent, if made by mistake or inadvertence and without any wilful default or intent to defraud or mislead the public."—*Id.*

65. "Usually the claim contains the words 'as described' or 'substantially as described,' or words of like import, which are everywhere understood as referring back to the descriptive parts of the specification. Words of such import, if not expressed in the claim, must be implied." *Mitchell v. Tilghman*, 19 Wall. 287.—SUP. CT. 1873.

66. "A patentee who has invented a new process in the arts, whereby an article of manufacture is produced new in kind and not before known, may separately claim and patent both the art and the manufacture. He cannot properly combine them in one claim. Differing in that respect from the English law, which allows a patent for 'any manner of new manufactures' [a term which includes process and product], our law distinguishes between a patent for an art and a patent for a manufacture." *Merrill v. Yeomans et al.*, 1 Holmes, 331.—SHEPLEY, 1874.

67. "It is competent . . . for a patentee, under the appropriate and fitting conditions appertaining to his invention, to claim broadly the new product, however made, or to claim the new product when made by a described process."—*Id.*

68. "The separate claims of a patent must be construed in reference to the specifications; and if the specifications point out the arrangements to be made or the methods to be adopted in connection with other instrumentalities which the inventor may not claim as new, in order to render his invention practically useful, the test to be applied is not whether the claim alone will produce a useful result, but whether it will do so supplemented by and in connection with such designated devices and instrumentalities." *Welles v. Jacques et al.*, 1 Bann & Ard. 60.—MCKENNAN & NIXON, 1874.

69. "Every skillful mechanic must be able to learn, from the patent itself, precisely what the monopoly covers." *Goulds Mfg Co. v. Cowing et al.*, 12 Blatch. 243.—HUNT, 1874.

70. "A claim for an effect or a function, in the abstract, is not patentable. The mode and machinery by which the effect is produced must be set forth. The party cannot, for example, sustain a patent for determining the depth of the cut of cutting teeth, in the abstract, or by any and all means that may be suggested." *Wheeler et al. v. Simpson et al.*, 1 Bann. & Ard. 420.—HUNT, 1874.

71. The claim of a patent need not necessarily specify parts enough to produce a specific result. The claim may properly be confined to the invention. *Boomer et al. v. United Power Press Co. et al.*, 13 Blatch. 107.—SHIPMAN, 1875.

72. "It is a well-settled principle that a patentee may so limit his claim as to deprive himself of the full benefit of his invention or discovery. It was to remedy such a difficulty or omission that the privilege of surrender and reissue was granted in the patent laws. Patentees often fail to realize any substantial advantage from some of the most useful inventions, owing to their too narrow claims, until such surrender, amendment, and reissue have been made." *Welling v. Rubber-Coated Harness Trimming Co.*, 2 Bann. & Ard. 1.—NIXON, 1875.

73. "When the patentee gets all that he has invented or discovered in one claim, it is better that he should not be permitted to set up and embarrass the public with another claim which gives no additional security or protection to his invention." *Putnam v. Yerrington*, 2 Bann. & Ard. 237.—NIXON, 1876.

74. "Patents for a machine will not be sustained if the claim is for a result, the established rule being that the invention, if any, within the meaning of the patent act, consists in the means or apparatus by which the result is obtained, and not merely in the mode of operation, independent of the mechanical devices employed;

nor will a patent be held valid for a principle or for an idea, or any other mere abstraction." *Fuller et al. v. Yentzer et al.*, 94 U. S. 288.—SUP. CT. 1876.

75. "A distinct and formal claim is . . . of primary importance in the effort to ascertain precisely what it is that is patented." *Merrill v. Yeomans et al.*, 94 U. S. 568.—SUP. CT. 1876.

76. "The genius of the inventor constantly making improvements in existing patents, a process which gives to the patent system its great value, should not be restrained by vague and indefinite descriptions of claims in existing patents from the salutary and necessary right of improving on that which has already been invented."—*Id.*

77. Claims for different combinations are proper in the same patent. *Rice v. Heald*, 13 Pac. Law Rep. 33.—SAWYER, 1877.

78. "Inventions sometimes embrace an entire machine, and in such cases it is sufficient if it appears that the claim is coextensive with the patented improvement. Other inventions embrace only one or more parts of a machine, and in such cases the part or parts claimed must be specified and pointed out, so that constructors, other inventors, and the public may know what the invention is and what is withdrawn from general use." *Parks et al. v. Booth*, 102 U. S. 96.—SUP. CT. 1880.

79. The claim in suit was to "an automatically feeding furnace, in which the ore is carried by the superincumbent weight to be acted upon by the heat, substantially as described." The court said: "This last claim cannot be sustained. There is no automatically feeding furnace in the case. The furnace described is fed by hand. . . The claim does not correspond with or cover the specifications, and in such cases the patentees are confined to what is expressed in their claim." *Knox et al. v. Quicksilver Mining Co.*, 4 Fed. Rep. 809.—FIELD, 1880.

80. It seems that a statement in the specification that a part—which forms an element of a claimed combination—is new is a sufficient notice of claim to such a part of itself. *Rowell et al. v. Lindsay et al.*, 10 Bissell, 217.—DYER, 1881.

81. "As the United States Supreme Court has held divisional patents valid, there can be no legal objection to subdividing the invention into distinct claims." *Brown v. Deere et al.*, 2 McCrary, 422.—TREAT, 1881.

82. In a patent for a horse-rake there was claimed the "arrangement of the rake-head *E*, and the foot-treadles *H J* and *G K*, on either, in relation to each other and the axle *B*, sub-

stantially," etc. The claim was held void for ambiguity. *Edgerton et al. v. Furst & Bradley M'fg Co. et al.*, 10 Bissell, 402.—BLOGGERT, 1881.

83. A combination claim must embrace parts operative to produce a useful result.—*Id.*

84. A claim of the patent in suit was: "In combination with the separator, I claim the vats arranged substantially as described and the method herein described of manufacturing starch." *Held*, to be a "double claim for the combination of the machinery and also for the process." *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 21 Blatch, 519.—SHIPMAN, 1883.

85. For an example of a claim for a product defined by reference to the process by which it was produced, see —. *Globe Nail Co. v. U. S. Horse Nail Co.*, 19 Fed. Rep. 819.—NELSON, 1884.

86. By the court: "In drawing the claims of a combination patent we do not understand it to be necessary to include any elements except such as are essential to the peculiar combination, and are affected by the invention." *Hancock Inspirator Co. v. Jenks*, 21 Fed. Rep. 911.—BROWN, 1884.

87. It was urged against a claim that it did not set forth an operative device, but the parts were so well referred to in the specification as to be understood, and the claim was held sufficient. *Jenkins et al. v. Gurney*, 23 Fed. Rep. 898.—COLT, 1885.

88. Complainants' patented machine was for unhairing and scouring hides and skins. The bed of the table was omitted from the claimed combination. Defendants contended that such bed formed an actual part of the combination, and because not mentioned in the claimed combination, that claim therefore covered a mere aggregation. Defendants' contention was overruled. *McDonald v. Whitney et al.*, 24 Fed. Rep. 600.—COLT, 1885.

89. "Each claim is, in effect, a separate and distinct patent; and the right to use one patent does not carry with it the right to use the others without a further license." *United Nickel Co. v. California Electrical Works*, 25 Fed. Rep. 475.—SAWYER, 1885.

90. The claim in issue was: "2. The arrangement and combination of a rotating pouncing cylinder, with a vertical supporting horn, substantially as described, whereby the supporting horn may be used to support the tips, side crown, or brim during the operation of pouncing the hat." Defendants contended that this claim was indefinite and nebulous; the court

sustained it, saying: "A claim for the combination of parts which perform a distinct function is good." *Nat'l Hat Pouncing Mach. Co. v. Thom et al.*, 25 Fed. Rep. 496.—COLT, 1885.

91. "One seeking a monopoly, which for seventeen years is to levy a tax upon the whole country, for the use of a device which may occur to many others at many times during the life of the monopoly, but who are forbidden to use their invention because a patentee has outstripped them, may surely be required to use plain terms, that plain people may be able to understand, explaining what is claimed to have been invented." *Schilling v. Cranford*, 37 O. G. 1349.—HAGNER, 1885.

92. It is to be doubted whether a claim can be treated as part of the description required by law. *Smith et al. v. Murray et al.*, 27 Fed. Rep. 6).—BLODGETT, 1886.

93. It was urged by defendants that the claim of complainant's patent did not reach to the final result. The final result of both complainant's and defendants' machines was the same. The point contended for by defendants was held immaterial. *Hoe et al. v. Knapp et al.*, 27 Fed. Rep. 204.—BLODGETT, 1886.

94. "Each claim of a patent that covers a complete invention is in substance an independent patent." *Celluloid M'fg Co. v. Zylonite Brush & Comb Co. et al.*, 27 Fed. Rep. 291.—WALLACE, 1886.

95. "There is no arbitrary and formal division of the application into different sections required by law that demands that language naturally indicative of the inventor's claim and intention shall be excluded from consideration as a part of the claim under the statute, simply because it is not found in a particular part of the application, or because it does not follow the words 'I claim;' nor is it necessary to use the word 'claim.'" *La Rue v. Western Electric Light Co.*, 28 Fed. Rep. 85.—BROWN, 1886.

96. "Whether the two patents cover the same thing must be determined by the scope of the claim in the later patent rather than by the description in the specification." *Adams v. Bellaire Stamping Co. et al.*, 36 O. G. 567.—JACKSON, 1886.

97. In a machine for rolling saw-logs the claim was: "In a log-turning device, the spike bar F, having spikes F' in combination with the piston-rod D" and the piston-head D'", of a steam cylinder, A, constructed and operating substantially as and for the purpose described." The machine would not operate without a certain rear pressure roll, and the court said that the claim did not describe patentable subject-matter.

*Tarrant v. Duluth Lumber Co.*, 30 Fed. Rep. 830.—NELSON, 1887.

## COMBINATION—IN GENERAL.

### CASES.

1. When a patent is for a combination of machines, it is not an infringement to use one of the machines. *Evans v. Eaton*, 1 Peters' C. C. 322.—WASH. 1816.

2. A patent for an improvement in the art of making nails by means of a machine which cuts and heads the nail at one operation is not a patent for an abstract principle, nor for the different parts of the machine, but for a combination of the various mechanical powers. *Gray et al. v. James et al.*, 1 Peters' C. C. 394.—WASH. 1817.

3. The separate parts of a claimed combination may be used without infringement.—*Id.*

4. A combination may be composed of old and new machines.—*Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

5. A combination is not infringed by using parts only of the combination.—*Id.*

6. Where the patent is for a combination only—and the elements of the combination may all be old—the whole combination must be used to amount to infringement. *Moody v. Fiske et al.*, 2 Mason, 112.—STORY, 1820.

7. "If old materials and old principles in mechanics, or otherwise, are used in a state of combination so as to produce a new result," the product is a patentable invention. *Pennock et al. v. Dialogue*, 4 Wash. 538.—WASH. 1825.

8. "A patent for a combination of A, B, and C cannot be technically or legally at once a combination of A, B, and C, and of A and B alone." *Prouty et al. v. Draper et al.*, 1 Story, 568.—STORY, 1841.

9. "A combination claim is not infringed by a use of less than the whole thereof." *Howe v. Abbott*, 2 Story, 190.—STORY, 1842.

10. "If the combination was new, it is a patentable matter, although a part of the apparatus might have been applied to similar purposes in other and different machines. Under such circumstances it would not be a mere application of an old apparatus to a new purpose, but a new combination of machinery incorporating, in part, old apparatus for a new purpose." *Pitts v. Whitman*, 2 Story, 609.—STORY, 1843.

11. Where the patented thing is a combination the defendants may, without infringement, use any of the combination less than the whole.



*Brooks et al. v. Jenkins et al.*, 3 McLean, 433.—MCLEAN, 1844.

12. "The same parts must be used in the same combination to make the defendants liable." *Brooks et al. v. Bicknell et al.*, 4 McLean, 70.—MCLEAN, 1845.

13. "Where the patent is for a new combination and not for the newly invented parts, a violation must extend to the whole." *Wilton v. The Railroads*, 1 Wallace, Jr., 192.—SUP. CT. 1847.

14. "It is a well-established principle that when the invention consists of a combination of known mechanical powers, the use of a part less than the whole combination would be no infringement. Each one of the different powers combined constitutes a part of the whole, but the invention is not in any of the parts, but in the combination of them. The parts of which the combination consists remain unrestrained from general use, as before the invention." *Parker v. Havorth*, 4 McLean, 370.—MCLEAN, 1848.

15. "If the patentee borrowed the idea of the different parts which go to constitute his wheel, and for the first time brought them together into one whole, and that whole is materially different from any whole that existed before, then he is the original and first inventor, and is entitled to a patent therefor." *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

16. If defendant omits a material part of complainant's patented combination, he does not infringe.—*Id.*

17. "In a patent for a combination, where the novelty of the invention consists in the combination, it is altogether immaterial whether the elements forming the combination are new or old. All may be old; but if they are brought together in a combination which was never before known, and practically produce a new and useful result, it is a patentable subject." *Buck et al. v. Hermance*, 1 Blatch. 398.—NELSON, 1849.

18. The entirety of a combination must be used in order to infringe. *Foote v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

19. To infringe a combination patent, all the parts of the combination must be used, "constructed and operating substantially in the same way." Yet no mere change in form or proportion, or substitution of mechanical equivalents, will avail a defendant anything. Nor do additions and improvements, though meritorious, give the defendant any right to use the plaintiff's patented improvement. *Gorham v. Minter*, 1 Am. L. J. (N. S.) 539.—SPRAGUE, 1849.

20. "When the application is for a patent for a combination of machinery and materials, form

and structure become substance." *Bain v. Morse*, 6 West L. J. 372.—CRANCH, 1849.

21. "The new combination, when a patent is for that, is not violated when only parts of it are used by others, and not all of them which are material." *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

22. "In order to violate a new combination, all the material parts of it must be used, or that is not used which the patentee claimed as necessary to constitute his new improvement."—*Id.*

23. If a certain part is new, the union thereof with another part makes the combination necessarily new. *Hall v. Wiles*, 2 Blatch. 197.—NELSON, 1851.

24. A defendant does not avoid an infringement of a combination by leaving out one element and substituting therefor something else which performs its office. *Brooks et al. v. Norcross et al.*, 2 Fish. P. C. 661.—WOODBURY, 1851.

25. "If a combination has . . . three different known parts, and the result is proposed to be accomplished by the union of all the parts, arranged with reference to each other, the use of two of these parts only, combined with a third which is substantially different in the manner of its arrangement and connection with the others, is not the same combination, and no infringement." *Brooks et al. v. Fiske et al.*, 15 Howard, 212.—SUP. CT. 1853.

26. "The word 'machine' in the statute includes new combinations as well as new organizations of mechanism, and hence there may be patents for new combinations of machinery to produce certain effects, whether the machines constituting the combination be new or old." *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILLSON, 1856.

27. A claim for a combination of devices "will include all combinations of these devices, to effect the same purpose, which are substantially the same, or, in other words, are mere colorable changes of some of the parts." *Sickles et al. v. Gloucester Mfg Co.*, 3 Wall. Jr. 196.—GRIER, 1856.

28. "The law secures to the patentees the right to the use of their machine, provided it consists of a new combination, although composed of parts well known and in common use." *Carr v. Rice*, 1 Fish. P. C. 198.—BETTS, 1856.

29. "In a patent for a combination there can be no infringement unless all the material parts entering into the combination are used. You may use the parts, provided you do not use the combination." *Foss et al. v. Herbert*, 1 Bissell, 121.—DRUMMOND, 1856.

30. "The most valuable inventions consist in

the combination of known mechanical powers. Every part of such invention may be found in some form among the various devices of human ingenuity, and the man who unites these powers and produces a new and important result to society is well denominated a public benefactor. It is not the man who may form an imperfect machine which may suggest to a higher and more practical order of mind valuable ideas, but it is the one who embodies those ideas in a practical and working form whom the law protects." *Pitts v. Edmonds et al.*, 1 Bissell, U. S. C., 168.—MCLEAN, 1857.

31. "To make a valid claim for a combination, it is not necessary that the several elementary parts of the combination should act simultaneously. If those elementary parts are so arranged that the successive action of each contributes to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as one entire whole, a valid claim for thus combining those elementary parts may be made." *Furbush et al. v. Cook et al.*, 10 Mo. L. R. 664.—CURTIS, 1857.

32. "Nor is it requisite to include in the claim for a combination, as elements thereof, all parts of the machine which are necessary to its action, save as they may be understood as entering into the mode of combining and arranging the elements of the combination."—*Id.*

33. The parts of a combination "may all be such as never existed before in such a combination, and yet the combination may not be new, in the sense of the patent law. To be new in that sense, some new mode of operation must be introduced. And it is decisive evidence, though not the only evidence, that a new mode of operation has been introduced, if the practical effect of the new combination is either a new effect or a materially better effect, or as good an effect more economically attained by means of the change made in the combination of the patentee. A new or improved, or more economical effect, attributable to the change made by the patentee in the mode of operation of existing machinery, proves that the change has introduced a new mode of operation, which is the subject-matter of a patent; and when this is ascertained, it is not a legitimate subject of inquiry at what cost to the patentee it was made, nor does the validity of the patent depend on an opinion formed after the event respecting the ease or difficulty of attaining it."—*Id.*

34. Although three elements of a patented combination may all be old, and two of them have been combined before, yet he who brings

into the combination the third element, and thereby gets a practical advantage, makes a patentable invention.—*Id.*

35. "It would be no defence in an action for the infringement of a combination to show that the separate elements are old; the proof must go to the novelty of the whole combination as a unit." *Latta v. Shawk*, 1 Bond, 259.—LEAVITT, 1859.

36. Where a combination is of old and new parts of a machine, the defendant infringes if he takes the new part only.—*Id.*

37. Defendant cannot evade plaintiff's patent for a combination by not using a part proved not to be material to the successful working of the plaintiff's combination.—*Id.*

38. There are two classes of combinations known to the patent law: one in which all the elements are old, and another in which some of the elements are new. In the former case all the elements must be used to constitute infringement, but in the latter case the patent is infringed if only the new elements are used. *Lee et al. v. Blandy et al.*, 1 Bond, 361.—LEAVITT, 1860.

39. A combination is a "union of parts co-operating to produce one result." *Howe v. Morton et al.*, 13 M. L. R. 70.—SPRAGUE, 1860.

40. "There may be sub-combinations entering into the general combination."—*Id.*

41. Said by the court of a sewing-machine patent: "It is familiar law that a new arrangement, a new combination, may constitute a new invention. If not only all the primary elements, but all the sub-combinations, had existed in different machines before, but never before had been brought together to constitute one machine, and co-operating to produce one result, and Howe had brought them together by invention, producing a useful result, he would be entitled to a patent for such combination and arrangement."—*Id.*

42. Where a patent is for a combination, a party using the same cannot prove that a part of the combination is useless, and therefore need not be considered. *Vance v. Campbell et al.*, 1 Black, 427.—SUP. CT. 1861.

43. "In order to constitute an infringement of a combination, the whole combination must be used." *Case v. Brown*, 1 Biss. 382.—DRUMMOND, 1862.

44. "The principle is undoubted, that in a patent for a mechanical structure, the novelty and utility of which consists wholly in a combination of things before known and in use, there is no infringement by the use of any of the separate parts of the combination." *Tilghman v. Werk*, 1 Bond, 511.—LEAVITT, 1862.

45. Where a patent is for a combination of mechanical powers to effect a useful result, it differs essentially from one where the subject-matter is new. *Eames v. Godfrey*, 1 Wallace, 78.—*SUP. CT. 1863.*

46. "There is no infringement of a patent which claims mechanical powers in combination, unless all the parts have been substantially used. The use of a part less than the whole is no infringement."—*Id.*

47. As regards a patent for a combination, if the defendant uses all the parts but one, and for that substitutes another mechanical structure, different in its construction and operation, but serving the same purpose, he is not an infringer.—*Id.*

48. Where a patent is for a combination, in order to infringe it there must be a use of the same methods substantially as those adopted by the patentee. *Case v. Brown*, 2 Wallace, 230.—*SUP. CT. 1864.*

49. "The patentee of a machine which consists merely of . . . a combination cannot prevent the use of any number of those parts less than the whole, or of new and substantial improvements of those old parts themselves, but only his own combination of parts, or known substitutes therefor." *Hale et al. v. Stimpson et al.*, 2 Fish. P. C. 565.—*LOWELL, 1865.*

50. "Where all the elements of a machine are old, and the invention consists solely in the combination, by which a new and useful result is effected, as compared with the old machine, on which the improvement is made, no one can be held as an infringer who does not use all the elements of the new combination." "The property of the first inventor consists in the new combination he has made, and to that its result he is fully and fairly entitled; but he cannot invoke the doctrine of equivalents to suppress any other improvement which does not embrace his improvement, and which is substantially different. Formal differences or colorable evasions, however, are not sufficient to confer any right as against the first patent, but the patentee and all those claiming under him will treat all such as culpable infringements." *Roberts v. Harneden*, 2 Clifford, 500.—*CLIFFORD, 1865.*

51. "In considering whether one element of a combination is substantially the same as the element of another combination, the fact that one works better than the other, coupled with the fact that the change is not within the knowledge and skill of all mechanics, is highly important and often decisive." *Woodman v. Stimpson*, 3 Fish. P. C. 98.—*LOWELL, 1866.*

52. "A combination in mechanism must con-

sist of distinct mechanical parts, having some relation to each other, and each having some function in the organism." *Yale & Greenleaf Mfg Co. et al. v. North*, 5 Blatch. 455.—*SHIPMAN, 1867.*

53. "A person obtains a patent for a machine containing three different elements in combination. Those three elements separately are none of them new, but the patentee, by his ingenuity and study, has contrived to combine them so as to produce a new and useful result, and that is a patentable subject under our patent laws." *Blanchard et al. v. Puttman et al.*, 2 Bond, 85.—*LEAVITT, 1867.*

54. All the parts of a combination "must coact in producing the results claimed for the combination." *Swift et al. v. Whisen et al.*, 2 Bond, 115.—*LEAVITT, 1867.*

55. "Where a patent is obtained as one combination of a number of parts which in themselves are not new, there is no infringement, in the eye of the law, of the right secured by such a patent unless the entire combination is used. If the alleged infringer uses less than all the combination and nothing else, he is not liable. If he uses less than all and substitutes something for the part omitted different from that which he omits, and which answers the same purpose, unless the substitute be a mere mechanical equivalent used for the combination, then, . . . according to the rule of law as well established on the subject, there is no liability." *Densmore et al. v. Schofield et al.*, 4 Fish. P. C. 148.—*SWAYNE, 1868.*

56. "Undoubtedly there may be separate combinations, and each separate combination may or may not all be covered by the same patent, as there may be separate and several things in the combination all covered by the same patent. When there is a combination complete in itself, more or less extensive, it is in the eye of the law, so far as its patentability is concerned, as much an identity and separate thing as if it were not a combination, but a single thing independent and complete in itself, and having no element of combination in it."—*Id.*

57. "A patent for a combination of two things is not, of course, a patent for a combination of one of the two with a third and different thing." *Nicholson Pavement Co. v. Hatch et al.*, 4 Sawyer, 692.—*FIELD, 1868.*

58. "It is a familiar and undoubted principle of law . . . that in a patent for the combination of three well-known things, the making and use of two only of them is no violation or infringement of the patent." *Haselden v. Ogden*, 3 Fish. P. C. 378.—*SHERMAN, 1868.*

59. "Infringement depends not so much on the form of the particular device in question, or upon the name given to it in the specification by the construction, as upon the functions it performs, and it is well-settled law that if one device is employed in a similar combination to another, and performs the same function in the same way, the two are substantially the same, although they may be different in form, and may be known among mechanics by different names." *Graham et al. v. Mason*, 4 Clifford, 88.—CLIFFORD, 1869.

60. "Technical equivalents do not belong to a mere combination of old elements. Such a combination is regarded merely as an improvement upon what was before known, and which, without such new combination, would have belonged to the public. Inventors of such improvements, if their rights are secured by letters-patent, may treat all others as infringers who make, use, or vend to others to be used, any and every subsequent combination of those elements not substantially different merely because the person constructing the machine under it employs a different device for one of the elements, provided such device was, at the date of the first patent, a well-known substitute for the omitted element." *Sands v. Wardell et al.*, 3 Clifford, 277.—CLIFFORD & CLARK, 1869.

61. What is specified as an element of a combination claim cannot be rejected as surplusage.—*Ib.*

62. Where a combination is made up of old elements, "the doctrine of mechanical equivalents does not apply." *Crampton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.

63. "The patentee of a combination cannot treat another as infringer who has improved the original machine by the use of a substantially different combination, though it produces the same result."—*Ib.*

64. Where the claim of a patent is for a combination, the presumption is that the elements separately considered are old. *Rich v. Close*, 8 Blatch. 41.—WOODRUFF, 1870.

65. In the claim of complainant's patent for improvement in water-wheels, the combination included as one element a certain "tube F." Plaintiff desired to show that this tube was immaterial. Plaintiff was not permitted to show this, and as defendant's device did not have this tube, defendant was held not to infringe.—*Ib.*

66. "Although a combination of old devices may be patentable when a new and useful result is produced, no one can, by combining several devices, each of which is old, thereby deprive others of the right to use them separately, or of the right

to use them in new combinations, or of the right to use some of them in combination, omitting others." *Hailes et al. v. Van Wormer et al.*, 7 Blatchford, 443.—WOODRUFF, 1870.

67. "If the combination of . . . old devices be supplemented by other and new devices co-operating therewith, and thereby a new and useful result is produced not attained by the action of the old devices, there also is invention."—*Ib.*

68. "Actual inventors of a combination of two or more ingredients in a machine, secured by letters-patent in due form, are entitled, even though the ingredients are old, if the combination produces a new and useful result, to treat every one as an infringer who makes or uses or vends the machine to others to be used without their authority or license. . . .

"They cannot suppress subsequent improvements which are substantially different, whether the new improvement consists in a new combination of the same ingredients, or of the substitution of some newly-discovered ingredient, or of some old one, performing some new function not known at the date of the letters-patent, as a proper substitute for the ingredients withdrawn from the combination constituting their invention. Mere formal alterations in a combination in letters-patent, however, are no defence to the charge of infringement, and the withdrawal of one ingredient from the same, and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination if the ingredient substituted performs substantially the same function as the one withdrawn.

"Patentees, therefore, are entitled in all cases to invoke to some extent the doctrine of equivalents, but they are never entitled to do so in any case to suppress all other substantial improvements, and the rule which disallows such pretensions, if properly understood and limited, is as applicable to the inventor of a device, or even of an entire machine, as to the inventor of a mere combination, except that the inventor of the latter cannot treat any one as an infringer whose machine does not contain all of the material ingredients of the prior combination, as in that state of the case the subsequent invention is regarded as substantially different from the former one, unless the latter machine employs as a substitute for the ingredient left out to perform the same function some other ingredient which was well known as a proper substitute for the same when the former invention was patented. . . .

"*Bona fide* inventors of a combination are as

much entitled to suppress every other combination of the same ingredients to produce the same result, not substantially different from what they have invented and caused to be patented, as any other class of inventors. All alike have the right to suppress every colorable invasion of that which is secured to them by their letters-patent." *Seymour v. Osborn*, 11 Wall. 516.—SUP. CT. 1870.

69. "Inventors of a combination are as much entitled to suppress every other combination of the same ingredients, to produce the same result, not substantially different from what they have invented and caused to be patented, as any other class of inventors, and they have the right to invoke the doctrine of equivalents to that extent to sustain their invention." *Sayles v. Chicago & N. W. R. R. Co.*, 3 Bissell, 52.—DRUMMOND, 1871.

70. "If a patentee has invented a combination of two or more old things so as to produce a new and useful result, then he has a right to treat as infringers all who have used his invention in order to accomplish something more or better, when, without the aid of such invention, it could not be effected."—*Ib.*

71. "A combination, all the elements of which are old is patentable, if a new or improved result is thereby obtained; . . . a combination, all the elements of which, except a single one, have been before used together, is also the subject of a patent. The whole combination is to be regarded as a unit, and if all its essential elements have not before been embodied and employed together, it is to be taken as an original invention." *Watson et al. v. Cunningham et al.*, 4 Fish. P. C. 528.—MCKENNAN, 1871.

72. "A combination to be valid must have the attribute of practical utility, but this is not to be determined by a reference to the abstract practicability of the elements claimed to compose it. Resort must be had to the whole specification, and if it is therein properly described, its relation to co-operative mechanism indicated and explained, and the method of its use in connection therewith directed, and, when so used, is practically operative, it is a good combination, and will support a restricted claim for it." *Parham v. American B. O. & Sewing Machine Co. et al.*, 1 Pa. Leg. G. Rep. 145.—MCKENNAN, 1871.

73. Where the patent in suit is for a combination, and the device substituted for one of the elements "is not a device known in mechanics, for accomplishing similar results in machinery, and would require the discovery of something new, the invention of something not before

known, nor before used in machinery for any similar or analogous purpose, then its contrivance and application to the purpose indicated is not the mere substitution of a known mechanical substitute, and is not an infringement." *Carter et al. v. Baker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

74. The patent in question was for a lamp-burner, and the combination claimed included the chimney, which defendants did not make. Defendants were held to infringe. *Wallace et al. v. Holmes et al.*, 9 Blatch. 65.—WOODRUFF, 1871.

75. "Where a patent is granted for a mere combination of old devices to produce a new result, such a patent is not infringed by one who produces the same result without using all the devices which are included in the combination patent." *Waterbury Brass Co. v. E. Miller & Co.*, 9 Blatch. 77.—WOODRUFF, 1871.

76. "All machines are in a certain sense combinations, but it is not true of machines, as such, that, because every one of its members performs in it the identical office which it would perform howsoever used, the conjoint action in their new combination may not produce a result new and useful, and never before attained." *Gallahue et al. v. Butterfield*, 10 Blatch. 232.—WOODRUFF, 1872.

77. "Patentable inventions may consist entirely in a new combination of old ingredients whereby a new and useful result is obtained, and in such cases the description of the invention is sufficient if the ingredients are named, the mode of operation given, and the new and useful result is pointed out, so that those skilled in the art, and the public, may know the nature and extent of the claim and what the parts are which co-operate to produce the described new and useful result." *Gould v. Rees*, 15 Wall. 187.—SUP. CT. 1872.

78. "Mere formal alterations of a combination in letters-patent do not constitute any defence to the charge of infringement, as the inventor of a combination is as much entitled to suppress any other combination of the same ingredients to produce the same result, not substantially different from what he has invented and caused to be patented, as the inventor of any other patented improvement. Such inventors may claim equivalents as well as any other class of inventors, and they have the same right to suppress every other subsequent improvement, not substantially different from what they have invented and secured by letters-patent, but they cannot suppress subsequent improvements which are substantially different from their inventions,

whether the new improvement consists in a new combination of the same ingredients or of some newly-discovered ingredient, or even of some old ingredient performing some new function, not known at the date of the letters-patent, as a proper substitute for the ingredient withdrawn.”

—*Ib.*

79. “Unquestionably, the withdrawal of one ingredient in a patented combination and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination ; and if the ingredient substituted performs substantially the same function as the one withdrawn, it would be correct to instruct the jury that such a substitution of one ingredient for another would not avoid the charge of infringement.”—*Ib.*

80. “If the ingredient substituted for the one withdrawn was a newly-discovered one, or even an old one performing some new function, and was not known at the date of the plaintiff’s patent as a proper substitute for the ingredient withdrawn, it would not be an equivalent for the ingredient withdrawn, it would avoid the infringement, as a new combination or a newly-discovered ingredient substituted for the one omitted, or even an old one performing a new function, not known at the date of the plaintiff’s patent as a proper substitute for the one withdrawn, would not be an equivalent for the ingredient omitted within the meaning of the patent law ; nor could it be successfully claimed as such by the plaintiff in order to support the charge of infringement. Such an alteration is not a mere formal alteration, as the difference between the two improvements is such that the new combination would be the proper subject for a patent, and consequently would avoid the charge of infringement in a case like the one supposed by the court.”—*Ib.*

81. “*Bona fide* inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements ; by which is meant, that a patentee, in such a case, may substitute another ingredient for any one of the ingredients of his invention, if the ingredient substituted performs the same function as the one omitted, and was well known at the date of his patent as a proper substitute for the one omitted in the patented combination. Apply that rule, and it is clear that an alteration in the patented combination which merely substitutes another old ingredient for one of the ingredients in the patented combination is an infringement of the patent, if the substitute performs the same function and was well known at the date of the pat-

ent as a proper substitute for the omitted ingredient ; but the rule is otherwise, if the ingredient substituted was a new one, or performs a substantially different function, or was not known at the date of the plaintiff’s patent as a proper substitute for the one omitted from his patented combination.”—*Ib.*

82. “Where the defendant, in constructing his machine, omits entirely one of the ingredients of the plaintiff’s combination without substituting any other, he does not infringe, and if he substitutes another in the place of the one omitted, which is new, or which performs a substantially different function, or if it was old, but was not known at the date of the plaintiff’s invention as a proper substitute for the omitted ingredient, then he does not infringe.”—*Ib.*

83. “It is not always enough to prove that two combinations of elements are equivalent to show that each element of the combination in one may be regarded, under some circumstances, as the equivalent of the corresponding element in the other, when the elements are separately considered. If the mechanical combination of the members of the two machines be such that the action and mode of operation differ in the two machines, then one is something more than a mere mechanical equivalent for the other.” *Blake et al. v. Rawson*, 1 Holmes, 200.—SHEP-LEY, 1872.

84. “Patents may be granted for combinations in which some of the parts are old and some are new ; and whatever in the several parts is new may be separately secured to the inventor ; and yet it may be true that only in the combination described, or in some similar combination, the new part thus secured to the inventor is of any practical use whatever.” *Wheeler, Jr., v. Clipper Mower and Reaper Company*, 10 Blatch. 181.—WOODRUFF, 1872.

85. The claim in complainant’s patent was : “What I claim, therefore, and desire to secure by letters-patent, is the combination of a lock and latch, when the latch-bolt and its operative mechanism are arranged in a case or frame independent of the main case and constructed so that the latch-bolt may be reversed substantially as described, without removing the said independent case from the main case.” Thereof the court said : “He might, no doubt, have claimed the improved reversible latch enclosed in any outer case. If that latch in its construction, mode of operation, and arrangement for reversing was new and useful, it was patentable, and his patent might have been more comprehensive than it now is. His patent is not to be held invalid because he only claims it when held in an-

other case, containing also lock mechanism, if, in fact, his improvement was patentable; not even though there is no relation in the operation of the two, and no effect from the combination which either separately would not produce. Nothing in the cases cited forbids the inventor of a new device from taking a patent under a claim narrowed as closely as he sees fit, and, however much narrower than he might have claimed, the patent is valid." *Russell & Erwin M'fg Co. v. Mallory et al.*, 10 Blatch. 140.—WOODRUFF, 1872.

86. "The rules of law applicable to the subject of combinations are free from difficulty. . . . A patent for a combination, where neither part is patented as new, is not infringed by one who uses one, or some, but not all of the parts." *Sarven v. Hall et al.*, 9 Blatch. 524.—WOODRUFF, 1872.

87. A combination patent is not infringed by the use of less than all the elements of the combination. *Garratt v. Seibert*, 7 Pac. Law Rep. 116.—STRONG, 1873.

88. "Where a combination is claimed the patentee cannot abandon part of said combination and maintain a claim to the residue, nor prove any part thereof immaterial or useless without destroying the whole. For the combination is an entirety, and if one of the elements is given up, the combination disappears." *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

89. "When a party has patented a combination, and that combination turns out to be useless, of no practical utility, and another party adds to the combination another element, and thereby makes the whole practically useful where there was no utility before, the party who thus adds another element to the combination which was necessary to make the proper combination of any practical utility is not an infringer, and . . . he is not entitled merely to use his improvements, requiring first a license to use the former combination, but . . . he may use the whole of it." *Robertson v. Hill*, 6 Fish. P. C. 465.—SHEPLEY, 1873.

90. "The use of any number of the elements of a patented combination less than the whole, or their equivalents, or what is substantially the same thing, is no infringement." *Brown v. Hinkley et al.*, 6 Fish. P. C. 370.—LONGYEAR, 1873.

91. Infringement of a combination is not avoided by substituting a well-known mechanical equivalent therein. *King v. Louisville Cement Co.*, 6 Fish. P. C. 336.—BALLARD, 1873.

92. "No one infringes a patent for a combination who does not employ all the ingredients of

the combination; but if he employs all the ingredients, or adopts mere formal alterations, or substitutes for one ingredient another which is well known at the date of the patent as a proper substitute for the one withdrawn, and which performs substantially the same function as the one withdrawn, he does not infringe."—*Id.*

93. "The description in the specifications of the operation and effect of each separate element or part of the patented combination must be read and construed with reference to the entire combination and its results, and the effect which the operation that each element or part has upon that of each of the others." *Hamilton v. Ives et al.*, 6 Fish. P. C. 244.—LONGYEAR, 1873.

94. "A valid combination may consist of old elements which have not been before similarly arranged, or, if they have, . . . a novel result is produced by their conjunction. Either the instrumentalities employed or the effect caused by their operation must be new to constitute a patentable combination. If substantially the same devices have been used before for a like purpose, or if they are applied merely to effectuate a method known and practised before, such employment of them will not be protected by a patent." *N. W. Fire Ec. Co. v. Philadelphia Fire Ec. Co.*, 1 Banning & Arden, 177.—MCKENAN, 1874.

95. In a combination "it is not necessary that every function should be performed simultaneously. Their connection and operation . . . in immediate succession is sufficient." *Birdsall v. McDonald et al.*, 1 Banning & Arden, 165.—SWAYNE & WELKER, 1874.

96. The law "protects the inventors of combinations against the substitutions of equivalents as fully as the inventors of other patentable improvements." "In order to avoid the charge of infringement in such cases, the substituted ingredient must be a new one, or must perform a substantially different function, or must be unknown at the date of the plaintiff's patent as a proper substitute for the one omitted from the patented combination." *Webster et al. v. New Brunswick Carpet Co.*, 1 Banning & Arden, 84.—NIXON, 1874.

97. When "the whole combination, as an entirety, is the thing claimed as the invention, and patented, no part, however useless, can be dispensed with for the purpose of working out an infringement." *Coolidge v. McCone*, 2 Sawyer, 571.—SAWYER, 1874.

98. "There must be the use of the entire combination, a combination of all the parts, in order to constitute an infringement." *Fisher v. Craig*, 3 Sawyer, 69.—SAWYER, 1874.

99. "A patent for a combination is infringed by the use of a similar combination, although one of the elements is omitted and another substituted for it, unless the substituted device is a new one, or performs a function essentially different, or was not known at the date of the patent as a proper substitute for the one omitted." *Welling v. Rubber Coated Harness Trimming Co. et al.*, 1 Banning & Arden, 282.—NIXON, 1874.

100. "Valid letters-patent may be granted for an invention which consists entirely of a new combination of old ingredients, provided that it appears that the new combination of the ingredients produces a new and useful result; but the rule is equally well settled in such a case that the invention consists merely in the new combination of the ingredients, and that a suit for an infringement cannot be maintained against a party who constructs or uses a substantially different combination, even though it includes the exact same ingredients.

"Alterations, however, in a combination which are merely formal do not constitute a defence to the charge of infringement, as the inventor of a new and useful combination of old ingredients is as much entitled to claim equivalents as any other class of inventors, but they cannot suppress subsequent improvements, which are substantially different from their inventions, whether the new improvement consists of a new combination of the same ingredients or of some newly-discovered ingredient, or even of some old ingredient performing some new function not known at the date of the letters-patent as a proper substitute for the ingredient withdrawn.

"Old ingredients known at the date of the letters-patent granted for an invention, consisting of a new combination of old ingredients, if also known at that date as a proper substitute for one or more of the ingredients of the invention secured by the letters-patent, are the equivalent of the corresponding ingredients of the patented combination. Such old ingredients, *so known* at the date of the letters-patent granted, are the equivalents of the ingredients of the patented combination, and no others, and it may be added that *that*, and that only, is what is meant by the rule that inventors of a new combination of old ingredients are as much entitled to claim equivalents as any other class of inventors."—*Gill v. Welles*, 22 Wall. 1.—SUP. CT. 1874.

101. A patent for a new combination of old parts "is valid and operative, but the rights of the patentee under it differ in some respects from those of a patentee for an invention which

consists of an entire machine, or of a new and useful device, as the rights of a patentee for a mere combination of old ingredients are not infringed unless it appears that the alleged infringer made or used the entire patented combination."—*Ib.*

102. "Argument to show that an invention consisting of a combination for three ingredients which are old is not the same as that of a combination of four old ingredients, is quite unnecessary, as the negative of the proposition is as well settled in the patent law as it is in mathematics." "A patentee in suit for an infringement of an invention consisting of a combination of old ingredients cannot, in his proofs, abandon a part of such a combination and maintain his claim to the rest, for the reason that unless the patented combination is maintained the whole of the invention fails.

"The patentee in such a suit cannot be allowed to prove that any part of the combination is immaterial or useless. The combination is an entirety, and if one of the ingredients be given up the thing claimed disappears, which is an obvious truth, as the invention in such a case consists simply in the combination. The clause which provides that the suit shall not be defeated where the patentee claims more than he has invented, in case he shall disclaim such part, applies only where the part invented can be clearly distinguished from that improperly claimed, which shows that the clause cannot apply to a patent granted for an invention consisting of a combination of old ingredients."—*Ib.*

103. By a mechanical equivalent in a case of a combination "is meant that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent securing the invention as a proper substitute for the one omitted in the patented combination."—*Ib.*

104. "A party who merely substitutes another old ingredient for one of the ingredients of a patented combination is an infringer if the substitute performs the same function as the ingredient for which it was substituted, and was well known at the date of the patent as a proper substitute for the omitted ingredient; but the rule is otherwise if the ingredient substituted was a new one, and performed substantially a different function, or was not known at the date of the plaintiff's patent as a proper substitute for the one omitted, as in that event he does not infringe."—*Ib.*

105. "It is somewhat difficult, and perhaps impossible, to draw a clear and well-defined line



between what is termed a mere aggregation of devices and what is regarded as a patentable combination." *Westinghouse, Jr., v. Gardner & Ranson Air-Brake Co.*, 2 Banning & Arden, 55.—SWAYNE & WELKER, 1875.

106. "Equivalents are allowed in an invention consisting of a combination of old ingredients, as well as in every other class or description of inventions. Such an invention consists entirely in the combination, and the rule is that the rights of the patentee under it differ in one respect from those of a patentee of an invention that consists of an entire machine, or of a new and useful device, as the rights of a patentee for a mere combination of old ingredients are not infringed unless it appears that the alleged infringer made or used the entire combination. . . . Combinations of the kind include not only the ingredients described in the patent, but equivalents also, by which is meant any other ingredients which will perform the same function as the one described, and which were well known at the date of the patent as proper substitutes for the ones actually described in the patent." *Storrs v. Howe et al.*, 4 Clifford, 388.—CLIFFORD, 1876.

107. "Where the invention consists entirely in a new combination of old elements or ingredients, the law is well settled that a suit for infringement cannot be maintained unless it appears that the respondent has used all the elements or ingredients of the new combination." *Sanford et al. v. Merrimack Hat Co.*, 4 Cliff. 407.—CLIFFORD, 1876.

108. "Valid letters-patent undoubtedly may be granted for an invention which consists entirely in a new combination of old elements or old ingredients, provided it appears that the new combination of the ingredients produces a new and useful result; but the rule is equally well settled that the invention in such a case consists merely in the new combination, and that a suit for infringement cannot be maintained against a party who constructs or uses a substantially different combination, even though it includes the exact same elements or ingredients, if the combination is in fact new and useful, and substantially different from the one which preceded it." *Fuller et al. v. Yentzer et al.*, 94 U. S. 288.—SUP. CT. 1876.

109. "Where the claim for the patent is for a combination, it is necessary to understand the meaning of the several devices of which the combination is composed." *Carameyer et al. v. Newton et al.*, 94 U. S. 225.—SUP. CT. 1876.

110. Where the patent in suit is for a combination then upon the question of infringe-

ment, "though some of the corresponding parts of the machinery designated in this combination are not the same in point of form in the two bolting apparatuses, and, separately considered, could not be regarded as identical or conflicting, yet having the same purpose in the combination, and effecting that purpose in substantially the same manner, they are the equivalents of each other in that regard." *Cochrane et al. v. Deener et al.*, 94 U. S. 780.—SUP. CT. 1876.

111. "If the combination is used, although some of its separate parts may be improved, it is an infringement." *Converse et al. v. Cannon et al.*, 2 Woods, 7.—WOODS, 1873.

112. A claim for a combination is not infringed unless all the parts of the combination are used. *Eddy v. Dennis*, 95 U. S. 560.—SUP. CT. 1877.

113. "When the patent is for a peculiar combination of old devices the patentee cannot insist upon mechanical equivalents." *Yuengling v. Johnson*, 1 Hughes, 607.—HUGHES, 1877.

114. "Mechanical equivalents cannot be insisted upon in inventions which consist in the mere arrangement of old devices."—*Id.*

115. "The invention of a new device is in general patentable without reference to the object it is designed to accomplish, and is good against any subsequent invention of the same device designed for any other object. . . . This is not necessarily the case where the invention is merely of a combination of old devices. In such inventions the purpose aimed at, the form of the structure, its portableness or non-portableness, whether it is used as a fixture or carried in the hand, are elements which, though any one of them might not determine its character with reference to another invention of a combination of devices, yet all together might unite to constitute it a different instrument."—*Id.*

116. Combinations of machinery which produce a result by the successive action of the parts, each producing its own results, are patentable combinations. *Herring et al. v. Nelson et al.*, 14 Blatch. 293.—JOHNSON, 1877.

117. "A combination is always an entirety. In such cases the patentee cannot abandon a part and claim the rest, nor can he be permitted to prove that a part is useless and therefore immaterial. He must stand by his claim as he has made it." *Schumacher v. Cornell*, 96 U. S. 549.—SUP. CT. 1877.

118. "In the case of a claim for a combination, where all the elements of the invention are old, and where the invention consists entirely in the new combination of old elements or devices

whereby a new and useful result is obtained, such combination is sufficiently described if the elements or devices of which it is composed are all named, and their mode of operation given, and the new and useful result to be accomplished pointed out, so that those skilled in the art, and the public, may know the extent and the nature of the claims, and what the parts are which co-operate to produce the described new and useful result." *Bates et al. v. Coe*, 98 U. S. 31.—*SUP. CT.* 1878.

119. "Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine, and another part in another prior exhibit, and still another part in a third one, and from three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement."—*Id.*

120. "The patentee or owner of a patent for a combination is as much entitled to equivalents as the patentee or owner of any other class of inventions. Doubts at one time existed as to the correctness of that proposition, but it is now well settled." *American Whip Co. v. Lombard*, 4 Clifford, 495.—*CLIFFORD*, 1878.

121. "If the defendant omits entirely one of the elements or ingredients of the patented combination without substituting any other in its place, he does not infringe the plaintiff's patent; and if he substitutes another in the place of the omitted one, which is new, or which performs a substantially different function, or, even if it is old, was not known at the date of the plaintiff's patent as a proper substitute for the omitted element or ingredient, then the charge of infringement is not maintained. By an equivalent in such a case, it is meant that the element or ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent in question as a proper substitute for the one omitted in the patented combination. Hence it follows that a party who merely substitutes another old element or ingredient for one of the elements or ingredients of a patented combination is an infringer, if the substitute performs the same function as the one omitted, and was well known at the date of the patent as a proper substitute for the element or ingredient employed in the patented combination."—*Id.*

122. "Mere formal alterations of a combina-

tion in letters-patent do not constitute any defence to the charge of infringement, as the inventor of such an improvement is as much entitled to suppress every other combination of the same devices to produce the same result as the inventor of any other patented process or product."—*Id.*

123. Though two combinations may have the same parts, yet if in the latter the parts are differently combined, and produce a different result, the latter combination is patentable. *Hovess et al. v. McNeal*, 15 Blatch. 103.—*BLATCHFORD*, 1878.

124. For example of improvement in the parts of a lamp held to be a patentable combination and not a mere aggregation see—. *Williams v. Rome, Watertown and Ogdensburg Railroad Co.*, 15 Blatch. 200.—*BLATCHFORD*, 1878.

125. The patentee of a combination "may doubtless invoke the doctrine of equivalents as against the infringer of a patent, but the term 'equivalent' as applied to such an invention, is special in its signification, and somewhat different from that which is meant when the term is applied to an invention consisting of a new device or an entirely new machine." *Imhaeuser v. Buerk*, 101 U. S. 647.—*SUP. CT.* 1879.

126. "Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same functions, if it was well known as a proper substitute for the one described in the specification at the date of the patent."—*Id.*

127. "Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another prior exhibit, and still another part in a third prior exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the first and original inventor of the patented improvement."—*Id.*

128. "A combination is sufficiently described to constitute a compliance with the letter and spirit of the act of Congress if the devices of which it is composed are specifically named, their mode of operation given, and the new and useful result to be accomplished is pointed out, so that those skilled in the art, and the public,

may know the extent and nature of the claim, and what the parts are which co-operate to do the work claimed for the invention." *Parks et al. v. Booth*, 102 U. S. 96.—SUP. CT. 1880.

129. "Old instrumentalities are patentable when combined for the first time in such a manner as to produce new and useful results." *Willimantic Linen Co. et al. v. Clark Thread Co. et al.*, 4 Banning & Arden, 133.—NIXON, 1879.

130. "Where an invention pertains to a machine where all the elements are old, and where the invention consists in the new combination, "A party guilty of infringing . . . must be shown to have used all the necessary parts of the combination."—*Ib.*

131. "Where there is a patent for a combination of old parts there can be no infringement unless all the material parts are used, because, without one of them, the combination or arrangement would be different." *Burdett v. Estey et al.*, 16 Blatch. 105.—WHEELER, 1879.

132. "In a patent for a combination the use of equivalents known to be such at the date of the patent may be included."—*Ib.*

133. "It is a well-known doctrine of patent law that the claim of a combination is not infringed if any material parts of the combination are omitted. It is equally well known that if any one of the parts is only formally omitted, and is supplied by a mechanical equivalent, performing the same office, and producing the same result, the patent is infringed." *Union Water-Meter Co. v. Desper*, 101 U. S. 332.—SUP. CT. 1879.

134. "Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim."—*Ib.*

135. "It is not necessary that the several elementary parts of the combination should act simultaneously." It suffices if the result is the "product of the successive action of all the elementary parts." *Hoe et al. v. Cottrell et al.*, 17 Blatch. 546.—SHIPMAN, 1880.

136. As there were prior to the patentee's invention structures "having all these elements arranged in the same order, although of different form and capacity, he was entitled only to his particular form of devices, which were really different from those which had been in use or known before, and the combination of these devices with each other or with others so as to produce a new result, or an old result in a new

way." *Sharp v. Tiff*, 18 Blatch. 132.—WHEELER, 1880.

137. "Generally where a patent is for a combination of known parts, materials, or elements, it is not infringed by the use of any number of the parts, materials, or elements less than the whole, for the patent in every such case is for that identical combination and nothing else, and a combination of any less number of parts is a different thing. (*Prouty v. Ruggles*, 16 Pet. 336.) But where some of the parts of the combination are new, and those parts are taken and used in the same manner, but with different things from the rest of the combination patented, a part of the patented invention is taken although the whole is not, and it is an infringement to that extent." *Union Sugar Refinery v. Matthieson*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

138. A claim for a combination of old parts is not infringed unless all the parts are used. *Flaurot et al. v. Hawes*, 3 Fed. Rep. 456.—BAXTER, 1880.

139. Where a portion of the elements of a combination are new, he who appropriates the new parts, and uses something to fill the place of the balance of the elements of the combination is an infringer as to such new parts. *Holly v. Vergennes Mach. Co. et al.*, 18 Blatch. 327.—WHEELER, 1880.

140. If the invention "is of a combination of numerous parts, including in it other new and useful combinations of less of the parts, he seems to be entitled to the exclusive use of these lesser combinations as well as to the exclusive use of the whole."—*Ib.*

141. "It is not necessary, in order to constitute infringement of a combination patented as such, that the whole combination should be used. If a part of it only, that, separate from the rest, was new and patentable to the inventor, is used, taking that part is an infringement *pro tanto*." *Adair v. Thayer*, 17 Blatch. 468.—WHEELER, 1880.

142. "It is a settled rule of law that where a patent is for a combination of known parts, it is not infringed by the use of any number of parts less than the whole. This principle has been so often reiterated that it is elementary." *Rowell et al. v. Lindsay et al.*, 10 Bissell, 217.—DYER, 1881.

143. "It is conclusively settled that where a patentee claims as his invention only the combination which he describes, the separate parts which constitute the combination are to be regarded as old, or common and public."—*Ib.*

144. "There is . . . a class of combinations, where some of the parts are new and others old,

and where the new parts are claimed as inventions. If the combination is of this character the appropriation of the part which is new is an infringement."—*Ib.*

145. An element of a combination in order to be new, to the extent of being specifically exempt from appropriation by others than the patentee, must be new of itself, not simply in the use made of it by the patentee.—*Ib.*

146. The patentee must stand by his whole combination in a suit. He cannot abandon a part thereof. He cannot prove any part to be immaterial or useless.—*Ib.*

147. The doctrine of *Gill v. Wells* (22 Wall. 1) as to equivalents in combinations stated and followed.—*Ib.*

148. Where defendant substitutes for one old element of a combination another element performing a partly different function, the substituted element is not an equivalent.—*Ib.*

149. The doctrine of known substitutes for the element of a combination "is a doctrine of very limited application, and, as a formula, is, perhaps, rather misleading. The true question always is whether the defendant uses anything which the plaintiff invented."—*Ib.*

150. A claim being, as construed, to the combination of a spring and a tongue with a side recess open underneath, defendant urged that no actual combination existed in that the new form of recess (the broad combination being old) exerted no new influence on the spring, and *vice versa*. The court found that the new form of recess was "more economical, and would keep the hook more free from dirt," and that this advantage was sufficient to support the combination. *Fitch v. Bragg & Co.*, 8 Fed. Rep. 588.—SHIPMAN, 1881.

151. "If two or more persons conspire, one to make one part of a patented combination, and another another part, with the intention that the parts should be afterward put together—this is an infringement. But in order to make one who makes and sells parts of the patented combination liable for infringement the parts manufactured must be useless in another machine, and they must be sold and manufactured with the understanding that the remaining parts are to be supplied by another and will then be combined for use." *Millner v. Schofield et al.*, 4 Hughes, 258.—HUGHES, 1881.

152. Where the moulds of a pill-making machine hold the pills while the needles pierce them, there is a concert of action which creates a combination between the moulds and the needles. *McKesson et al. v. Carnrick*, 19 Blatch. 158.—BLATCHFORD, 1881.

153. Where a "result is attained in a better mode than was before known" by a union of parts, which have no other new result, a patentable combination exists. *Detroit Lubricator Mfg Co. v. Renchard et al.*, 9 Fed. Rep. 293.—MATTHEWS, 1881.

154. "If an alleged infringer uses less than all of the elements of a combination, and substitutes something for the part which he omits, there is no infringement, unless the substitute is a mere mechanical equivalent." *Cross v. Livermore*, 9 Fed. Rep. 607.—COLT, 1881.

155. Devices for shifting and lifting the shoes of a grain drill form a patentable combination, the two devices being sometimes operated simultaneously. *Davis et al. v. Brown et al.*, 19 Blatch. 263.—BLATCHFORD, 1881.

156. "A majority of patents granted in modern times are for such inventions" (combinations); "and they are none the less entitled to protection, and none the less valuable on this account. . . . Such a machine is infringed whenever another employs substantially the same combination, in plan and elements, operating in the same manner, and producing substantially the same result. . . . The doctrine of equivalents, with slight modification, applies with as much force to such an invention as to any other. . . . The old elements from which one individual has drawn are open to all. It is the peculiar combination which one has effected that another shall not copy." *Dederick v. Cassell et al.*, 9 Fed. Rep. 306.—BUTLER, 1881.

157. "That all the elements of a patented combination may be singly found in prior structures is not a pertinent fact." "It will not answer to say . . . that any mechanic might have selected the parts and combined them. . . . The fact that no mechanic did select and combine the parts, . . . notwithstanding the great need for it, is a sufficient answer to the suggestion."—*Ib.*

158. The claim was for "a coffee or similar mill having a detachable hopper and grinding-shell formed in a single piece and suspended in the box by the upper part of the hopper or a flange thereon, substantially as and for the purpose specified." Defendant contended that the union was a mere aggregation. The court said: "It is a sufficient answer to this view to say that a hopper and grinding-shell formed in a single piece and suspended in the box by the upper part of the hopper or a flange thereon did not exist before combined in a mill. . . . If that combination had existed before, the question whether adding to that the feature of detachability made another patentable combination might arise; but it does not arise now." *Strobridge*

v. *Landers et al.*, 20 Blatch. 73.—BLATCHFORD, 1881.

159. Although there may be no co-operation between an air tube, as such, and a spring attached thereto and supporting some other thing, yet since the tube, besides its function with reference to air, performs the function of supporting the spring, there is, therefore, such co-operation between the tube and the spring as makes the combination patentable. *Cross v. Mackinon et al.*, 20 Blatch. 395.—WHEELER, 1882.

160. By the courts: "As to the second point, that the device shows only a mere aggregation of parts and produces no new result, it is sufficient to say the result produced is the transmission of signals to a car *when in motion* which was new, and had never been produced until this combination, and that some of the parts in this combination perform a new function and the whole combination produces a new result." *Western Electric M'fg Co. v. Chicago Electric M'fg Co.*, 11 Bissell, 427.—BLODGET, 1882.

161. If a defendant omits some of the old elements of a previously existing combination, then defendant does not infringe; "if he uses the same elements in the same combination he does infringe, although some of his elements differ in form and modes of immediate operation, provided they are known mechanical equivalents. If, on the other hand, he omits some of the devices in the original or patented combination, and substitutes therefor not a known mechanical equivalent, but an utterly new device, whereby a more beneficial result is effected, his combination is a new one, and not to be excluded from competition with the old." *Washburn & Moen M'fg Co. v. Griesche*, 5 McCrary, 246.—TREAT, 1883.

162. "The law as applicable to patents of this character would seem to be as follows: All the component parts must so enter into a combination of old elements that each qualifies every other. The result must be the product of the combination, which is patentable provided something new and useful is produced. If the elements of a combination act independently of each other, or if one element acts independently of the others, it is an aggregation of parts and not entitled to protection as a combination.

"It is indispensable that a new and useful result should be produced either by the invention of a new thing or a new combination of old things. Unless this is the case, even though the elements act reciprocally and in combination, the requirements of the law are not satisfied. The combination must be new, so must the re-

sult." *Clarke Pomace Holder Co. v. Ferguson*, 21 Blatch. 376.—COXE, 1883.

163. "The presumption of law where a patent is claimed for a combination simply, is that all the separate elements are old."—*Id.*

164. A combination "can only be anticipated by a prior device having identically the same elements, or the mechanical equivalents of those that are used. It will not do to find in older devices a portion of these elements in one machine, another portion in a second machine, another in a third, and so on, and then say that this device is anticipated. The inventor does not pretend to be the original inventor of any given one of the elements; he only claims such an arrangement of these elements as to produce a new machine." *Worswick M'fg Co. v. Steiger*, 17 Fed. Rep. 250.—WELKER, 1883.

165. "A mere aggregation of old things is not patentable, and, in the sense of the patent law, is not a combination. In a combination the elemental parts must be so united that they will dependently co-operate and produce some new and useful result." *Wood et al. v. Packer*, 17 Fed. Rep. 650.—NIXON, 1883.

166. "If the patentee specifies any element as entering into the combination either directly by the language of the claim or by such a reference to the descriptive part of the specification as carries such elements into the claim, he makes such elements material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether the omitted part is supplied by an equivalent device or instrumentality." *Fay & Co. v. Cordesman et al.*, 109 U. S. 408.—SUP. CT. 1883.

167. He who substitutes for one of the elements of a combination a different part, performing the same function, is an infringer. *Child v. B. & F. H. Iron Works*, 19 Fed. Rep. 258.—LOWELL, 1884.

168. For example of a defendant held to be an infringer who used complainant's patented combination, substituting an equivalent for one element thereof, see —. *Mundy v. Lidgerwood M'fg Co.*, 20 Fed. Rep. 114.—WHEELER, 1884.

169. When the prior art approaches very closely to the patented invention, "the defendants cannot be adjudged infringers unless they have appropriated, in substantial form of construction, the identical elements which the complainant has the right to claim as new in his

patent;" and further, to make the defendants liable as infringers, "it must appear that they have appropriated all the elements of the complainant's combination, or their equivalents." *Saladee v. Racine Wagon & Carriage Co. et al.*, 27 O. G. 1133.—DYER, 1884.

170. "It is well settled that a claim for a combination is not infringed unless all the elements composing the combination, or equivalents thereof, are employed." *Gould v. Spicers et al.*, 20 Fed. Rep. 317.—COLT, 1884.

171. "Certainly there is no patentable combination in a mere aggregation of old devices which produces no new effect or result due to their concurrent or to their successive joint and co-operating action. But it is by no means essential to a patentable combination . . . that the several devices or elements thereof should co-act upon each other; it is sufficient if all the devices co-operate with respect to the work to be done, and in furtherance thereof, although each device may perform its own particular function only." *Stutz v. Armstrong & Son*, 28 O. G. 367.—ACHESON, 1884.

172. For example of union of elements claimed to be aggregations, but held to be patentable combinations, see —.—*Id.*

173. Although all the parts of a combination are old, yet if the parts act together for one purpose, and each has influence in producing the result in a more perfect and reliable manner than was known before, the union is a combination and not a mere aggregation. *Railway Register M'fg Co. v. Broadway & Seventh Ave. R. R. Co.*, 30 O. G. 180.—WHEELER, 1884.

174. Complainant's improvement in paint-cans employed an annular disk with an upwardly projecting bead presenting a round smooth surface to the brush. Defendant employed an annular disk with a sharp upturned edge. The court held defendant not to infringe in view of the prior art, and said :

"One combination is not the same as another if it substantially differs from it in any of its parts." *Norton v. Haight*, 22 Fed. Rep. 787.—GRESHAM, 1884.

175. One combination is not the same as another combination, "if it substantially differs from it in any of its parts. This rule is subject to the qualification that a combination may be infringed when some of the elements are employed, and for the others mechanical equivalents are used, which were known to be such at the time the patent was granted." *Rowell et al. v. Lindsay*, 113 U. S. 97.—SUP. CT. 1885.

176. "Where one patented combination is asserted to be an infringement of another, a de-

vice in one, to be the equivalent of a device in the other, must perform the same function."—*Id.*

177. "A combination is patentable only when the several elements of which it is composed produce by their joint action a new and useful result, or an old result in a cheaper or otherwise more advantageous way." *Stephenson v. Brooklyn Cross-Town R. R. Co.*, 5 Sup. Ct. Rep. 777.—SUP. CT. 1885.

178. "To constitute identity of invention, and therefore infringement, not only must the result attained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function; provided, however, that the differences alleged are not merely colorable according to the rule forbidding the use of known equivalents." *Electric Railroad Signal Co. v. Hall R. R. Signal Co.*, 114 U. S. 87.—SUP. CT. 1885.

179. "As a rule, a patent for a combination includes the then known equivalents for the respective elements of the combination." *Bate Refrigerating Co. v. Eastman*, 32 O. G. 517.—SHIPMAN, 1885.

180. "It is a most familiar principle in the law of patents that one who has a combination cannot sue for an infringement any person who does not use his entire combination." *Underwood v. Warren et al.*, 24 Fed. Rep. 183.—TREAT, 1885.

181. Complainant's patented machine was for unhairing and scouring hides and skins. The bed of the table was omitted from the claimed combination. Defendant contended that such bed formed an actual part of the combination, and because not mentioned in the claimed combination that claim, therefore, covered a mere aggregation. Defendant's contention was overruled. *McDonald v. Whiting et al.*, 24 Fed. Rep. 600.—COLT, 1885.

182. Combinations are "patentable where a new and useful result is produced by their joint action, or an old result in a cheaper or otherwise more advantageous manner. . . . An old result may be sufficient when it is produced by the combination in a cheaper or otherwise advantageous manner." *Railway Reg. M'fg Co. v. North Hudson County Railway Co. et al.*, 26 Fed. Rep. 411.—NIXON, 1886.

183. "A great majority of patents are for improvements in old and well-known devices, or on patented inventions. Changes in the construction of an old machine, which increase its usefulness, are patentable. . . . So a new com-

bination of new devices, whereby the effectiveness of a machine is increased, may be the subject of a patent." *Cantrell et al. v. Wallick*, 117 U. S. 689.—SUP. CT. 1886.

184. "A combination is patentable (1) if it produces new and useful results, though all the constituents of the combination were well known and in common use before the combination was made, provided the results are a product of the combination, and not a mere aggregation of several results, each the product of one of the combined elements; (2) if it produces a different force, effect, or result in the combined forces or processes from that given by their separate parts, and a new result is produced by their union; (3) if it either forms a new machine of distinct character or formation, or produces a result which is not the mere aggregate of separate contributions, but is due to the joint and co-operating action of all the elements; (4) when the several elements of which it is composed produce, by their joint action, either a new and useful result, or an old result in a cheaper or otherwise more advantageous way." *Niles Tool-Works v. Betts Machine Co.*, 27 Fed. Rep. 301.—WALES, 1886.

185. "The law does not encourage or sanction the defeat of combination patents on the ground that the several parts are old, if the combination is new and useful." *May v. County of Fond du Lac*, 27 Fed. Rep. 691.—DYER, 1886.

186. "The ordinary doctrine in law concerning patents is that if a party insists on a patent for a combination of devices (whether new or old is not material), each element of the combination is an essential element; so that one who uses a combination in some respects, but omits one of the elements that the patentee chooses to describe as essential, the supposed infringer does not infringe.

"The patentee is supposed to describe clearly and fully all the elements which he thinks essential to produce the result described. If he chooses to crowd his supposed inventions or combinations with elements that have no functions whatsoever, and a party chooses to use a like contrivance, omitting some of these elements, he does not infringe. The reason of the rule, as explained by the Supreme Court very frequently, is this: that *first*, a party claiming a patent should not incur the combination or device with matters that are wholly unessential, and thereby block the path of improvement or invention. If he chooses to put such in his contrivance, he must abide by the result." *Royer v. Schult Belting Co.*, 28 Fed. Rep. 850.—TREAT, 1886.

187. Where a patent is for a combination, the fact that its main features are old, considered singly, does not limit the complainant to the exact form of the mechanism found in the patent. The patent is to receive a reasonably broad construction, and those should be held to be infringers who accomplish the same result with substantially the same or equivalent means. *Boston Electric Co. v. Fuller et al.*, 29 Fed. Rep. 515.—COLT, 1886.

188. "Where a patent consists of more than one device, or what is called a combination patent, the person charged with an infringement must be shown to have used all the devices or processes described in the patent. He may use one or more, but less than all, and still not infringe such combination patents." *Byerly v. Cleveland Linseed-Oil Works*, 31 Fed. Rep. 73.—WELKER, 1887.

189. In a machine for rolling saw-logs the claim was: "In a log-turning device, the spike bar F, having spikes F" in combination with the piston-rod D", and the piston-head D'" of a steam cylinder A, constructed and operating substantially as and for the purpose described." The machine would not operate without a certain rear pressure roll, and the court held that the claim did not describe patentable subject-matter. *Tarrant v. Duluth Lumber Co.*, 30 Fed. Rep. 830.—NELSON, 1887.

190. "To infringe a patent for a combination, it is necessary to use each member of the combination, or its equivalent, substantially as set forth; and if the use of less than the whole can be an infringement, it is only where the part used, separate and apart from the rest not used, was new and patentable to the inventor." *Thoens v. Israel*, 31 Fed. Rep. 556.—PARDEE, 1887.

191. As regards a patent for a combination, "of course any party has a right to use any one or more of those elements, because the patent does not cover them separately. But he may not use that combination, or anything which, taking the various elements, by a mere change in form of one or the other, works out the same result in the same way and by substantially the same process." *Westinghouse Air-Brake Co. v. Carpenter*, 32 Fed. Rep. 484.—BREWER, 1887.

## COMBINATION—UNPATENTABLE.

### CASES.

1. "The mere addition of an old device producing a specific result, to another device pro-

ducing its own result, in such wise that their combination produces those two same results, and no other, is not an invention." *Hailes et al. v. Van Wormer et al.*, 7 Blatch. 443.—WOODRUFF, 1870.

2. "It would not be an invention to combine a known tool with a known machine, if the combination required nothing beyond the ordinary skill of a mechanic; and this would be *a fortiori*, if the combination had already been suggested." *Bailey Washing and Wringing Machine Co. v. Lincoln et al.*, 4 Fish. P. C. 379.—LOWELL, 1871.

3. "A mere aggregation of parts, whereof the patentee has not the exclusive right to either, and in which the parts have no new operation and produce no new result which is due to the combination itself, is not patentable." *Sarven v. Hall et al.*, 9 Blatch. 524.—WOODRUFF, 1872.

4. "A combination of devices would not necessarily be patentable from the mere fact that their union produced a better device." "If the superiority arose from the fact that the two were intrinsically better than others, and the" device "combined both—each, however, operating independently of the other—the combination would be but the exercise of judgment in the choice of parts, and not invention in discovering new means to produce useful or better results."—*Id.*

5. The patent in suit was for an improvement in stoves, and a claim thereof was "a vessel over the fire-pot to receive the coal, and let it down by way of supply on the fire below, the lower end of the vessel being narrower than the upper." It was held that this was not a patentable combination, but a mere aggregation, because the reversible flues had no more to do with the stove supplied by a feeder than they would have with a stove supplied by hand. *Hailes et al. v. Van Wormer et al.*, 20 Wall. 358.—SUP. CT. 1873.

6. "A new combination, if it produces new and useful results, is patentable, though all of the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one bringing together old devices without producing a new and useful result, the joint product of

the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same device, either singly or in combinations, or even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others in combination."—*Id.*

7. "If, to attain the utility and convenience which the union of two implements produces, something new in the construction of the implements, or some new device requiring thought or study, more or less, is necessary to unite them, such union may be patentable." . . . "When the functions and uses of each are unaffected by the union, and the means of uniting has no novelty, it is not obvious, certainly, that anything of invention can be alleged of the combined implements. . . . That the aggregated result may be very convenient, may, for that reason, be popular, and may find a ready sale and show a great demand, does not determine the question." *Reckendorfer v. Faber*, 12 Blatch. 68.—WOODRUFF, 1874.

8. "The aggregate result may be the production of a better structure, as an aggregate, than was ever before produced, and yet, for the lack of novelty of device or new result produced by the aggregation and due thereto, it may have no patentable quality."—*Id.*

9. "The aggregation of devices, each of which is old, so that each may work out its own effect without the production of something novel arising from the co-operation of the devices, is not a new result." *Metropolitan Wringer Machine Co. v. Young et al.*, 14 Blatch. 46.—WALLACE, 1876.

10. The claims of a patent were: "1. A pencil composed of a wooden sheath and a leaden core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article, as shown and set forth.

"2. A pencil, the wooden case of which gradually tapers from its enlarged and recessed head toward the opposite end for the whole or a portion of its length, substantially as shown and described." Both were held to cover mere aggregations. *Reckendorfer v. Faber*, 92 U. S. 347.—SUP. CT. 1875.

11. "The combination, to be patentable, must produce a different force, or effect, or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements."—*Id.*

12. "A patent for a combination cannot be maintained where nothing is done except to



bring well-known devices into juxtaposition, each working its own effect, and the aggregate producing no new and useful result." *Kerosene Lamp Heater Co. v. Littell*, 3 Banning & Arden, 312.—NIXON, 1878.

13. A claim for complainant's patent was: "In combination the lay and its rigid shuttle-box, the pivoted vibrating wire trough, the reciprocating driving slide, and the latch moving thereon, the latter being operated by the wire box, the combination being and operating substantially as described." The court found that the lay and the wire-motion did not join together in doing anything, and that this was a claim for an aggregation rather than for a patentable combination. *Webster Loom Co. v. Higgins et al.*, 15 Blatch. 446.—WHEELER, 1879.

14. A claim was for "the convex metallic washer in combination with the staple." The court said: "The bail ear and the washer perform separate and distinct functions, the distinct office of neither being changed nor affected by the operation of the other;" and held the combination to be a mere aggregation. *Double Point Tack Co. v. Two Rivers M'fg Co. et al.*, 9 Bissell, 258.—DYER, 1880.

15. A large box with two compartments and a window to the upper compartment being old, it is mere aggregation and duplication to add another window to the upper compartment. *Slawson v. Grand St., Prospect Park and Flatbush R. R. Co.*, 17 Blatch. 512.—BENEDICT, 1880.

16. "In order to constitute a patentable combination, the result must be some effect different from the effect of the separate parts, and produced by the combined forces."—*Id.*

17. "A new result must arise from the union of the elements of the combination, and not simply from the separate action of each element."—*Id.*

18. The idea of barbing fence wire was the subject of one patent. The idea of fixing the barb rigidly on the wire by twisting another wire upon it was subject of a second patent. The looping of the barb around the fence wire was the subject of a third patent. A fourth patent was for all these features combined; it was held not to embody patentable invention. *Washburn & Moen M'fg Co. et al. v. Haish*, 10 Bissell, 65.—BLODGETT & DRUMMOND, 1880.

19. "There are, undoubtedly, cases where a combination may be made of parts never combined before, where no invention is involved; such is the case where a well-known contrivance is used to perform a function exactly analogous to that in which it was formerly used." *Wisner*

*et al. v. Grant et al.*, 7 Fed. Rep. 485.—WALLACE, 1880.

20. A union of devices for steaming the interior of an oil well, and a pipe with a cock in it for taking away the gas arising from within the well, is not a patentable combination, but is a mere aggregation, in view of the fact that a well can be steamed without the gas pipe. *Doubleday v. Roess*, 11 Fed. Rep. 737.—ACHESON, 1880.

21. A device for forming the interior of a crucible on a potter's wheel was old; a mould for forming the exterior was old. Complainant joined the two, and claimed the union as a combination. Held to be a mere aggregation. *Pickering et al. v. McCullough, Datzell & Co.*, 104 U. S. 310.—SUP. CT. 1881.

22. "In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. . . . It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition and not a vital union."—*Id.*

23. Double recessed lap-joints in sheet-metal structures being old, and soldering by dipping being old, and complainant's alleged invention consisting in "a can or other vessel made of sheet metal, in which the top and bottom is joined to the sides of a double recessed lap-joint," the court said: "The patentee has merely aggregated these elements in his can, without causing them to perform, by their united action, any function which they did not perform separately before. . . ."

In the conception or material embodiment or operation of such a union of well-known elements, we cannot detect any patentable merit." *Combined Patents Can Co. v. Lloyd*, 11 Fed. Rep. 153.—MCKENNAN, 1882.

24. A patent being in existence for the combination of a straw-feeding attachment with a boiler furnace generally, and return-flue boilers being, of themselves, old, a patent was taken for the combination of the straw-feeding attachment and return-flue boilers. The latter patent was held void on the ground that the use made of the feeding attachment therein was analogous to the former use. Also that "in the combination each operates separately, producing its own results." *Heald v. Rice*, 104 U. S. 737.—SUP. CT. 1882.

25. An anti-clinker opening between a dumping-grate and the bottom of the fire-pot above it, with the grate larger in area than such bottom,

was old. Downwardly contracted fire-pots were old. There was no new effect had by uniting the two. *Held* to be aggregation. *Perry et al., Trustees v. Co-operative Foundry Co. et al.*, 20 Blatch. 505.—BLATCHFORD, 1882.

26. An anti-clinker opening in a dished grate and a fire-pot were old. The union of the two involved no invention.—*Ib.*

27. Windows in the draft chamber of a stove are not patentable in combination with adjoining flues.—*Ib.*

28. "There was no invention in substituting an old grate in two parts for another old grate made in one part, preserving the same relation of the grate to the fire-pot and to the ash-pit walls, when no distinctive effect in the combination resulted from the substitution."—*Ib.*

29. A window in the ash-pit of a stove cannot modify or effect the action or operation of the grate or the anti-clinker space.—*Ib.*

30. By the court: "There existed in prior structures a fire-chamber having its clinker-discharge end grated or illuminating, and projecting downward into an air-chamber; a grate surface or fire-bed projecting beyond the inside diameter of the clinker-discharge end of the fire-chamber; and a clinker-cleaning opening between the grate surface and the fire-chamber over it. There also existed before, in combination, a fire-chamber with its non-grated clinker-discharge end projecting downward into an air-chamber, a grate surface or fire bed projecting beyond the inside diameter of the clinker-discharge end of the fire-chamber, and a clinker-cleaning opening between the grate surface and the fire-chamber above it. It was no invention to substitute in such combination for a fire-chamber with its clinker-discharge end non-grated, a fire-chamber with a grated clinker-discharge end. The substitution worked no change in the operation of the laterally projecting grate surface end of the clinker-cleaning opening in unison with a fire-chamber having its clinker-discharge end projecting downward into the air-chamber."—*Ib.*

31. By the court: "There is no relation or co-action between the contracted lower end of Spear's fire-pot and the laterally projecting grate, and the space outside of the grate which did not exist between the lower ends of the uncontracted fire-pots and the projecting grates and the outside spaces in prior structures.

"In view of all this there was no patentable invention in the idea that contracting the lower end of the fire-pot, with the consequent lessening of the area of the grate, would enlarge the outside space."—*Ib.*

32. By the court: "This claim is merely for an aggregation of prior revertible flues with the other three features before existing in unison in the same stove—namely, an anti-clinker opening, mica windows, and an isolated grate, and does not contain any patentable invention. The last-named three features operate together in the same way in a stove without revertible flues and in a stove with them, and no combined patentable result is due to the union."—*Ib.*

33. For example of a broad claim held void as being a claim for an aggregation, with an intimation that a more specific claim would be tenable, see —. *Thacher Heating Co. v. Burtis et al.*, 12 Fed. Rep. 569.—WALLACE, 1882.

34. By the court: "It is obvious that a plain ring, or a ring with radial slits, has the same action in combination with an annular recess, in which it is held by its elastic force alone, so far as regards its readjustment in the recess when disturbed, that a ring with non-contiguous projections has. The co-action between the recess and the part of the ring in it when the part of the ring out of it and next to the stock is disturbed, is the same in all the cases. Therefore if the ring with inward non-contiguous projections existed before, even though, without the annular recess, there was no patentable invention in using such ring with the old annular recess with which the plain ring had been used." *Searles v. Merriam et al.*, 20 Blatch. 263.—BLATCHFORD, 1882.

35. "A mere aggregation of old things is not patentable, and in the sense of the patent law is not a combination. In a combination, the elemental parts must be so united that they will dependently co-operate and produce some new and useful result." *Wood et al. v. Packer*, 17 Fed. Rep. 650.—NIXON, 1883.

36. A washer combined with a common form of staple being old, there is no invention in combining such a washer with a new form of staple when the washer does not affect the function performed by the new form of staple. Such a combination is a mere aggregation. *Double-pointed Tack Co. v. Two Rivers M'f'g Co. et al.*, 109 U. S. 117.—SUP. CT. 1883.

37. By the court: "Claim 2 is merely for an aggregation of parts and not for a patentable combination, there being no patentable relation between a portable reservoir with a flue within its rear side and the existence of portability of a base pan beneath it." *Bussy et al. v. Excelsior M'f'g Co.*, 110 U. S. 131.—SUP. CT. 1884.

38. There is "no patentable relation between a damper for the middle flue of a three-flue stove and the existence of portability of a base

pan or the existence of a warming closet." —*Ib.*

39. "There is no patentable combination, properly so called, in an aggregation of devices which have no common purpose or effect, concurrent or successive." *Tower v. Bemis & Call Hardware and Tool Co. et al.*, 19 Fed. Rep. 498. —LOWELL, 1884.

40. "A broad claim cannot be sustained for merely putting together two old tools for convenience of manipulation in several and wholly distinct uses; . . . the patent must be limited to some patentable improvement, either in the mode of combining the tools or in one or more of the tools themselves." —*Ib.*

41. A broad claim for "aggregating any pipe-wrench with any monkey-wrench upon a single handle cannot be sustained." —*Ib.*

42. Complainant's patent was for a ventilating louver, and the claim in issue was for the combination of a reticulated covering with the gutters or slats. Thereof the court said: "The reticulated covering operates as a screen precisely as it would if there were no slats. Neither operates any differently or accomplishes any result in connection with the other different from what it would if the other was not there. They appear to form a mere aggregation and not a patentable combination." *Hayes v. Bickelhaupt, Sr.*, 21 Fed. Rep. 567. —WHEELER, 1884.

43. The patented combination was a mirror placed in the hood over a street-car driver's head, with a glass panel in the door behind him, so that he might see people desiring to hail the car from behind him. The combination was held to be a mere aggregation. *Stephenson v. Brooklyn Cross-Town R. R. Co.*, 5 Sup. Ct. Rep. 777. —SUP. CT. 1885.

44. Vertically sliding flexible slat doors were old; common car doors were old. A patentee combined the old-fashioned car door with an inner, flexible, sliding door, and claimed a combination patent therefor. The combination was held to be a mere aggregation. *Watson v. Cincinnati I. St. L. & C. Ry. Co.*, 23 Fed. Rep. 443. —WOODS, 1885.

45. Complainant's alleged combination was for a union of a desk-board with the well-known church book-rest, and was held to be a mere aggregation. *Peard v. Johnson*, 23 Fed. Rep. 507. —COXE, 1885.

46. A claim was practically for the combination of two pairs of dies. These two pairs of dies "were not combined in one machine, and did not co-operate in one result. Each pair was used by itself, and might be so used at any distance of time or place from the other; and if the

two were used at the same place and in immediate succession of time, the result of the action of each was separate and distinct, and was in no way influenced or affected by the action of the other. There was no combination that would sustain a patent." *Beecher M'fg Co. v. Atwater M'fg Co. et al.*, 114 U. S. 523. —SUP. CT. 1885.

47. To introduce vertical springs underneath a coiled wire bed-fabric, such springs having been used in other bed-fabrics, is not invention. The new union constitutes a mere aggregation. *Ames et al. v. Carleton Spring Bed Co. et al.*, 32 O. G. 1238. —BLOGGETT, 1885.

48. "A patent for a combination is not invalid because all the parts are old. But merely assembling them together or placing them in juxtaposition does not indicate invention. Some new or peculiar function produced by such a combination must be developed. Unless this follows, the new arrangement is the mere exhibition of mechanical skill."

It appearing to the court that in the combination of complainant's patent "none of the parts shown in the construction perform any different function than that performed in other patents or combination," the patented device was held to be a mere aggregation. *Scott M'fg Co. v. Sayre*, 26 Fed. Rep. 153. —NIXON, 1885.

49. To combine the parts of two existing machines, leaving the parts in the new union to work as before, does not constitute a patentable combination, but merely an aggregation. *Troy Laundry Machinery Co. et al. v. Bunnell*, 23 Blatch. 558. —WALLACE, 1886.

50. "It is not invention merely to bring old devices into such juxtaposition as will allow each to work out its own effect without contributing any new function or mode of operation to the other. . . . It may involve invention to make changes or modifications in parts which were substantially old, in order so to combine them as to affect their efficient co-operation. Where such changes constitute the invention, the claims of the patent must be carefully limited, either by express terms or by fair construction, to the precise movement which is the subject of the invention." —*Ib.*

51. Where a certain seed-cleaner is old, and a certain thresher is old, a claim construed to cover the use of any seed-cleaner in combination with any thresher cannot be sustained. *Newark Machine Co. v. Hargett et al.*, 36 O. G. 692. —BOND & MORRIS, 1886.

52. The claim of complainant's patent in suit was:

"3. In a straw-stacking machine the wind-

lass *sp*, mounted on a shaft *s*<sup>2</sup>, the cogged gearing *eg eg*, shaft *s*<sup>2</sup>, and crank *cr*, the shaft *s*<sup>3</sup> being provided with a ratchet engaging a pawl on the frame, as set forth in combination with the chain *ch*, and carrier-arm P, substantially as described and for the purpose set forth."

The court held this to be an aggregation of well-known devices which, in their new relation, if it could be called new, performed no new office. *Hasselman v. Garr et al.*, 37 O. G. 1126.—WOODS, 1886.

53. Where the elements of a combination are old and the constituents do not qualify each other in any way, the combination is not patentable. *Leonard v. Lovell*, 29 Fed. Rep. 310.—SEVERANS, 1886.

54. The patent in suit was for a fireplace heater, with claims as follows: "1. A base-burning fireplace stove in which are combined the following elements—namely, a cylinder or body projecting outward from the mantel or frame, a fuel magazine or feeder within the cylinder, and an opening through which the said magazine can be fed from above. 2. A fireplace stove or heater in which the magazine is extended to the feed opening of the outer casing." Thereof the court said: "It is conceded that these claims are to be construed broadly, so as to cover the combination of a fireplace heater having a body projecting outward from the mantel or frame, and a furnace-like portion of the chimney behind the mantel, with a fuel receptacle within the cylinder of the heater which will preserve a supply of unignited coal while the heater is in operation, and an opening through which the magazine can be fed from above, the magazine extending to this opening." The court said further that it was admitted that what the patentee did "was to transfer this well-known fuel magazine from its use in an out-standing base-burning stove to a fireplace heater, equally well known and in common use as to its arrangement, construction, position, and mode of operation." Claims held to cover mere aggregations. *Thatcher Heating Co. et al. v. Burtis et al.*, 121 U. S. 286.—SUP. CT. 1887.

55. By the court of the above: "There is no specific quality of the result which cannot be definitely assigned to the independent action of a single element. There is, therefore, no patentable novelty in the aggregation of the several elements considered in itself."—*Id.*

56. Bringing together an old cracker machine and an old automatic stopping device does not make a patentable invention. *Duesh v. A. J. Medlar Co.*, 30 Fed. Rep. 619.—BUTLER, 1887.

57. The improvement of the patent in issue, as

expressed in the claim, was: "A water-closet basin having a concave bottom, a tubular rim, and openings for the flushing water, a single central connection at the back for the water supply pipe, a vertical discharge pipe, with a closed rounding upper end at the back of the closet and below the water supply pipe, and a short tube passing off at one side of and near the upper end of the discharge pipe, so as to receive the ventilating pipe and be clear of the water supply pipe." The patentee had selected from various prior patents such parts as he thought desirable, and by their union produced a superior contrivance, but not a new or different result from any that had been obtained before, nor an old result in a better or different way. His combination was held not patentable. *J. L. Mott Iron Works v. Skirm et al.*, 30 Fed. Rep. 621.—WALES, 1887.

58. The claim of the patent in suit was: "The combination of the burnishing tool, rest for the face of the sole, and finger rest in a machine for burnishing sole edges." A burnishing tool with a rest for the face of the sole had been used, and the finger rest had also been used; the combination was held to be unpatentable. *Union Edge Setter Co. v. Keith*, 31 Fed. Rep. 46.—COLT, 1887.

## COMITY.

### CASES.

1. "The rule of comity, always observed by the justices of the Supreme Court in cases which admitted of being carried before the whole court, was to conform to the opinions of each other, if any had been given. Such decisions amounted to authority which, though not conclusive, were operative whenever the question should be carried up." *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

2. Where a decision by another court upon the same patent is cited, and defendant was not a party thereto, and defendant's machine was not there in controversy, it is not binding, although entitled to respectful consideration.—*Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

3. "Much deference is due to the judgment of every court of co-ordinate jurisdiction." *Putnam v. Yerrington*, 2 Bann. & Ard. 237.—NIXON, 1876.

4. The patent in suit had been thoroughly litigated and sustained in the first circuit. In a subsequent suit in the same circuit provisional injunction was asked for. Defendants showed that a litigation over the same question was pending in the second circuit, and urged that

comity required a withdrawal of the injunction until the termination of the suit in the second circuit. The court granted injunction. *Atlantic Giant Powder Co. v. Goodyear*, 3 Bann. & Ard. 161.—SHEPLEY, 1877.

5. "The same rule ought to prevail throughout the country in respect to infringement of the same patent by the same means, as well as upon other questions in respect to other subjects." *Goodyear Dental Vulcanite Co. v. Preterre*, 15 Blatch. 274.—WHEELER, 1878.

6. Where different courts have decided differently upon a patent, comity does not require a court to favor one side or the other. *United States Stamping Co. v. King et al.*, 17 Blatch. 55.—BLATCHFORD, 1879.

7. Where different courts have held different ways as to the same patent, comity does not require still another court to be bound by either decision. *American Cotton Tie Supply Co. v. Bullard et al.*, 17 Blatch. 160.—BLATCHFORD, 1879.

8. "Comity would induce a following of the views of a co ordinate court on questions . . . directly raised, considered, and decided." *Atlantic Giant Powder Co. v. Rand et al.*, 16 Blatch. 250.—BLATCH. 1879.

9. The circuit judge of the second circuit having found complainant's patent valid and infringed, after a very full consideration upon a motion for provisional injunction, the court for another circuit followed that finding in a hearing upon the merits against other defendants. *Hammerschlag v. Garrett et al.*, 9 Fed. Rep. 43.—BUTLER, 1881.

10. If the same question raised in a case in one circuit has been adjudicated in another circuit upon the same testimony, the judge in the former case will feel bound to follow such adjudication. *Edgerton et al. v. Furst & Bradley M'fg Co. et al.*, 10 Bissell, 402.—BLODGETT, 1881.

11. By the court: "The greatest respect which we entertain for the opinion of that court, as well as interstate comity, would readily lead us to accept its decision as controlling this case, if the truth of the facts on which it was based were not controverted and seriously questioned here." *Spring et al. v. Domestic Sewing Machine Co.*, 9 Fed. Rep. 505.—NIXON, 1881.

12. "It would be proper, as it is usual, to follow the former decision on final hearing in another circuit court." *Strobridge v. Landers et al.*, 20 Blatch. 73.—BLATCH. 1881.

13. By the court: "The respect due to these judgments and the importance of consistency and the uniformity of decisions in courts of co-

ordinate jurisdiction, where the same subject-matter is involved, requires this court to adopt the judgments referred to." *Am. Ballast Log Co. v. Cotter*, 21 O. G. 1030.—BUTLER, 1882.

14. By the court: "Upon general questions of law we listen to the opinion of our brother judges with deference, and with a desire to conform to them if we can consistently do so; but we do not treat them as conclusive. In patent causes, however, where the same issue has been passed upon by the Circuit Court sitting in another district, it is only in cases of a clear mistake of law or fact, of newly-discovered testimony, or upon some question not considered by such court, that we feel at liberty to review its findings." *Searles v. Worden et al.*, 11 Fed. Rep. 501.—BROWN, 1882.

15. The Supreme Court of the District of Columbia, "like the other courts of the country, is charged with the examination for itself of the questions involved in complaints of infringement; and the circumstance that to this court," located at the seat of Government, is trusted the exceptional jurisdiction of determining appeals from the decrees of the Commissioner of Patents may well be considered as imposing upon it a special duty of making such examinations with care and of deciding only upon its own conviction of the merits of the case." *Schilling v. Cranford*, 37 O. G. 1349.—HAGNER, 1885.

16. "It would be unseemly that one rule of property in patents should prevail" in one part of the country "and another in other parts of the country, where the same title may be brought into litigation." *Celluloid M'fg Co. v. Zylonite Brush & Comb Co. et al.*, 27 Fed. Rep. 291.—WALLACE, 1886.

17. By the court: "We do not understand that the weight given by one circuit court to the adjudication of another rests entirely upon the basis of comity, but as well upon that of recognized rights and of convenience, and that it is largely to prevent the necessity of more than one court going through with the investigation of the same facts that the inference derived by the first court is for the purpose of determining whether or not an injunction shall go till the final decree adopted by the other circuit courts." *Am. Bell Telephone Co. et al. v. National I. Telephone Co. et al.*, 27 Fed. Rep. 663, *per curiam*, 1886.

18. While the decision of one court is not binding upon another court, ordinarily, "a proper regard for certainty and uniformity in the law requires that the courts of one circuit shall follow the decision of another covering the same question, and especially the same letters-patent."

*Worswick M'fg Co. et al. v. Philadelphia*, 30 Fed. Rep. 625, *per curiam*, 1887.

19. A proper regard for uniformity of decision, especially in litigations over patents, should incline a court to hold a patent valid where another court has previously done the same, against substantially the same defendants, until all controversy is put at rest by decree of the Supreme Court. *Hammerschlag M'fg Co. v. Bancroft*, 40 O. G. 1339.—GRESHAM, 1887.

## COMMISSIONER OF PATENTS.

### "COMMISSIONER OF PATENTS" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 1. Provides that an application for patent shall be made to "the Secretary of State, the Secretary for the Department of War, and the Attorney-General of the United States." [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 1. Provides that applications for patent shall be made to the "Secretary of State," afterward to be examined by the "Attorney-General of the United States." [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be established and attached to the Department of State an office to be denominated the Patent Office; the chief officer of which shall be called the Commissioner of Patents, to be appointed by the President, by and with the advice and consent of the Senate, whose duty it shall be, under the direction of the Secretary of State, to superintend, execute, and perform all such acts and things touching and respecting the granting and issuing of patents for new and useful discoveries, inventions, and improvements, as are herein provided for, or shall hereafter be, by law, directed to be done and performed, and shall have the charge and custody of all the books, records, papers, models, machines, and all other things belonging to said Office. And said Commissioner shall receive the same compensation as is allowed by law to the Commissioner of the Indian Department, and shall be entitled to send and receive letters and packages by mail, relating to the business of the Office, free of postage.

SEC. 5. *And be it further enacted*, That all patents issued from said Office shall be issued in the name of the United States and under the seal of said Office, and be signed by the Secre-

tary of State, and countersigned by the Commissioner of the said Office. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 11. *And be it further enacted*, That in case of the death, resignation, absence, or sickness of the Commissioner, his duties shall devolve on the assistant commissioner until a successor shall be appointed, or such absence or sickness shall cease.

SEC. 19. *And be it further enacted*, That the Commissioner, subject to the approval of the Secretary of the Interior, may from time to time establish rules and regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 481. The Commissioner of Patents, under the direction of the Secretary of the Interior, shall superintend or perform all duties respecting the granting and issuing of patents directed by law; and he shall have charge of all books, records, papers, models, machines, and other things belonging to the Patent Office.

SEC. 483. The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office.

### CASES.

1. "It is undoubtedly true that the Secretary of State may be considered, in issuing patents, as a mere ministerial officer." *Grant et al. v. Raymond et al.*, 6 Peters' C. C. 218.—SUP. CT., 1832.

2. Where a patent is signed by a person as acting commissioner, he will be presumed to be acting legally till the contrary is shown. *Woodworth et al. v. Hall et al.*, 1 W. & M. 248.—WOODBURY, 1846.

3. Under Section 2 of the patent law of 1836, the chief clerk may act as Commissioner, not only when the Commissioner's office is entirely vacant, but also when he is really absent from sickness or other necessary cause. *Woodworth v. Hall et al.*, 1 W. & M. 389.—WOODBURY, 1846.

4. The Commissioner of Patents is presumed to have done his duty in all particulars till the contrary is shown. *Woodworth et al. v. Edwards et al.*, 3 W. & M. 120.—WOODBURY, 1847.

5. The Commissioner of Patents is not bound to respond to orders for copies where the demand is accompanied with rudeness and insult, such a demand not being a legal demand. But if the same person subsequently makes a proper

demand for such copies, the Commissioner must comply with it. *Boyden v. Burke*, 14 Howard, 575.—SUP. CT. 1852.

6. The Commissioner "has no power to confirm a patent obtained by false suggestion, either by pardoning the offence or excusing it on the plea of innocent ignorance." *Mini's Assignee v. Adams*, 3 Wall. Jr. 20.—GRIER, 1854.

7. It was objected to the patent in suit that it was signed by "an acting Commissioner of Patents," and that the record contained no averment or proof of his title to the office. Thereof the Supreme Court said: "The court will take notice judicially of the persons who from time to time preside over the Patent Office, whether permanently or transiently; and the production of their commissions is not necessary to support their official acts." *York & Maryland Line R.R. Co. v. Winans*, 17 Howard, 30.—SUP. CT. 1854.

8. By the act of July 4th, 1836, the chief clerk of the Patent Office was made acting Commissioner, in the necessary absence of his chief. By the act approved July 23d, 1868, this duty of acting Commissioner devolved upon the oldest examiner. July 24th, 1868, the chief clerk, acting as Commissioner, endorsed a patent as extended. The extension was held invalid. *American Wood-Paper Co. v. Glen Falls Paper Co.*, 8 Blatch. 513.—WOODRUFF, 1871.

9. "The decision of the Commissioner upon a question of fact, upon which he is authorized to pass, is unimpeachable, except upon the ground that it is *ultra vires*. An infringer cannot assail it for fraud, much less for mere error of judgment." *M'Millin et al. v. Barclay et al.*, 4 Brews. 275.—McKENNAN, 1871.

10. Although a bill of complaint may allege that a patent was extended by the Commissioner, an extension by an acting commissioner fulfils the averment. *Dorsey Harvester Revolving-Rake Co. v. Marsh et al.*, 6 Fish. P. C. 387.—McKENNAN, 1873.

11. "A provisional officer who is invested by law with the functions of the Commissioner of Patents is properly described as a Commissioner, so far as the efficacy of his official acts is concerned, and for this purpose only is it necessary to describe him at all. The validity of his act is the essential subject of inquiry."—*Ib.*

12. "The actual incumbent of a public office is presumed to be in the lawful possession of it, and no affirmative proof of his title is required to support his official acts. This is a familiar maxim."—*Ib.*

13. "The contingency upon which the examiner-in-chief is authorized to assume the duties

of Commissioner is primarily to be taken to exist from his actual discharge of these duties."—*Ib.*

14. The burden of proof is upon him who denies the validity of the acts of the Commissioner.—*Ib.*

15. "In a suit by a patentee against an infringer, it cannot be shown that the Commissioner who granted the patent exceeded or irregularly exercised his authority, except by matter apparent on the face of the patent, and . . . it is conclusively valid until it is successfully impeached in a direct proceeding, properly instituted for that purpose."—*Ib.*

16. "Where . . . an act is to be done, or a patent granted upon proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act, or granted the patent, is *prima facie* evidence that the proofs have been regularly made, and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their competency and sufficiency." *Gear et al. v. Grosvenor et al.*, 1 Holmes, 215.—SHEPLEY, 1873.

17. "The decision of the Commissioner in regard to the questions which have been committed to his exclusive jurisdiction is final. His decision is conclusive in regard to the sufficiency and competency of the formal acts and proofs which the statute provides shall be a prerequisite to the issuing of a patent. His is, moreover, made the tribunal which is to decide both in regard to the existence of those facts upon which a reissue is to be granted, and upon which an extension of patents issued prior to March 2d, 1861, is to be made. By Section 32 of the act of 1870, he is to judge of the sufficiency of the reasons for delay, exceeding two years, in prosecuting applications which shall thereafter be made. Upon these three subjects which are submitted to him, his decision is conclusive." *U. S. Rifle & Cartridge Co. et al. v. Whitney Arms Co. et al.*, 14 Blatch. 94.—SHIPMAN, 1877.

18. "The decision of the Commissioner in regard to abandonment, upon renewed applications which were made under Section 35, has no higher authority or more enlarged scope than his decision upon the same question upon an original application. And . . . all the defences which the statute authorizes may be made as well in respect to patents granted upon applications renewed after the act of 1870, as in respect to those issued upon original applications."—*Ib.*

19. "It is to be presumed . . . that a high officer of a department of the Government will

do his duty without compulsion or even command from any quarter, especially where he has no interest nor the Government any except that the duty be done." *Vt. Farm Mach. Co. v. Marble*, 22 Blatch. 128.—WHEELER, 1884.

20. The Commissioner of Patents is "not an officer in whom, under the Constitution, judicial power can be vested." *Odell et al. v. Stout et al.*, 29 O. G. 862.—SAGE, 1884.

21. The official residence of the Commissioner of Patents is in the District of Columbia, and where it is sought to make him a party to a suit elsewhere proper service of process must be attained in some way. *Butterworth, Com'r, v. Hill et al.*, 5 Sup. Ct. Rep. 796.—SUP. CT. 1885.

22. "The Supreme Court has over and over again affirmed the principle that 'all questions of fact behind the patent are to be examined, heard, and conclusively determined by the Commissioner of Patents.'" *Railway Register M'fg Co. v. No. Hudson Co. R. R. Co. et al.*, 23 Fed. Rep. 593.—NIXON, 1885.

## COMPOSITION OF MATTER.

### CASES.

1. The ingredients of a composition may each and all be old and the composition be new and patentable. *Ryan et al. v. Goodwin et al.*, 3 Sumner, 514.—STORY, 1839.

2. The inventor of a new compound may properly specify substitutes for the different ingredients and thereby cover their use in the compound.—*Id.*

3. Where the patent in question is for a new composition of metals a slight or immaterial change in the ingredients, or the manner of preparing them, makes no difference, nor does a variation of proportions, nor the addition of other ingredients, make a substantial difference. *Matthews v. Skates et al.*, 1 Fish. P. C. 602.—JONES, 1860.

4. "Where a patent is granted for a composition made of several ingredients it covers and embraces known equivalents of each of the ingredients. An equivalent of any substance is another substance having similar properties and producing substantially the same effect."—*Id.*

5. Where a patent for a composition of matter states the proportions of the ingredients used approximately in connection with such a statement as: "It is not intended to confine the patent to the use of the ingredients specified, as those proportions may, in some cases, be advantageously varied." "Exact conformity to these proportions is not required, because they are stated

as approximate, and the right is claimed to vary them. But this right is not unlimited. It can only extend to any adjustment of proportions which will result in the production of a substance possessing the peculiar properties attributed to the substance described in the patent. Substantial identity of result is the test of substantial conformity to the mode of combination prescribed in the specification." *Francis et al. v. Mellor et al.*, 8 Phil. 157.—MCKENNAN, 1871.

6. Complainant's composition of matter, according to his specification, consisted of rubber, from 20 to 25 per cent; gum-shellac, from 10 to 20 per cent; Paris white, from 20 to 30 per cent; French chalk, from 15 to 25 per cent; litharge, from 11 to 18 per cent; lamp-black, from 2 to 3 per cent; sulphur, from 1 to 3 per cent. Defendants' compound contained: rubber, 30.6 per cent; plumbago, 40 per cent; copper and zinc, 14.6 per cent; lead, 8.2 per cent; sulphur, 6.6 per cent. Defendants were held to infringe. *Jenkins v. Walker et al.*, 1 Holmes, 120.—SHEPLEY, 1872.

7. Complainant's invention related to the preparation and use of certain solvents of xyloidine. Eight different solvents were specified, among them camphor or camphor oil, or mixture of the same in conjunction with alcohol or spirits of wine, the same to be employed in about equal proportions. The claim was: "The preparation and use of solvents of xyloidine such as before described," etc. The court said: "Making use of the solvent power of camphor and alcohol when in the presence of each other and the xyloidine is the essence of the invention. The use of camphor and alcohol in about equal proportions is not of the essence of the invention." *Spill v. Celluloid M'fg Co.*, 18 Blatch. 190.—BLATCHFORD, 1880.

8. Complainant's improvement in bleaching xyloidine was stated thus: "I bleach it directly after the removal of the acids and before removing it from the vat. This I do by any of the well-known means," etc. The claim was: "The process of bleaching xyloidine in the manner herein specified." The court said: "The real invention . . . was to bleach xyloidine by ordinary bleaching agents directly after the converting acids had been washed out of it and before anything had been mixed with it which might interfere. . . . Whether the bleaching is done in the washing vat or not . . . are immaterial matters."—*Id.*

9. The patentable novelty of an alloy consisting in the proportions in which the copper and tin were compounded and in the addition thereto, in the process of melting, of a prescribed quan-



tity of arsenic, and defendant's metal being shown to be copper, tin, zinc, lead and arsenic copper within the range of proportion stated in the patent, and the tin and arsenic generally below the minimum proportion stated in the patent, defendant was held not to infringe. *Kirk et al. v. Elkins Mfg & Gas Co.*, 19 Fed. Rep. 417.—MCKENNAN, 1884.

## CONGRESS.

## CASES.

1. If a patent were held to imply a contract between the Government and the people, that the invention shall become public property at the expiration of the patent, yet Congress has power to pass laws violating contracts and to create a monopoly of the invention. *Evans v. Eaton*, 1 Peters' C. C. 322.—WASH. 1816.

2. Congress has power to give renewed patents retroactive effect. *Blanchard v. Sprague*, 2 Story, 164.—STORY, 1839.

3. "The power of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so they do not take away the rights of property in existing patents." *McClurg et al. v. Kingsland et al.*, 1 Howard, 202.—SUP. CT. 1843.

4. "Congress undoubtedly have power to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

"But it does not follow that Congress may, from time to time, as often as they think proper, authorize an inventor to recall rights which he had granted to others, or reinvest in him rights of property which he had before conveyed for a valuable and fair consideration." *Bloomer v. McQuewan et al.*, 14 Howard, 539.—SUP. CT. 1852.

5. Congress has the right to compel distillers to affix certain meters to their stills, even though the effect may be to compel the distillers to purchase them of the patentee. *Narusbaum v. Emery*, 3 Bissell, 469.—BLDGGETT, 1873.

6. Congress has full power to grant a patent to an inventor, notwithstanding the existence of statutory obstacles; but since "it has no right to deprive any person of his property without due form of law," it cannot, by granting such patent, prevent persons already in possession of the embodied invention from using it. *Page et al. v. Holmes Burglar Alarm Tel. Co.*, 17 Blatch. 484.—BLATCHFORD, 1880.

7. "The right which the public has acquired to use the thing invented, by reason of the applicant for a patent failing to do something prescribed by Congress, and the necessity for which Congress might, by previous legislation, have dispensed with, has never been held to be a vested right." *Graham, Adm'r, v. Johnston et al.*, 21 Fed. Rep. 40.—MORRIS, 1884.

## CONSTRUCTION OF PATENT—IN GENERAL.

## CASES.

1. "If to an old machine some new combination be added to produce new effects, the right is limited to the new combinations." *Whittemore et al. v. Cutter*, 1 Gall. 478.—STORY, 1813.

2. "The law should be construed favorably and benignly in favor of patentees." "Juries ought to look favorably on the right of property." *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

3. Patents are not to be treated as odious monopolies, nor to be construed with rigor. They are to be construed fairly, and not to be subjected to over-nice and critical refinements. When the nature and extent of the invention can be ascertained from the fair sense of the words used, rights are not to be frittered away on formal objections. *Ames v. Howard et al.*, 1 Sumner, 482.—STORY, 1833.

4. "Patents are to be treated as a just reward to ingenious men; as holding out encouragements to genius, talents, and enterprise; as highly beneficial to the public; as ultimately securing great advantages to the whole community, and are to be liberally construed." *Blanchard v. Sprague*, 2 Story, 164.—STORY, 1839.

5. A patentee fully described his machine, and then claimed as his invention "the method or mode of operation in the abstract, explained in the second article." Held not to be a claim for a function, but for the machine.—*Id.*

6. Where in a combination patent one of the elements of the combination is described as having a certain construction, and that construction is a necessity of the purpose set forth, such construction will be deemed a material part of the combination, although not particularly specified in the claim. *Eastman v. Bodfish*, 1 Story, 528.—STORY, 1841.

7. "The end to be accomplished is not the subject of a patent. The invention consists in the new and useful means of obtaining it." *Carver v. Hyde et al.*, 16 Peters, 513.—SUP. CT. 1842.

8. "There is no magic in words, and, above all.

in patents. The court looks through the whole patent and specification in order to ascertain what the thing claimed and patented is." *Carver v. Braintree M'g Co.*, 2 Story, 432.—STORY, 1843.

9. "In construing a patent for an invention, we are not to look alone to the descriptive words contained in the letters-patent, but we are to construe those words in connection with the specification, which in our law is always annexed to and made a part of the letters-patent." *Pitts v. Whitman*, 2 Story, 609.—STORY, 1843.

10. "This law gives a monopoly, but not in an ordinary sense. It takes nothing from the community at large, but it gives to them the greatest of benefits. Distinguished as many names have become in the different ages of the world, the names of Fulton and the inventor of the cotton-gin, with all intelligent men, will be placed in the first rank of human benefactors. To remunerate inventors for 'time, ingenuity, and expense,' the law gives to them the exclusive right of selling their invention for a limited period. When we consider the inestimable advantages which result to the world from the 'labor, ingenuity, and expense' of inventors, so far from classing them with monopolizers, they should be regarded as public benefactors. And in order to secure to them the remuneration which the law provides, a liberal construction should be given to it." *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

11. "The drawings are to be treated as part of the written specification, and may be referred to to show the nature and character and extent of the claim, as well as to compose a part of the description." *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

12. "The jury are to judge of the meaning of words of art and technical phrases in commerce and manufactures, and of the surrounding circumstances which may materially affect, enlarge, or contract the meaning of the words of the patent and specification."—*Ib.*

13. Where a kind of thing is mentioned generically in a claim, it may be construed to mean a specific kind of thing. Such a question is for the court, not for the jury. *Davoll et al. v. Brown*, 1 W. & M. 53.—WOODBURY, 1845.

14. "A liberal construction is to be given to a patent, and inventions sustained if practicable, without a departure from sound principles. Only thus can ingenuity and perseverance be encouraged to exert themselves in this way usefully to the community; and only in this way can we protect intellectual property, the labors of the mind, productions and interests as much

a man's own, and as much the fruit of his honest industry, as the wheat he cultivates or the flocks he owns."—*Ib.*

15. "The preamble, even, may be resorted to for ascertaining the object of the specification. . . . Sometimes the body of the specification, . . . sometimes the summing up, . . . and sometimes the formal clause at the end of the specification. Generally all of them are examined together unless the formal clause seems explicitly to exclude the rest, and require a decision on itself alone."—*Ib.*

16. Specifications must be sustained if they can be fairly.—*Ib.*

17. "We should not be astute to avoid inventions."—*Ib.*

18. "The study of the courts has recently been, and especially since the patent acts of 1836 and 1839, to carry out the protection of the law to inventors so as to secure to them the full benefit of their inventions."—*Sparkman et al. v. Higgins et al.*, 1 Blatch. 205.—BETTS, 1846.

19. A part which is not mentioned in a claim may become a part thereof by construction given by the court. *Hovey v. Stevens*, 1 W. & M. 290.—WOODBURY, 1846.

20. Although a claim to the motion of a machine may not be patentable, it may yet be construed to be for the parts of the machine. *Hovey v. Stevens*, 3 W. & M. 17.—WOODBURY, 1846.

21. "When the patentee chooses to . . . cover with his patent the material of which a part of his machine is composed, he thereby endangers his right to prosecute when a different and inferior material is employed, and especially one which he himself, after repeated experiments, had abandoned." *Aiken v. Bemis*, 3 W. & M. 348.—WOODBURY, 1848.

22. "A court cannot consent to be over-astute in sustaining objections to patents. The true rule of construction in respect to patents and specifications, and the doings generally of inventors, is to apply to them plain and ordinary principles, . . . and not in this most metaphysical branch of modern law, to yield to subtleties and technicalities unsuited to the subject and not in keeping with the liberal spirit of the age, and likely to prove ruinous to a class of the community so inconsiderate and unskilled in business as men of genius and inventors usually are." *Hogg et al. v. Emerson*, 6 Howard, 437.—SUP. CT. 1848.

23. When it is said that "a thing is substantially the same," it is meant that "it is the same in all important particulars." *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

24. If defendant's machine acts in obedience to the same laws as plaintiff's machine, and is guided by the same mechanical principle, then, although the mechanism may be changed, though the proportions may vary, though the two machines may differ in the extent to which the common purpose is accomplished, the defendant is an infringer. *Parker v. Hulme*, 7 West. L. J. 417.—KANE, 1849.

25. Although defendant's device may differ from that of complainant's, yet, "if these are only changes of form and proportions without introducing any new principle or mechanical power, or new mode of operation producing a new kind of a result," the defendant is an infringer. *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

26. A formal change on defendant's part will not distinguish his article from the patented thing. "That would be an evasion. The change must be substantial. It must be different in the mechanical structure, in the physical existence of the thing, and also in its practical operation and effect in producing the result." *Buck et al. v. Hermance*, 1 Blatch. 398.—NELSON, 1849.

27. "It is now a principle settled by the concurrent opinions of some of the most enlightened jurists of this country, that patents securing to inventors the just rewards of their labor and industry are to be construed liberally, and with a fair purpose of carrying out the object of the constitutional provision on this subject and the legislation of Congress based upon it. It is now justly held that these exclusive rights are not to be viewed in the light of odious monopolies, but as the result of a policy at once beneficent and wise." *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

28. "It is . . . well settled that the whole instrument—that is, the patent, embracing the specification and drawing—is to be taken together; and if, from this, 'the exact nature and extent of the claim made by the inventor can be perceived, the court is bound to adopt that interpretation, and to give it full effect.'"—*Id.*

29. The language used in the specification "is to be so received as consistently, with its fair import, 'will make the claim coextensive with the actual discovery.' 'So that a patentee, unless his language necessarily imports a claim to things in use, will be presumed not to intend to claim things which he must know to be in use.'"—*Id.*

30. "In every combination of mechanical devices to perform certain functions so as to constitute a new machine or a new and useful in-

vention, it is impossible to enumerate, in a specification, all the various modes by which the machine may be made to operate, so as to produce a useful result. Many of its parts may be changed or substituted by other mechanical equivalents or devices, which either improve or deteriorate its value, while the original idea, principle, or mode of operation of the inventor is manifestly preserved. The inventor usually sets forth what he conceives the best form or mode under which his machine may be used to produce the required result. In order to ascertain the true nature and value of his invention, we must separate the substance and principle of it from its accidents; its essence from its modes; a mere change in the latter, while the former are retained, will not acquit the party making it from the charge of guilt of pirating the invention." *Blanchard v. Reeves et al.*, 1 Fish. P. C. 103.—GRIER, 1850.

31. "Patents should be construed liberally to support the claims of meritorious inventors. But there may be a liberality of construction very injurious to the public, especially if it permits the patentee to couch his specification in such ambiguous terms that its claims may be contracted or expanded to suit the exigency." *Parker v. Sears et al.*, 1 Fish. P. C. 93.—GRIER, 1850.

32. "It would amount to an infringement of such an invention as Morse's, or the patent for it, to adopt his mode of acting, operating, etc., or merely to change it by substituting some mechanical equivalent in a part of it, or altering only the form and proportion, so as not materially to affect results, or making any change merely evasive, colorable, and not 'substantial' or 'considerable' in its character. But one machine or manufacture is not a violation of another, within the purview of the patent system, unless it is substantially the same. It need not be identical, but it must be similar in the principle or mode of operation." *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

33. Where complainant's device cannot be made to do that which is done by defendant's device, it would seem that the two are not equivalents, and that defendant does not infringe.—*Id.*

34. "If [an inventor] has discovered much and discloses little—if there has been revealed to him one of the *arcana* of nature, and he communicates to the world only one or more of its derivative and secondary truths, he patents no more than he has proclaimed. He will not be allowed afterward, when the extent of his right shall be the subject of controversy, either by ex-

panding into a general expression what was limited before in a particular form, or, by tracing out for us the line that leads back from consequence to remote causes, to initiate us, inferentially, into the radical mystery of his invention, and then argue that he had described it by implication from the first, and has claimed ownership of it in his patent." *Detmold v. Reeves et al.*, 4 Am. L. J. 188.—KANE, 1851.

35. "There is no doubt that he who has discovered some new element or property of matter may secure to himself the ownership of his discovery so soon as he has been able to illustrate it practically, and to demonstrate its value. His patent, in such a case, will be commensurate with the principle which it announces to the world, and may be as broad as the mental conception itself. But, then, the mental conception must have been susceptible of embodiment, and must have been, in fact, embodied in some mechanical device or some process of art. The abstract must have been resolved into the concrete. The patent must be for a thing—not for an idea merely."—*Ib.*

36. "The one who patents an invention first is entitled to the protection of the principle in it over everybody else that patents it afterward." *Colt v. Mass. Arms Co.*, 1 Fish. P. C. 108.—WOODBURY, 1851.

37. "Where the difference is only in form or proportion to bring about similar results, or where it is only by using a mechanical equivalent instead of what is used by the other, there is, in point of law, not that considerable difference in principle, or in operation, or in results, which the law holds not to be a violation of what preceded it; but if it differs in something beyond mechanical equivalents—if it differs in something beyond form and proportions—if the difference in the parts of a pistol where it is charged is very considerable—the plaintiff cannot claim that as similar to his."—*Ib.*

38. "The claim must be construed to mean the words which he points out for his operations, and not any and all words. It is true that the operation of the law is such that any mode which is equivalent to the one he points out—which is similar—is covered by his patent, when he claims a particular mode; but in his patent he claims only what he points out, and that covers all which are similar and analogous, or which vary only in form."—*Ib.*

39. It is a presumption of law that the patentee has knowledge of the prior art. *Foot v. Silsby et al.*, 2 Blatch. 260.—NELSON, 1851.

40. "To substitute in place of some one element of a composition of matter a mere known

equivalent is an infringement, because, although the patentee has not expressly mentioned such equivalent in his claim, he is understood to embrace it, and in contemplation of law he has embraced it without express mention of it." *Byam et al. v. Farr et al.*, 1 Curtis's C. C. 260.—CURTIS, 1852.

41. "The claim must be taken as it stands, whatever is mentioned in it."—*Ib.*

42. "A patentee is not confined to the precise arrangement, in the construction of his machine, which he has described in his patent. . . . Formal changes are nothing—mere mechanical changes are nothing—all these may be made outside of the description to be found in the patent; and yet the machine, after it has been thus changed in its construction, is still the machine of the patentee, because it contains his invention, the fruits of his mind, and embodies the discovery which he has brought into existence and put into practical operation." *Tatham et al. v. Le Roy et al.*, 2 Blatch. 474.—NELSON, 1852.

43. "Any change or alteration which is suggested to the skilful operator from the working of the machine and in the course of its operation—any useful change that may be the result of the practical working of the machine—is clearly a change that belongs not to the operator, but to the original inventor of the improvement."—*Ib.*

44. "In examining a machine, with a view to ascertain whether or not it is an infringement of a previous one, the similarity or dissimilarity of the mechanical construction is not necessarily controlling. Its structure may be apparently very similar in form, and yet its principle and operation and result may be very different. So, on the other hand, its structure and appearance may be very different to the eye and in point of fact, and yet it may, in reality and in principle, be the same as the previous machine." "The sure test, and the one the jury should be guided by in all cases of this kind, is whether or not the defendants' machine, 'whatever may be its form or mechanical construction, has incorporated within it the principle or the combination or the novel ideas which constitute the improvement to be found in the plaintiff's machine. If it does, no matter what may be its mechanical construction or its form, it is an infringement, an appropriation of the ideas of another, simply in a different form." *Blanchard v. Beers et al.*, 2 Blatch. 411.—NELSON, 1852.

45. After a chemical discovery has been made and patented, it is easy to find chemicals of different names which will answer the purpose of the invention; but the use thereof is an infringement.

ment. *Goodyear et al. v. Central R. R. of New Jersey*, 2 Wall. Jr. 356.—GRIER, 1853.

46. "Patents are granted to 'promote science and the useful arts.' They are not odious monopolies or restrictions on the rights of the public. For the temporary monopoly given to the inventor, the public receive full compensation by the publication of the invention. And when the specification of a patent honestly sets forth the process and mode of compounding a new and valuable composition of matter, courts are bound to give it a liberal construction, and not to fritter it away or annul its benefits by formal or subtle objections."—*Ib.*

47. "The extent of the patentee's rights must be judged from the whole instrument taken together; and not from any one sentence."—*Ib.*

48. "When the subject-matter of the patent is a manufacture, the question will be whether in reality and in substance the defendant has availed himself of the invention of the patentee; a mere colorable evasion in the process or application should not be allowed to protect a defendant." *Rich et al. v. Lippincott et al.*, 2 Fish. P. C. 1.—GRIER, 1853.

49. "The patent embraces nothing more than the improvement described and claimed as new, and . . . any one who afterward discovered a method of accomplishing the same object, substantially and essentially differing from the one described, had a right to use it." *O'Reilly et al. v. Morse et al.*, 15 Howard, 62.—SUP. CT. 1853.

50. "The claim or summing up is not to be taken alone, but in connection with the specification and drawings. The whole instrument is to be taken together." And the court is to "look at the others only for the purpose of enabling" it "to correctly interpret the claim." *Brooks et al. v. Fiske et al.*, 15 Howard, 212.—SUP. CT. 1853.

51. Where a patentee "has stated his claim in rather ambiguous and equivocal terms which might be construed to mean either a process or machine," in such case the construction should be that which is most favorable to the patentee, "*ut res magis valeat quam pereat.*" *Corning et al. v. Burden*, 15 Howard, 252.—SUP. CT. 1853.

52. "Now while it is undoubtedly true that the patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, though they also embody his invention, yet such an interpretation should not be put upon his claim if it can fairly

be construed otherwise, and this for two reasons:

"1st. Because the reasonable presumption is that, having a right to cover and protect his whole invention, he intended to do so.

"2d. Because specifications are to be construed liberally, in accordance with the design of the Constitution and the Patent Laws of the United States, to promote the progress of the useful arts, and allow inventors to retain for their own use, not anything which is matter of common right, but what they themselves have created." *Winans v. Denmead et al.*, 15 Howard, 330.—SUP. CT. 1853.

53. "When a patentee describes a machine and then claims it as described, . . . he is understood to intend to claim, and does by law actually cover, not only the precise form he has described, but all other forms which embody his invention; it being a familiar rule that to copy the principle or mode of operation described is an infringement, although such copy should be totally unlike the original in form and proportion."—*Ib.*

54. "Where form and substance are inseparable, it is enough to look at the form only. Where they are separable, where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention, for that which entitled the inventor to his patent, and which the patent was designed to secure. Where that is found there is an infringement, and it is not a defence that it is embodied in a form not described and in terms claimed by the patentee."—*Ib.*

55. "Patentees sometimes add to their claims an express declaration to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words. The exclusive right to the thing patented is not secured if the public are at liberty to make substantial copies of it, varying its form or proportions. And, therefore, the patentee, having described his invention and shown its principles, and claimed it in that form which most perfectly embodies it, is in contemplation of law deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms."—*Ib.*

56. "The patentee may . . . limit his claim in his specification to one particular form of machine, and thus exclude all other forms which embody his invention, and thereby not secure himself the whole that he has invented. In such

a case he is secured only in the particular form claimed." *Am. Pin Co. v. Oakville Co. et al.*, 3 Blatch. 190.—INGERSOLL, 1854.

57. "The claims contained in a patent are to be construed with reference to the state of the art at the time of the invention." *Pitts v. Wemple*, 1 Bissell, 87.—DRUMMOND, 1855.

58. A patentee is restricted to his claim. "It is true that the whole patent, including specifications and drawings, is to be taken into consideration, but . . . only for the purpose of placing a proper construction upon the claim."—*Id.*

59. The question is not whether defendant's machine operates as perfectly as plaintiff's, "but whether it is the same in principle or not. And by the principle of a machine or improvement of a machine . . . is to be understood the peculiar mode, manner, or device by which a proposed result or effect is produced."—*Id.*

60. "The words of the specification are to be taken together, and they are to be so construed as to give effect to the meaning and intention of the person using them. Words are not to be distorted from their meaning so as to affect what may be supposed to have been the intention of the person using them. But they are to have a reasonable construction, as connected with the sentence in which they are used." *Allen v. Hunter*, 6 McLean, 303.—MCLEAN, 1855.

61. "Formerly a strict construction was given in this country and in England to the claims of a patentee, but a more liberal and favorable view is now taken of his claim. He must describe it within the law; but courts do not go beyond the law for technical objection to defeat it."—*Id.*

62. "An unsubstantial or colorable alteration in a machine or compound does not protect an individual from the character and consequences of an infringement. Where the machine is constructed or the compound formed on the same principle, however varied in form, there is an infringement. In a machine where the same powers are employed, with only formal alterations as to size or position of the machinery, to produce a certain result, the principle of the machine remains the same. And so of a compound where the ingredients are the same and the change is merely in the mode of combining them; or where there is a substitute of one ingredient, having the same quality and producing the same result, being within the scope of the claim."—*Id.*

63. "There is a reasonable presumption that it is the intention of the inventor to obtain, and of the Government to concede to him, the ex-

clusive right to what he actually invented." *Kittle v. Merriam*, 2 Curtis's C. C. 475.—CURTIS, 1855.

64. "The first and original inventor is entitled to protection against all other means of carrying the principle into effect." *Nichols v. Harries*, 1 MacArthur's P. C. 362.—MORSELL, 1855.

65. A claim was for "the employment of a column of falling water," etc. The court construed this to be a claim for certain mechanism, saying: "It is the duty of the court, in construing claims of this character, to so construe them, if they can without doing violence to the language used, as not to defeat the claim of the patentee, but to give the plaintiff what he has actually invented, and to give him all that he has actually invented; in other words, to make the claim commensurate with the invention which has been actually made by the patentee." *Ransom et al. v. New York*, 1 Fish. P. C. 252.—HALL, 1856.

66. "The patentee is to be presumed not to intend to claim things which he must know to be in use; . . . the specification should be so read as will make the claim coextensive with the actual discovery or invention." *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILSON, 1856.

67. "When a person has invented some mode of carrying into effect a law of natural science or a rule of practice which constitutes the peculiar feature of his invention, such discovery may be secured to him by a patent. Hence it follows that he is entitled to protect himself from all other modes of making the same application. The substantial identity, therefore, that is to be looked to respects that which constitutes the essence of the invention—namely, *the application of the principle*. If the mode of carrying the same principle into effect, adopted by the defendant, still shows that the principle admits of the same application in a variety of forms or by a variety of apparatus, the jury will be authorized to treat such mode as a piracy of the invention. But if the defendant has adopted variations which show that the application of the principle is varied, that some other law or rule of practice or science is made to take the place of that which the patentee claims as the essence of his invention, then there is no infringement."—*Id.*

68. Upon the question of infringement, the question as regards complainant's patent is what he has claimed, not what he might have claimed. *Sickles et al. v. Gloucester Mfg Co.*, 3 Wall. Jr. 196.—GRIER, 1856.

69. "The title or description given to the in-

vention in the grant is never expected to be specific, but only to indicate the nature and design of the invention. The specification, as its name indicates, must be searched for the exact description of what the patent claims."—*Ib.*

70. By the "principle" of a machine is meant the "*modus operandi*."—*Ib.*

71. "The law requires a clear and particular specification of the principle and several modes in which the patentee contemplates its application. Courts will always construe these instruments favorably to the patentee; but they cannot make a new specification with more extensive claims than the original, or stop the course of invention by a fanciful application of the doctrine of equivalents."—*Ib.*

72. "The new form of the machinery embodying the new ideas is not a material part of the patentee's invention, for the reason that the embodiment of his ideas into working machinery is rather the work of a skilful mechanic than that of the inventor." "The mere form of the defendants' machinery must be disregarded, and the jury must look into the substance of its arrangement and its method of working for the purpose of seeing whether the ideas of the inventor are incorporated in it. If they are, the patent is infringed." *Sickles v. Borden*, 3 Blatch. 535.—NELSON, 1856.

73. In discussing the operation of the patented machine, "it is not material what the theory of the patentee was on this point." *Foss et al. v. Herbert*, 1 Bissell, 121.—DRUMMOND, 1856.

74. "In the construction of a patent, the entire specification is to be taken together, as embracing the particular description which the law requires of the discovery, the manner of construction, and the claim of the patentee. The specification and claim emanate from the same pen—the one cannot contradict the other." *Paxe v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

75. "The intention of the inventor, so as to effect the object designed, is to govern the construction of the language he employs. Inventors are not always educated or scientific men. Some of the most useful inventions have sprung from an illiterate source. Genius is not always blessed with the power of language. Courts look to the manifest design in order to remove any ambiguity arising from the terms employed. But this ambiguity must not be such as would perplex an ordinary mechanic in the art to which it applies."—*Ib.*

76. Courts use the phrase, "'Substantial identity,' as excluding immaterial variations or fraudulent evasions. That is a substantial

identity, which comprehends the application of the *principle* of the invention.

"If a defendant adopts a different mode of carrying the same principle into effect, and the principle admits of a variety of forms, there is an identity of principle, though not an identity of mode."—*Ib.*

77. "A patent, in calling for a specific mode, embraces in law all mechanical equivalents or modes which operate on the same principle; consequently all modes, however changed in form, but which act substantially on the same principle and effect the same end, are within the patent. If this were not so a patent right would be of no value, as it might be avoided by any one who possessed ordinary mechanical skill." *Pitts v. Edmonds et al.*, 1 Bissell, U. S. C. 168.—MCLEAN, 1857.

78. "The invention patented when a patent is taken out for a machine is the machine itself—the mechanical means and devices by which certain results in the operation of the machine can be obtained; and when the inventor has obtained a patent for his invention, he is entitled to the exclusive use of it, if that invention is a machine, for all the uses and purposes to which that machine, without the exercise of any inventive power, can be usefully applied. In other words, when he patents a machine he cannot patent either a purpose or an effect, but the mechanical means, devices, and organization which his machine embodies; and when these means, devices, and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device, or means, for all the uses and purposes to which it can be applied, to every function, power, and capacity of his patented machine, without regard to the purposes to which he supposed originally it was most applicable, or to which he supposed it was solely applicable, if such were his original view." *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

79. "A mere change of form in the elementary parts of a combination, or in the different parts of a machine which is patented, does not change the character and principle of the machine, provided the spirit, substance, and principle of the machine is retained, and the substitution of one well-known mechanical equivalent for another is not such a change as will alter the character of the machine or shield infringers from the consequences of an infringement."—*Ib.*

80. An attempt to treat the earlier and better device used by defendant as an infringement of a later device, to obviate a difficulty unknown

to the first, is an application of the doctrine of equivalents which needs no . . . comment." *McCormick v. Talcott et al.*, 20 Howard, 402.—Sup. Ct. 1857.

81. "Patents are to be construed liberally; . . . they are not to be subjected to a rigid interpretation, and . . . it is to be presumed that the Commissioner has done his duty, and not granted a patent when he ought not to have granted one." *Potter et al. v. Holland*, 4 Blatch. 238.—INGERSOLL, 1858.

82. "The plaintiff is not controlled by his title, but the patent, specification, and drawings are all to be examined, and are all to have a fair and liberal construction in determining the nature and extent of the invention." *Bell v. Daniels et al.*, 1 Bond, 212.—LEAVITT, 1858.

83. "In determining what it is that the plaintiff has secured to him by his patent from the Government, the court looks, in the first place, at what is called technically the claim, which is the summing up, at the close of the patent, or specification preceding; the claim being in the terms: 'What I claim to have invented, and wish to secure by letters-patent, is —' and then a condensed statement of what he wishes to have secured to him by his patent. But in construing that, we take into view the whole of what precedes it in the specification, and also such extraneous facts presented by the evidence as may aid in giving the true construction to the patent, particularly the documents from the Patent Office which have preceded the granting of the patent itself." *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

84. "Patents are to be construed liberally, and are not to be subject to a strict and rigid interpretation. The rights secured are to be protected against any substantial violation. Formal and subtle differences are to be disregarded." *Imlay v. Norwich & Worcester R. R.*, 4 Blatch. 227.—INGERSOLL, 1858.

85. "Patents are to be liberally construed; . . . they should not be subjected to too rigid an interpretation. That is a rule of law, and if it were not a rule of law, and not regarded, but very few patents would be of any avail." *Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co.*, 3 Fish. P. C. 43.—INGERSOLL, 1858.

86. If there is a question about the construction of a claim, the other parts of the specification are to be used in understanding the claim. *Whipple v. Baldwin M'fg Co.*, 4 Fish. P. C. 29.—SPRAGUE, 1858.

87. "Defendant may lawfully produce the like result with the plaintiffs if he uses means

substantially different from those described in the plaintiff's specification. Results are not patented, but only means to produce results." *Burr et al. v. Copperthwait*, 4 Blatch. 163.—INGERSOLL, 1858.

88. "All exclusive rights in the nature of patents are created, and must be controlled by statutory provisions, and, therefore, it must appear that all the essential requisites of the law have been complied with. In deciding this question, we must look to the patent, specification, and drawings, and these are to be examined and construed in a liberal spirit. It is sometimes said that all patents are monopolies, grants of exclusive privileges which ought not to be maintained. . . . This view is not to be countenanced; . . . the patent should be construed liberally, and the patentee should be protected in all rights which fairly belong to him." *Lat-ta v. Shawk*, 1 Bond, 259.—LEAVITT, 1859.

89. "On the question of identity, the law regards substance and not form, and the real question is, whether the machine used by defendants is in principle the same as that patented to the plaintiff. It would be a reproach to the law if a mere colorable change could deprive an inventor of the merit of his invention. By the term, 'Principle of a machine,' we understand its mode or manner of operation, and hence there may be two structures widely different in appearance or dimensions, and yet identically the same in principle."—*Id.*

90. "Difference in size and proportions, so long as the construction, arrangement, principle, and mode of operation are substantially the same, is entirely immaterial. Any machine gotten up by the patentee or those claiming under him whose construction, arrangement, principle, and mode of operation are substantially the same as the one described in the specification, though differing in size and proportions, is as much within the protection of the patent as the structure therein described, provided it is of sufficient size and has the proper proportions to accomplish the requisite work, and actually accomplishes it, substantially by the same means and substantially in the same way." *Cahoon et al. v. Ring*, 1 Cliff. 592.—CLIFFORD, 1859.

91. "If two machines do the same work in substantially the same way, and accomplish substantially the same result, they are the same; and so if parts of two machines do the same way, and accomplish substantially the same result, those parts are the same, although they may differ in name, form, or shape; but, in both cases, if the two things perform different work, or in a way substantially different, or do not accomplish sub-



stantially the same result, then they are substantially different.

"Slight differences in degree cannot be regarded as of weight in determining a question of substantial similarity or substantial difference. One thing may be a little longer or a little shorter than another, or it may work a little better or a little worse, and yet the two may be substantially the same; and whether they are so or not, and whether the difference in degree is sufficient to constitute a substantial difference in the thing or not, are questions for . . . determination. Mere difference in degree, however, when properly applied to the facts of the case in comparing these machines, or the several devices or elements of which they are composed, is entitled to very little weight."—*Ib.*

92. "It is the duty of the court to give" a patent "such a liberal construction as will secure to the inventor an exclusive right to his invention and discovery, as stated and described in the specification."—*Pike v. Potter*, 3 Fish. P. C. 55.—PITMAN, 1859.

93. "If, by examination of the specification, and applying to the then existing state of the art, we can learn what the invention was, then the claim, which was designed to be a condensed summary of the invention, is to be construed so as to be coextensive with the invention, if that can be done without doing violence to its language." *Whipple v. Middlesex Co.*, 4 Fish. P. C. 41.—SPRAGUE, 1859.

94. "In giving a construction to the plaintiff's patent, we are to ascertain what he intended."—*Ib.*

95. The idea involved in an invention may be such that, after the original completion, a skillful mechanic might, by mere skill and without the use of any inventive faculty, embody it and adapt it to practical use by different mechanical devices. All such adaptations would be infringements of the patent granted for the invention. *Potter et al. v. Wilson et al.*, 2 Fish. P. C. 102.—NELSON, 1860.

96. "The law is that the patentee is protected against any other device which involves substantially the same principle. But if another party produces the same result by means different in application and principle, then it is no infringement, for it would be absurd to say that the granting of a patent covers all possible ways of producing the same result." *Lee et al. v. Blandy et al.*, 1 Bond, 361.—LEAVITT, 1860.

97. Where the patent in question is for a new composition of metals, a slight, immaterial change in the ingredients or in the manner of preparing them makes no difference, nor does a

variation of proportions, nor the addition of other ingredients, make a substantial difference. *Matthews v. Skates et al.*, 1 Fish. P. C. 602.—JONES, 1860.

98. "In giving construction to a claim, we must look at the specification which precedes it." *Howe v. Morton et al.*, 13 Mo. L. R. 70.—SPRAGUE, 1860.

99. "If a party is not the original inventor of the principle as well as of the machine, he has no right to invoke the doctrine of equivalents, for it does not belong to him; but if he is the inventor of the principle which he embodies in his machine, as well as the first inventor of the machine which carries it out, he has a right to invoke the doctrine of equivalents." *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

100. "Where there was anything inconsistent either in the specification or in the claim, and yet the patent claimed in substance that which was patentable, the courts have always decided that that was the meaning of the claim; as, for instance, in the case where a party described a machine, and yet claimed a function; the court decided there that the patent was good for the machine. But the courts have never gone so far . . . upon that principle of the liberal construction of patents, nor could they have done so as to say that a party, having claimed that which was not patentable, his patent could stand."—*Ib.*

101. "Where a party has discovered a result, as well as the machinery which produces it, he has a right to invoke the doctrine of equivalents in reference to infringers. Where he has discovered a function that is new for the first time, and discovers a machine that is new, too, he has a right to invoke the doctrine of equivalents to protect himself."—*Ib.*

102. If "the mechanism or combination of mechanism used by defendants varies from that prescribed in plaintiff's patent only in immaterial respects, or by the substitution of other known equivalent mechanical powers for those mentioned in plaintiff's specification, then the defendants have infringed the patent or patents of the said plaintiffs."—*Ib.*

103. "In comparing the machines of the defendants with the inventions of the plaintiff, the mere change in form of machinery, or an alteration of some one of its inessential parts, or in the use of known equivalent powers, not varying essentially the machine or device, or its mode of operation or organization, will not make the defendants' machine or device invention."—*Ib.*

104. In deciding the question of infringement, identity does not depend upon form and propor-

tions so much as upon the principle of action and the operation of the two things. *Judson v. Moore et al.*, 1 Bond, 285.—LEAVITT, 1860.

105. "Courts should be very tender of the rights of inventors, and not draw hasty conclusions adverse to the validity of their rights secured by patent." *Tappan v. National Bank-Note Co.*, 4 Blatch, 509.—SHIPMAN, 1861.

106. It is the qualities which an article has, and not those which are imputed to it in the specification, which govern. *Goodyear et al. v. N. Y. Gutta Percha & India Rubber Vulcanite Co. et al.*, 2 Fish. P. C. 312.—NELSON, 1862.

107. "Patents for inventions are not to be treated as mere monopolies, and, therefore, odious in the eyes of the law; but they are to receive a liberal construction, and under the fair application of the rule *ut res magis valeat quam pereat* are, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor." *Turrill v. Michigan Southern R. R. Co.*, 1 Wall. 491.—SUP. CT. 1863.

108. "An infringement involves substantial identity, whether that identity be described by the terms, 'same principle,' 'same *modus operandi*,' or any other. It is a copy of the thing described in the specification of the patentee, either without variation or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention—that is, by an arrangement of the mechanism which performs the same service or produces the same effect in the same way, or substantially the same way." *Burr v. Duryee*, 1 Wall. 531.—SUP. CT. 1863.

109. "Although several inventors might obtain substantially the same result if it was obtained by means substantially different in character, construction, arrangement, and mode of operation from any prior invention adapted to the same general purpose, the use of such means for a similar, or even for the same purpose, would not infringe the rights of a prior patentee. The patentee of the first of such inventions could not treat another as an infringer because he had improved the machine of . . . any other prior inventor by the use of a substantially different device, or a substantially different combination of parts, though such device or combination were capable of performing the same functions. In such cases, the inventor of the first improvement cannot invoke the doctrine of equivalents to suppress the other improvements, which are not mere colorable evasions of the first." *Burden v. Corn-*

*ing et al.*, 2 Fish. P. C. 477.—NELSON & HALL, 1864.

110. "The claim must be construed as favorably to the plaintiff as the language of the claim, the state of the art, and the extent and character of his actual invention will allow."—*Ib.*

111. Where a patentee is simply an improver on a prior existing machine, the construction of his claim is to be limited to the specific device he describes and claims and to equivalents thereof, meaning by equivalents not equivalents in results, but equivalents in means.—*Ib.*

112. In construing a patent, the same mode is to be followed in determining upon an infringement that was followed in determining upon patentable novelty.—*Ib.*

113. "Duty of the court is to collect the intention of the parties from the whole instrument, and, if practicable, to adopt such construction as will give it effect and render it available for the purpose for which it was granted." *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Cliff. 351.—CLIFFORD, 1864.

114. "Every inventor is entitled to the full benefit of his invention as described and secured in his patent, and no one charged with infringing the same can successfully defend himself against the charge merely because the machine he makes, uses, or vends differs from that of the plaintiff in form, or in any respect which does not render the machine so made, used, or vended substantially different from the patented machine." *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

115. "Patentees have that property in their inventions as secured by letters-patent, and they have no other; and hence it is that courts of justice have uniformly held that patents for inventions are not to be treated as mere monopolies, and therefore odious in the eye of the law, but they are to receive a liberal construction, and, if practicable, are to be so interpreted as to uphold and not to destroy the rights of the inventor."—*Ib.*

116. Where the elements of an invention are old, the rule "undoubtedly is that the patentee cannot invoke the doctrine of equivalents to suppress all other improvements of the old machine, but he is entitled to treat every one as an infringer who makes, uses, or vends his patented improvement without any other change than the employment of a substitute for one of its elements, well known as such at the date of his invention, and which any constructor acquainted with the art knew how to employ. Reason for the qualification of the rule as stated is, that such a change—that is, the mere substitution of a well-

known element for another, where it appears that the substituted element was well known as a usual substitute for the element left out—is a merely formal one, and nothing better than a colorable evasion of the patent.”—*Ib.*

117. Where the elements of an invention are old, “the patentee cannot invoke the doctrine of equivalents to suppress all other improvements of the old apparatus or machine, but he is entitled to treat every one as an infringer who makes, uses, or vends his patented improvement without any other change than a common substitute for one of its elements, well known as such, and which any constructor, without any experiment or resort to invention, knew how to employ.”—*Ib.*

118. It is the duty of the court “to construe the patent in such a way, if possible, as to conform to the actual invention.” *Hale et al. v. Stimpson et al.*, 2 Fish. P. C. 565.—LOWELL, 1865.

119. “There always is, in the mind of the court, a desire to sustain a patent securing an invention upon as broad a construction as is consistent with the rules which must determine the court in the construction of an instrument of this kind.” *Doughty v. West et al.*, 2 Fish. P. C. 553.—SHIPMAN, 1865.

120. “The general rule on the subject is, that patents are to be so construed, if possible, that the inventor shall have the benefit of what he has actually invented, if he has invented anything; and that is a rule which is beneficially applied to the advantage, undoubtedly, of patentees.” *Woodman v. Stimpson*, 3 Fish. P. C. 98.—LOWELL, 1866.

121. “The man who has made the first invention has made it for all uses to which it is applicable.”—*Ib.*

122. It seems that, in construing a patent, the inventor’s previous caveat may be taken into consideration. *Goodyear et al. v. Mullee et al.*, 5 Blatch. 429.—BLATCHFORD, 1867.

123. “There is one principle true, beyond all question, that a patent for a particular structure, intended to accomplish a particular end, does not necessarily import an exclusive right to every possible mode of accomplishing the same end.” *Blanchard et al. v. Puttman et al.*, 2 Bond, 85.—LEAVITT, 1867.

124. “If, by the use of good sense and the ordinary rules of interpretation, the court can clearly see the nature and limits of the invention, the claim will be upheld. If it is so ambiguous and uncertain that its true meaning cannot be made out without resorting to conjecture, or if it includes that which is old and therefore

not within the power of the patentee rightfully to claim, then the patent is void.” *Blake v. Stafford*, 6 Blatch. 195.—SHIPMAN, 1867.

125. “Where the patent is brought to the test of a litigation, ambiguity, or excess in the specification and claim, is to be determined by construction, and the instrument must stand or fall under this test.”—*Ib.*

126. “It might be said that, if a fraudulent intent to make the specification or claim obscure were proved by extrinsic evidence, the court ought not to give the patentee the benefit of the liberal rule of construction which prevails in favor of inventors. But this rule of construction rests upon the public policy, and not upon cases of individual merit. Its application to the instrument is necessary before it can be determined whether or not the alleged defect exists.”—*Ib.*

127. “It is a settled rule in the construction of patents that the specification is to be liberally construed, and effect, if possible, is to be given to the claims of the patentee, so as to give him all the benefits of his invention.” *Whitney v. Mowry*, 2 Bond, 45.—LEAVITT, 1867.

128. “It is a conceded principle that a patent for a mechanical structure, or a process to effect a specific purpose, does not embrace every possible means of effecting the same result. The true inquiry is, whether the machine or process charged to be an evasion of an exclusive right of a patentee embodies the idea or conception of the original inventor, and accomplishes it by substantially the same means. A patentee is protected from the use of all plans or devices which, however seemingly different from the patented invention, are the same in principle and operation.”—*Ib.*

129. “It is well settled by the courts that, in the effort to ascertain the intention and meaning of the specification and claims, they are to be viewed in a liberal spirit; that, if possible, the object of the inventor or patentee may be carried out. Mere rigid technicalities are to be set aside, unless there is clear legal necessity for sustaining them.” *Goodyear et al. v. Berry*, 2 Bond, 189.—LEAVITT, 1868.

130. “A patent for a mechanical structure or contrivance, producing a new and useful result, is no protection against the use of an invention producing the same result by appliances or principles substantially different from the patented invention. The rights of the patentee or proprietor of the patent are only invaded by a result like that of his invention, effected by what are substantially the same means. And so in the case of patented chemical combinations, the exclusive right to the invention imports noth-

ing but protection against the use of the same, or substantially the same, elements compounded and treated on principles substantially the same as those of the patented article."—*Id.*

131. "An infringement is a copy made after and agreeing substantially and in principle with the article described in the letters-patent." *Haselden v. Ogden*, 3 Fish. P. C. 378.—SHERMAN, 1868.

132. "In construing a patent, in the first place, courts generally look to the claim, which, by law, is required to be a summing up of the particulars of the invention for which the applicant desires a patent. If that claim is vague and uncertain, then reference is made to the proceedings, specifications, and drawings, together with such other exhibits as may aid in giving a construction to the patent."—*Id.*

133. A patent should be construed in a liberal spirit to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality rather than strictness should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius and labors." [Said of a reissued patent.] *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

134. "The claims must be construed in connection with the descriptive parts of the specification and with reference to what is seen to be the real invention." *Coffin v. Ogden et al.*, 7 Blatch. 61.—BLATCHFORD, 1869.

135. "The rights secured by a patent for an invention or discovery are as much property as anything else, real or incorporeal. The titles by which they are held, like other titles, should not be overthrown upon doubts or objections capable of a reasonable and just solution in favor of their validity. This principle should be steadily borne in mind by those to whom is intrusted the administration of civil justice." *Blandy et al. v. Griffith et al.*, 3 Fish. P. C. 609.—SWAYNE, 1869.

136. "The identity or diversity of two machines depends not on the employment of the same elements or powers of mechanics, but upon producing the given effect by substantially the same mode of operation or substantially the same combination of powers." *Crompton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.

137. "In the construction of a claim, reference is to be had to the descriptive portion of the specification, or to any other portion of it, to ascertain the true interpretation of the claim. But

where it is clear and explicit, and especially where there is nothing in the specification which shows that the patentee did not mean just what the plain language of the claim imports, we are not aided by and have no need of aid from such specification." *Rich v. Close*, 8 Blatch. 41.—WOODRUFF, 1870.

138. "Much aid may be derived in construing the claim of a patent by referring to the descriptive part of the specification, and reference may also be made, if need be, to the drawings and Patent Office model; but neither the correspondence between the Commissioner and the applicant, nor the proceedings in the Patent Office, are admissible to enlarge, diminish, or vary the language of the claim." *Goodyear Dental Vulcanite Co. et al. v. Gardner*, 3 Cliff. 408.—CLIFFORD, 1870.

139. "Evidence to prove the state of the art is admissible, and expert testimony to aid in expounding and defining technical words and phrases may be received; but in all other respects the rules for the construction of letters-patent are the same as those applied in construing other grants and written instruments. Patents for inventions are to receive a liberal interpretation, and are, if practicable, to be so construed as to uphold and not to destroy the right of the inventor."—*Id.*

140. A patent is to be construed without referring to correspondence upon rejections in the Patent Office forming part of the application. *Piper v. Brown et al.*, 1 Holmes, 20.—SHEPLEY, 1870.

141. "Where the claim immediately follows the description of the invention, it may be construed in connection with the explanations contained in the specifications, and, where it contains words referring back to the specifications, it cannot be construed in any other way." *Seymour v. Osborn*, 11 Wall. 516.—SUP. CT. 1870.

142. "Actual inventors of a combination of two or more ingredients in a machine, secured by letters-patent in due form, are entitled, even though the ingredients are old, if the combination produces a new and useful result, to treat every one as an infringer who makes or uses or vends the machine to others to be used without their authority or license. . . .

"They cannot suppress subsequent improvements which are substantially different, whether the new improvement consists in a new combination of the same ingredients, or of the substitution of some newly discovered ingredient, or of some old one, performing some new function not known at the date of the letters-patent, as a proper substitute for the ingredient withdrawn

from the combination constituting their invention. Mere formal alterations in a combination in letters-patent, however, are no defence to the charge of infringement, and the withdrawal of one ingredient from the same, and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination, if the ingredient substituted performs substantially the same function as the one withdrawn.

“Patentees, therefore, are entitled in all cases to invoke to some extent the doctrine of equivalents, but they are never entitled to do so in any case to suppress all other substantial improvements, and the rule which disallows such pretensions, if properly understood and limited, is as applicable to the inventor of a device, or even of an entire machine, as to the inventor of a mere combination, except that the inventor of the latter cannot treat any one as an infringer whose machine does not contain all of the material ingredients of the prior combination, as in that state of the case the subsequent invention is regarded as substantially different from the former one, unless the latter machine employs as a substitute for the ingredient left out to perform the same function, some other ingredient which was well known as a proper substitute for the same when the former invention was patented. . . .

“*Bona fide* inventors of a combination are as much entitled to suppress every other combination of the same ingredients to produce the same result, not substantially different from what they have invented and caused to be patented, as any other class of inventors. All alike have the right to suppress every colorable invasion of that which is secured to them by their letters-patent.”—*Id.*

143. “When a claim immediately follows a description of an invention, it may be construed in connection with the explanation contained in the specifications; and when it contains words referring to the specification, it cannot properly be construed in any other way.” *Roberts v. Dickey*, 4 Brews. 260.—STRONG, 1871.

144. “Mere form is often immaterial, and therefore it is always held, in regard to infringements, that a mere change of form, when the instrument remains in substance and in its mode of operation the same, will not avail an alleged infringer. But sometimes form is of the very substance of an invention, and change of form is the invention itself.” *Dennis v. Eddy et al.*, 4 Fish. P. C. 423.—WOODRUFF, 1871.

145. “No certain, definite rule can be stated

by which to determine unerringly, in every case, what will amount to substantial identity. The jury, guided by general principles, must determine each case upon its own circumstances. If, however, ‘the invention of the patentee be a machine, or an improvement on a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention—that is, by an arrangement of its mechanism, which performs the same service, or produces the same effect in the same, or substantially the same way.’” *Carter et al. v. Baker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

146. “The question is, whether the given effect is produced substantially by the same mode of operation and the same combination of powers and devices in both machines; mere colorable or evasive differences cannot defeat the right of the original inventor. The inquiry, therefore, should be whether the defendant’s device is in substance and effect a colorable evasion of the plaintiff’s contrivance, or whether it is really a new and substantially different thing. If the defendants have taken the same general plan and applied it for the same purpose and produced the same effect, in substantially the same mode, although they have varied the form of construction merely, it will still be substantially, in contemplation of the patent law, the same thing; otherwise it will not.”—*Id.*

147. “Whether or not one machine is an infringement of another . . . does not necessarily depend upon whether the mechanical constructions are different. But the question is, whether [whatever may be the mechanical construction] the latter machine contains the means or combination found in the previous machine; whether, taking the structure as you find it, you can see the new idea *completely* embodied in it.”—*Id.*

148. Where complainant’s patent is for a combination, “if the defendants have only varied their combination by employing well-known mechanical substitutes for some one or more material elements or parts of the plaintiff’s combination, then there is an infringement; for a mere known mechanical *substitute* for a thing, for the purpose of determining the question in issue, must be regarded as *the thing itself*.”

149. “It does not necessarily follow, because a subsequent machine is better than or an improvement on a prior patented machine, that it is not an infringement. It may or may not be an infringement, depending upon whether the better or improved machine embodies the old machine. It may contain the whole substance of the first machine, and something more, or be constructed of an improved material which

renders it better and more useful, and makes it the subject of a patent in these particulars. Yet if it embodies the prior machine, or combination, or improvement, or the patented portion of it, there is an infringement, and the inventor of the improved machine cannot appropriate the prior invention without being liable for infringement, even though his own improvement is useless without such appropriation of the prior patented machine."—*Ib.*

150. "In patents for machines, it is usual to say that the parts may be made of any suitable material, and that means known materials; but even if it does not, a person who should afterward discover a new material would have no right to make the machine, and the inventor is protected against a machine when made of any such material, though the second inventor would have the exclusive right to the material." *Bailey Washing & Wringing Mach. Co. v. Lincoln et al.*, 4 Fish. P. C. 379.—LOWELL, 1871.

151. "Patents are to be construed liberally, so as to sustain and not destroy the right of the inventor. Hence the whole of the specification may and should be looked at to learn from the description of the invention not only how to make it, but to ascertain what it really is. By the requirements of the statute the description must be in full, clear, and exact terms, and it is, therefore, an authorized guide to an accurate comprehension of what the patentee meant to claim as his invention. It is only where the specification is expressly referred to that the claim is to be construed in connection with it; but, as a general rule, the explanations contained in it are to be taken as the inventor's own interpreter of the meaning of his claim, and of the essential qualities of the invention protected by his patent." *Francis et al. v. Mellor et al.*, 8 Phil. 157.—McKENNAN, 1871.

152. "The plaintiff's invention being only an improvement of certain parts of a known machine, he cannot treat another as an infringer because he has improved the previously existing machine or machines by using a form, construction, device, or combination substantially different from that invented and patented by the plaintiff, though performing the same functions." *Taylor v. Garretson et al.*, 9 Blatch. 156.—HALL, 1871.

153. "Ordinarily the claim of a patentee should be so construed as to secure to him the exclusive right to control the use of his actual invention, if this can be done without violence to the language of his claims; but this general rule would hardly be acted upon in a case where it was evident that his claims had been

expressed in loose, ambiguous, or general terms, for the fraudulent purpose of apparently covering subsequent inventions, especially where the objectionable claim had been introduced in a reissue, for the purpose of covering the subsequent invention of another."—*Ib.*

154. "The mere substitution of a mechanical equivalent or equivalents for one or more of the elements constituting the combinations and organizations . . . claimed, or any merely formal or fraudulently evasive change in the parts or arrangement embraced in the claim, would not relieve a party from liability as an infringer."—*Ib.*

155. "The rule *ut res magis valeat quam pereat* is as applicable to patents as to any other instruments in regard to which it is the duty of the court to adopt a liberal construction, in order to give effect to the intention of the parties." *Carew v. Boston Elastic Fabric Co.*, 3 Cliff. 356.—CLIFFORD, 1871.

156. "Where doubts arise, it is the duty of the court to collect the intention of the parties from the whole instrument, and, if practicable, to adopt such a construction as will give it effect and render it available for the purpose for which it was granted."—*Ib.*

157. "Where no patent is granted, the invention, however novel, ingenious, or useful, may be used by any one; and when a patent is granted, the patentee must stand by his patent. He gains no exclusive right, except for such a machine as his patent describes and secures, though it may be far less broad or comprehensive than his actual invention." *Waterbury Brass Co. v. E. Miller & Co.*, 9 Blatch. 77.—WOODRUFF, 1871.

158. The words, "substantially as described and shown," are not to be construed as referring the claim back to the specification, so as to permit a party to escape the charge of infringement who substantially appropriates the improvement covered by the claim.—*Ib.*

159. "Courts and juries should not favor the avoidance of the patent by an immaterial variation. Quite otherwise; . . . when, in substance and effect, the useful purpose for which the device or thing is intended is the same, it should be treated as an infringement; but if in substance and effect it is different, it is equally true, on the other hand, that it is no infringement." *Hawes v. Gage*, 5 O. G. 494.—WOODRUFF, 1871.

160. "By substitution of chemical equivalents, patents may as well be infringed as by mechanical equivalents. When a new composition of matter or process of manufacture is invented

and patented, it is easy for the chemist, with the aid of the specification in the inventor's patent, to suggest changes in the process by the substitution of chemical equivalents which may produce similar or better results. It does not necessarily follow that such a use of chemical equivalents would not infringe the patent, even if in some respects they were improvements on the original process patented." *Woodward v. Morrison et al.*, 1 Holmes, 124.—SHEPLEY, 1872.

161. "Every specification is to be read as if by persons acquainted with the general facts of the mechanical or chemical science involved in such inventions. The specification of the parts in a mechanical or chemical process is a specification to ordinarily skilful mechanics or chemists of the well-known mechanical or chemical equivalents. If there are equivalents, mechanical or chemical, existing, but previously unknown to ordinarily skilful mechanics or chemists, these are not included in the specification, unless expressly stated therein. These are, in fact, new discoveries in themselves, independent of the specification, and may be used by all persons without infringing the patent."—*Ib.*

162. "The complainant must abide by the specification and claim which he has made. If he has rights which, under the specification and claim, are not protected, the court cannot aid him." *Smith v. Elliot*, 9 Blatch. 400.—WOODRUFF, 1872.

163. Although the claim of a patent may specify a certain form of device, yet if it is not, in view of the prior art, limited to such forms, a defendant who uses another form, obtaining substantially the same result, will be held to be an infringer. *Murphy et al. v. Eastham et al.*, 1 Holmes, 113.—SHEPLEY, 1872.

164. "Undoubtedly in some cases the letters-patent include only the particular form described and claimed, not for the reason that the patentee has described and claimed that form only, but because the invention consists in that form only, and only in that form can be embodied; so that when the form is not copied the invention is not used."—*Ib.*

165. "The actual claims cannot be rejected. The complainants must stand or fall by the claims as made," even though the real invention may be much broader than the claim. *Meissner et al. v. Devoe M'f'g Co.*, 9 Blatch. 363.—WOODRUFF, 1872.

166. "Probably no principle of patent law is better settled than that the patentee is limited by his claim. And the courts are only allowed to look at the detailed specification, models, or drawings, for the purpose of construing the

claim; as, for instance, if any doubt existed as to the parts of the lantern to be attached together by the catch and lips, a reference to the preceding part of the instrument is allowable for the purpose of settling that point." *Dennis v. Cross et al.*, 3 Bissell, 389.—BLODGETT, 1872.

167. "The machine patented frequently has a broader scope than the particular form of the machine described as the form used by the patentee." *Blake v. Rawson*, 1 Holmes, 200.—SHEPLEY, 1872.

168. Where complainant has a plurality of patents, one cannot be used to support the other; each stands alone. *Wheeler, Jr., v. Clipper Mower & Reaper Co.*, 10 Blatch. 181.—WOODRUFF, 1872.

169. "Claims should be read in connection with the specification itself, and read in the light gained therefrom; and it is proper to give such construction to the language employed as expresses the evident intention, if that may be done." *Russell & Erwin M'f'g Co. v. Mallory et al.*, 10 Blatch. 140.—WOODRUFF, 1872.

170. The existence of a feature in a model where it is not referred to in the specification will not help the patentee on the question of construing his patent. *Barry v. Eugenheim et al.*, 5 Fish. P. C. 452.—McKENNAN, 1872.

171. "The patent covers all the modes and processes by which the principle of the invention is made operative in practice." *McComb et al. v. Brodie*, 1 Woods, 153.—WOODS, 1872.

172. "In order to learn the true meaning and construction of the claim of a patent, the whole specification may be consulted; and where that claim itself incorporates in it, by reference, several features of the invention, these become essential." *Carter v. Messinger*, 11 Blatch. 34.—WOODRUFF, 1873.

173. "All that is included in the specification is not necessarily included in the patent." *Wheeler v. McCormick*, 11 Blatch. 334.—WOODRUFF, 1873.

174. "In determining the several questions of infringement, the jury must not judge about mere similarities or differences by the names of things, but must look to the whole structure and its several devices or elements in the light of what office or function they perform, and how they perform it, and find that a thing is substantially the same as another, if it performs substantially the same function or office, in the same way, to attain the same result; but the devices are substantially different if they perform different duties or in a different way, or produce a different result." *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

175. Doubts about the sufficiency of a claim are to be resolved in favor of the patent. *Craig v. Smith et al.*, 2 Dillon, 375.—DILLON, 1873.

176. "The rights of the plaintiff depend upon the claim in his patent, according to its proper construction, and not upon what he may erroneously suppose it covers. If at one time he insists on too much, and at another on too little, he does not thereby work any prejudice to the rights actually secured to him." *Masury v. Anderson et al.*, 11 Blatch. 162.—BLATCH. 1873.

177. "The patent shall be liberally construed, so as, if possible, to uphold it." *Ingels v. Mast*, 6 Fish. P. C. 415.—SWING, 1873.

178. "In the construction, the patent, specifications, and drawings are all to be taken together."—*Id.*

179. Although a specification and claims may make no specific mention of certain parts, yet if they are clearly shown in the drawings, they may be construed in the claims.—*Id.*

180. "An inventor is entitled to protection in all the functions which his invention may perform, whether claimed or not; or, in other words, . . . the claim will be extended, coextensive with the improvement."—*Id.*

181. "Because in a particular case other tribunals, co-ordinate or appellate, have decided that certain words, when used in connection with their accompanying incidents, did import a claim for a result or principle, another tribunal should not treat these judgments as setting up formulas in all circumstances involving a similar meaning." *Union Paper-Bag Co. v. Nixon et al.*, 6 Fish. P. C. 402.—EMMONS, 1873.

182. "The patentee will be protected from obvious modes, readily adopted without invention, for accomplishing the same end."—*Id.*

183. "It would be a blemish upon the law, which professes to protect useful improvements, if . . . substitutes, capable of selection by persons of ordinary intelligence, are not deemed evasions of an inventor's rights."—*Id.*

184. "It is a just rule that patents are to be construed liberally, so as to sustain the right of the inventor. Mere verbal discrepancies, therefore, are to be entitled to but little consideration." *Dorsey Harvester Revolving Rake Co. v. Marsh et al.*, 6 Fish. P. C. 387.—MCKEN-NAN, 1873.

185. A patent is not necessarily to be construed upon the position a comma may or may not have in the language used. *Robertson v. Secombe M'f'g Co.*, 10 Blatch. 481.—BLATCH-FORD, 1873.

186. "Where a patentee, after describing a

machine, claims as his invention a certain combination of elements, or a certain device or part of the machine, this is an implied declaration, as conclusive, so far as that patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this; but that will speak for itself. So far as the patent in question is concerned, the remaining parts are old or common and public." *Brown v. Guild et al.*, 23 Wall. 181.—BRADLEY, 1873.

187. "A patent embraces nothing more than the improvement described and claimed as new, and . . . any one who afterward discovers a method of accomplishing the same object substantially and essentially differing from the one described, has a right to use it and to vend it to others to be used." *Mitchell v. Tughman*, 19 Wall. 287.—SUP. CT. 1873.

188. "Doubtful expressions may be subject to construction, but where the language is clear and unambiguous, it must speak its own construction in the specification of a patent as well as in any other grant issued by public authority. Intention in every case, it may be admitted, is the primary rule of construction, but language invoked to support a particular theory must be such as is fit, when it is compared with the whole instrument, to express the imputed intention, else the theory in question cannot be supported, as courts of justice cannot legislate nor can they add to a grant or contract any stipulation or condition which it does not contain."—*Id.*

189. "The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language he has employed." *Klein v. Russell*, 19 Wall. 433.—SUP. CT. 1873.

190. "Sometimes an old process produces a new product. If the thing produced be new, in and of itself, it is patentable as a new manufacture. If it be capable of being produced by various different processes, as, for instance, by hand, by the use of hand tools, or by automatic or other machines, yet when the product is independent of the process, the patent is infringed by the unlicensed manufacture of the new product by any mode of manufacture, the process of manufacture being wholly unimportant.

"In other instances, however, not only does a new process produce a new product, but the process is inseparable from the product, and inheres in it after it is made, so that, upon inspec-



tion of the product, it is manifest that the process must have been employed." *Merrill v. Yeomans et al.*, 1 Holmes, 331.—SHEPLEY, 1874.

191. "Inventors are a meritorious class of men. They are not monopolists in the odious sense of that term. They take nothing from the public. They contribute largely to its wealth and comfort. Patent laws are founded on the policy of giving to them remuneration for the fruits, enjoyed by others, of their labor and their genius. Their patents are their title deeds, and they should be construed in a fair and liberal spirit, to accomplish the purpose of the laws under which they are issued." *Birdsall v. McDonald*, 1 Bann. & Ard. 165.—SWAYNE, 1874.

192. "Any change merely colorable, involving no new idea, requiring not invention but only mechanical skill to make it, a change which retains the idea of the patentee and the substance of his invention, notwithstanding the different drapery in which the substance is clothed, cannot prevail to protect a party charged with infringement."—*Id.*

193. A person cannot, by a mere change of form, be permitted to use a patented invention. *Bantz v. Elsas et al.*, 1 Bann. & Ard. 351.—SWING, 1874.

194. "Patents are to be construed liberally, and are not to be subjected to a rigid interpretation," *Welling v. Rubber-Coated Harness Trimming Co. et al.*, 1 Bann. & Ard. 282.—NIXON, 1874.

195. "Men often build better than they know; but where a fair interpretation of the words employed to describe an invention or discovery includes matters not in the mind of the patentee at the time, he is as fully authorized to claim the unlooked-for as he is the anticipated result."—*Id.*

196. "The same exact rule of interpretation is not to be applied at all times, but such, in each case, as will best enable the court to arrive at the meaning intended."—*Id.*

197. "In construing a patent, the court should look to the patent, specifications, and drawings, to ascertain what is the thing claimed and patented." *Geier v. Goetinger*, 1 Bann. & Ard. 553.—SWING, 1874.

198. A result "cannot be patented, but only the mechanical device by which it is attained; and no device is an infringement of the patent but such as produces the same result by the same mode of operation, although the form may be varied." *Myers et al. v. Duker et al.*, 1 Bann. & Ard. 535.—GILES, 1874.

199. "It would be wrong to stretch an inven-

tion beyond the legitimate bounds of the discovery, so as to exclude all other inventions within the same field of operation." *Fuller et al. v. Yentzer et al.*, 6 Bissell, 203.—DRUMMOND, 1874.

200. "No one can take something old and apply it in a new way or in a new form, so as to produce a particular result, and be protected beyond the particular way or form or device, and the application which he has made."—*Id.*

201. "There are two modes of construing the patent law, and it may be said, perhaps, without any disrespect, that there are some judges who adopt one mode and some another. There are those who are inclined to expand beyond legitimate boundaries the invention of the patentee. There are others who restrict it within narrower bounds, holding that the invention of the patentee must be limited by the particular mechanism and the application by which the result is attained, thus leaving the field of discovery open to all persons to explore it beyond the range of that particular mechanism and its application. . . . The latter seems . . . the more correct rule."—*Id.*

202. A construction of a word in a claim that would make the claim repugnant to the subject-matter of the patent should not be made if any other construction can be. *King v. Werner*, 12 Blatch. 270.—BLATCHFORD, 1874.

203. In a claim "the words 'substantially as described' must necessarily be implied; and being so implied, they involve a reference to the specification which is sufficiently clear to prevent any misunderstanding of the scope and meaning of the claims in question." *Westinghouse, Jr., v. Gardner & Ranson Air-Brake Co.*, 2 Bann. & Ard. 55.—WELKER, 1875.

204. "The true construction of the claim is that which makes it coextensive with the invention." *Weston et al. v. Nash et al.*, 1 Holmes, 488.—SHEPLEY, 1875.

205. "We should not put a broader construction on the language of the patentee than the whole subject-matter and description and nature of the case seem to indicate as designed; no fancied construction, but rather what is natural and clear, considering what already exists upon the same subject." *Trader et al. v. Messmore et al.*, 1 Bann. & Ard. 639.—SWING, 1875.

206. "While patents should be liberally construed, they should not be so construed as to enable patentees to reach out and cover every improvement or invention which, after seeing, they conclude they might have embraced and included in their patent, but which was not so embraced and included."—*Id.*

207. "Evidence of the state of the art is admissible in actions at law under the general issue without special notice, and in equity cases without an averment in the answer touching the subject. It consists in proof of what was old and in general use at the time of the alleged invention. It is received for three purposes and none other—to show what was then old, to distinguish what was new, to aid the court in the construction of the patent." *Brown et al. v. Piper*, 91 U. S. 37.—SUP. CT. 1875.

208. A product may be claimed not as a product pure and simple, but as a product made by a particular process. *Jones et al. v. Merrill et al.*, 8 O. G. 401.—WALLACE, 1875.

209. The words "as and for the purpose described" in a claim are capable of having a specific force given to them. *Bissey et al. v. Wager et al.*, 2 Bann. & Ard. 229.—WALLACE, 1876.

210. "A liberal construction should be accorded to patents, so as, if possible, to secure to an inventor what is really his invention."—*Id.*

211. "References not sustained do not modify the invention in question." *Stevens v. Pritchard*, 4 Cliff. 417.—CLIFFORD, 1876.

212. "Since the leading case of *Crane v. Price*, 1 Web. Pat. Cases, 409, it has not been considered safe to invoke the ordinary doctrine of equivalents in construing patents for new manufactures or compositions of matter." *Rumford Chemical Works v. Hecker*, 2 Bann. & Ard. 351.—NIXON, 1876.

213. Where a patentee describes particular modes as essential to his invention, he is, as a rule, confined thereto, but that principle is not to be applied to a case where the device is capable of being employed in another mode complete in itself, and when so used and employed all its benefits are wholly secured. *Union Paper-Bag Mach. Co. et al. v. Nixon et al.*, 1 Flippin, 491.—EMMONS & SWING, 1876.

214. A claim is to be construed as favorably as its language, the state of the art, and the extent and the character of the actual invention will permit. *Metropolitan Wringing Mach. Co. v. Young et al.*, 14 Blatch. 46.—WALLACE, 1876.

215. "The technical claims in a patent are to be construed with reference to the state of the art so as to limit the patentee to, and to give him the full benefit of, the invention he has made. They are also to be construed with the specification, so as to limit the patentee to, and give him the full benefit of, the invention he has described." *Estabrook et al. v. Dunbar et al.*, 2 Bann. & Ard. 427.—SHEPLEY, 1876.

216. "The general terms, and sometimes special words, in the claims must receive such a construction as may enlarge or contract the scope of the claim, so as to uphold that invention which the patentee has actually made and described, when such construction is not absolutely inconsistent with the language of the claim."—*Id.*

217. "Where the claim immediately follows the description of the invention, it may be construed in connection with the explanations given in the description; and if the claim contains words referring back to the specification, it cannot be properly construed in any other way." *Fuller et al. v. Yentzer et al.*, 94 U. S. 288.—SUP. CT. 1876.

218. In construing a patent in view of the prior art, the comparison is to be made between the invention at the time of making it and the prior art, not between the invention at the time of application for patent and the then prior art. *Sprague et al. v. Adriance et al.*, 3 Bann. & Ard. 124.—WHEELER, 1877.

219. "In determining the question of infringement the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions, or in a different way, or produce a substantially different result." *Union Paper-Bag Mach. Co. et al. v. Murphy et al.*, 97 U. S. 120.—SUP. CT. 1877.

220. "Where the form is of the essence of the invention it is necessarily material, and if the same object can be attained by a machine different in form, where the form is inseparable from the successful operation of the instrument, there is no infringement." *Werner v. King*, 96 U. S. 218.—SUP. CT. 1877.

221. "In ascertaining the construction to be put upon" a "patent, the state of the art is a legitimate and necessary subject of consideration." *Rubber-Coated Harness Trimming Co. et al. v. Welling*, 97 U. S. 7.—SUP. CT. 1877.

222. "When a claim is . . . explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to cor-

rect the error by a surrender of their patent and an application for a reissue. They cannot expect the courts to wade through the history of the art and spell out what they might have claimed, but have not claimed." *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274.—SUP. CT. 1877.

223. "Courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct [as they always should be] the patentee, in a suit brought upon the patent, is bound by it. . . . He can claim nothing beyond it. But the defendant may at all times, under proper pleadings, resort to prior use and the general history of the art to assail the validity of a patent or to restrain its construction. The door is then open to the plaintiff to resort to the same kind of evidence in rebuttal; but he can never go beyond his claim. As patents are procured *ex parte*, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or if broader, they must be held to have surrendered the surplus to the public."—*Id.*

224. Although "the terms used are somewhat unfortunate and may tend to confuse, . . . the court should never defeat a patent for a mere technical defect, if it clearly appears what the inventor has described and claimed as his invention." *Adams v. Joliet Mfg Co.*, 3 Bann & Ard. 1.—BLODGETT, 1877.

225. To preserve the coherency of a claim, the word "wheels" may be construed to mean "disks."—*Id.*

226. A court may, if necessary to preserve a patent, reject words in a claim as surplusage.—*Id.*

227. "It is the duty of the court to uphold and sustain the patent instead of seeking for reasons to overthrow it."—*Id.*

228. "A change of location of a part, in a combination where there is no new function performed by the changed member in its new location, will not evade a patent."—*Id.*

229. "No inventor has a right to gradually widen the scope of his claims to keep pace with the progress of invention. Especially in cases where mere changes of form become patentable by reason of involving functional differences, should it be left open to subsequent inventors to devise other changes of form involving other functional changes, where the same result is not attained in substantially the same way."

*Swaine Turbine & Mfg Co. v. Ladd*, 2 Bann. & Ard. 488.—SHEPLEY, 1877.

230. A claim which is functional in form is to be construed to be for the means used.—*Id.*

231. The substitution of a particular part in a claim must sometimes be construed not solely with reference to the words in the specification, but also with reference to the limitations in the context of the claims. *Pearl et al. v. Ocean Mills et al.*, 2 Bann. & Ard. 469.—SHEPLEY, 1877.

232. Although, in a specification, a patentee may describe his entire improvement as consisting of two elements, both of which must be preserved, still, in the light of subsequent claims, the court may not be bound by such a declaration. *Henderson v. Cleveland Co-operative Stove Co.*, 2 Bann & Ard. 604.—BROWN, 1877.

233. A court will give a patent such a construction as will uphold it, if possible, bearing in mind that specifications and claims are frequently drawn by persons unaccustomed to the use of accurate legal phraseology.—*Id.*

234. "In all cases where the claim is for the result, it must be construed to mean the means by which the result is produced, whether there is any reference to the specification in the claims or not."—*Id.*

235. Although the theory upon which defendant's device is constructed may not be such as involves the use of complainant's patented improvement, yet if in fact it does involve such use, defendant's article is an infringement.—*Id.*

236. The claim of a patent is to be construed in connection with the specification, and in view of the actual invention and of the state of the art. *Bruff v. Ives*, 14 Blatch. 198.—SHIPMAN, 1877.

237. "The patentee, without describing equivalents, is entitled to use equivalents and to treat the use of equivalents by others as an infringement." *Union Metallic Cartridge Co. v. U. S. Cartridge Co.*, 2 Bann & Ard. 593.—SHEPLEY, 1877.

238. "The well-known and just principle of the courts of this country is, that a liberal construction is to be given to the language of all patents and specifications, *ut res magis valeat quam pereat*." *Schilling v. Gunther*, 14 Blatch. 152.—SHIPMAN, 1877.

239. "Where there is a slight change in a machine by which a new result is brought about, and which might be the subject of a patent, courts do not feel inclined to extend the invention beyond the mere change, although they might be inclined to sustain the patent; but where something elementary, so to speak, is dis-

covered and constitutes fairly a part of the invention of the patentee, then" no "other inventor or manufacturer ought to be permitted to use that elementary part without paying tribute to the first inventor or originator." *Corneil v. Downer & Bemis Brewing Co. et al.*, 7 Bissell, 346.—DRUMMOND, 1877.

240. "Nothing is better settled in the law of patents than that identity is not affected by colorable differences, that regard is had to substance and not to form, the inquiry being whether the infringing machine is the same in principle as that patented." *Phillips et al. v. City of Detroit*, 2 Flippin, 92.—BROWN, 1877.

241. "It is better to adopt that construction which, although limiting the scope of the claim, secures to the inventor all that he has actually invented and no more, than to adopt the one which would render the patent invalid, or one which, being broader than the invention of the patentee, would be a barrier in the way of future progress in discovery and invention." *Goodyear Dental Vulcanite Co. v. Davis*, 3 Bann. & Ard. 115.—SHEPLEY, 1877.

242. A patent cannot be construed to cover what is expressly disclaimed therein. *Ashcroft v. Hollings*, 11 O. G. 879.—SHEPLEY, 1877.

243. "'Equivalent' mechanism, known at the date of the invention, which accomplished in the same way and by the same mechanical means the same result, . . . is protected by the patent." *Stanley Rule & Level Co. v. Bailey*, 14 Blatch. 510.—SHIPMAN, 1878.

244. "The courts should not hasten to deprive patentees of the advantages of a real and meritorious invention on account of the awkward and clumsy manner in which their claims are stated." *Odiorne v. Denney*, 3 Bann. & Ard. 287.—NIXON, 1878.

245. Where a device is not specified in the claim of a patent, and in the specification is only referred to as one of the appurtenances of the invention and not as a part of the invention itself, it is not to be construed into the claim. *Bullock Printing-Press Co. v. Jones et al.*, 3 Bann. & Ard. 195.—WHEELER, 1878.

246. "Cases arise not infrequently where the actual invention described in the specification is larger than the claims of the patent, and in such cases it is undoubtedly true that the patentees in a suit for infringement must be limited to what is specified in the claims annexed to the specification; but it is equally true that the claims of the patent, like other provisions in writing, must be reasonably construed, and in case of doubt or ambiguity it is proper in all

cases to refer back to the descriptive portions of the specification to aid in solving the doubt or in ascertaining the true intent and meaning of the language employed in the claims; nor is it incorrect to say that due reference may be had to the specifications, drawings, and claims of a patent in order to ascertain its true legal construction." *Bates et al. v. Coe*, 98 U. S. 31.—SUP. CT. 1878.

247. "In construing patents it is the province of the court to determine what the subject-matter is upon the face of the specification and the accompanying drawings."—*Ib.*

248. "If one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance toward the thing desired is gradual and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form so long as it differs from those of his competitors, and does not include theirs." *Chicago & Northwestern Railway Co. v. Sayles*, 97 U. S. 554.—SUP. CT. 1878.

249. "The law does not permit . . . enlargements of an original specification, which would interfere with other inventors who have entered the field in the mean time, any more than it does in the case of reissues of patents previously granted. Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has, in the mean time, gone into public use."—*Ib.*

250. "Whether a patent is for a process or a composition is especially a question of construction, and is for the court to decide; and whether a patent for a process is the same invention as a patent for a composition is certainly a mere question of law." *Giant Powder Co. v. California Powder Works et al.*, 96 U. S. 128.—SUP. CT. 1878.

251. Although a claim may purport to be for a result, yet when the specification makes it clear that the result pure and simple is not intended to be claimed, the patent is not to be construed as being for a result. *Badische Anilin & Soda Fabrik v. Higgins et al.*, 15 Blatch. 290.—WHEELER, 1878.

252. Patents should be so construed that they may be sustained rather than defeated, and to give the benefit of the exact improvement.

*Blaisdell v. Tufts*, 3 Bann. & Ard. 521.—LOWELL, 1878.

253. The claim should be construed in connection with the descriptive part of the specification. *Haskell et al. v. Shoe Mach. M'fg Co. et al.*, 3 Bann. & Ard. 553.—CLIFFORD, 1878.

254. "It is not always safe or proper in construing a patent to confine attention to the claims. These are sometimes too narrow to embrace the whole invention disclosed in the description and specifications." *Gould et al. v. Ballard et al.*, 3 Bann. & Ard. 324.—NIXON, 1878.

255. "In order to ascertain the proper construction of the patent, it is important to know the nature and extent of the invention which was made by the patentee." *Union Paper-Bag Mach. Co. et al. v. Pultz & Walkley Co. et al.*, 15 Blatch. 160.—SHIPMAN, 1878.

256. Where, preceding a patentee's invention, there has been an abandoned experiment, tending in the same direction and known to the patentee, "the patentee is not necessarily limited in his patent to the narrow field between the model of his predecessor and his own perfected machine, for his invention may have actually covered a wider field, and may have included the territory which the previous investigator undertook to occupy and abandoned. The patentee has the right to take up the improvement at the point where it was left by his predecessor; and if, by the exercise of his own inventive skill, he is successful in first perfecting and reducing to practise the invention which his predecessor undertook to make, he is entitled to the merit of such improvement as an original inventor; . . . and if he is an original inventor of the improvement, he is entitled to the benefit of unsubstantial variations and modifications in form of the principle of his invention, notwithstanding such modifications may run into and include the forms of mechanism shown in the abandoned experiments of which he had knowledge, provided the invention is properly claimed and set forth in his specification."—*Id.*

257. The court is unwilling to "vary the construction which would otherwise be given to a patent, in order to conform to the declarations of a patentee and former owner, whereby he undertakes to restrict the invention within a narrower compass than that which he had previously stated in his specification."—*Id.*

258. Where complainants' patent in suit has a claim with a certain limitation, although that limitation may be unnecessary in view of the prior art, the claim will be construed by that limitation in considering the question of in-

fringement. *Edgerton et al. v. Brown et al.*, 5 Bann. & Ard. 42.—LOWELL, 1879.

259. "The correct rule of construction is the one which will give the patentee what he has really invented, so far as is consistent with the language of his description and claim, both of which are to be read together; and where . . . all the parts are conceded in the description to be old, and their efficiency is referred to their peculiarity of construction and arrangement, it is this peculiarity which is the essence of the invention." *Williams v. Boston & Albany R. R. Co.*, 17 Blatch. 21.—WALLACE, 1879.

260. "The patentee's exclusive right is enforceable only within the limits of his own definition of it. What he has, then, not distinctly claimed, much more what he has not claimed at all, cannot be injected into his claims, even though that may be necessary to save his patent." *Couse et al. v. Johnson et al.*, 4 Bann. & Ard. 501.—MCKENNAN, 1879.

261. Where the claim of a patent mentions a thing generally, and the specification does not assign any special value to the form of that thing, the claim cannot be limited to that thing of the particular form shown and described in the patent.—*Id.*

262. Where a claim is evidently made broad upon a purpose, the court will not construe into it a limitation not found in its terms, in order to save its validity. *Stewart v. Mahoney*, 4 Bann. & Ard. 84.—LOWELL, 1879.

263. "In construing a patent, it is first pertinent to ascertain what, in view of the prior state of the art, the inventor has actually accomplished, and this having been found, such a construction should be given as will secure the actual invention to the patentee, so far as this can be done consistently with giving due effect to the language of the specification and claim." *Van Marter v. Miller et al.*, 15 Blatch. 562.—WALLACE, 1879.

264. "The identity or diversity of . . . two machines depends, not in the employment of the same elements or powers of mechanics, but upon producing the given effect by the same mode of operation or the same combination of powers." *Willimantic Linen Co. et al. v. Clark Thread Co. et al.*, 4 Bann. & Ard. 133.—NIXON, 1879.

265. Is not the true test of infringement sometimes this: "One machine, with its peculiar mechanism, being given, does it or not require invention to produce the other, with its peculiar mechanism?"—*Id.*

266. It is manifestly unjust to so construe a patent as to avoid something in the prior art and

then, on the question of infringement, make it include the same sort of thing. *Burdett v. Estey et al.*, 16 Blatch. 105.—WHEELER, 1879.

267. Where one person has attempted to make an invention and laid it aside permanently, another person may take it up where he leaves it, make it successful, and cover the whole ground in his claim. *Union Paper-Bag Mach. Co. v. Pultz & Walkley Co. et al.*, 16 Blatch. 76.—SHIPMAN, 1879.

268. "When a product arrived at by certain defined stages or processes is patented, only those things can be considered equivalents for the elements of the manufacture which perform the same function in substantially the same way. The same result may be reached by different processes, each of them patentable, and one process is not infringed by the use of any number of its stages less than all of them." *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222.—SUP. CT. 1880.

269. "The courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material." *Union Water-Meter Co. v. Desper*, 101 U. S. 332.—SUP. CT. 1880.

270. "The courts . . . should be careful not to enlarge by construction the claim which the Patent Office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms." *Burns v. Meyer*, 100 U. S. 671.—SUP. CT. 1880.

271. "The drawing could and should be looked at, if necessary, in order to explain an ambiguous or doubtful specification, and to make the invention capable of being understood and used. But it cannot supply an entire want of any part of a specification or claim in a suit upon a patent, although it might afford ground for a reissue covering the part shown by it." [U. S. Rev. St., Sec. 4916.] *Tinker v. Wilbur E. M. & R. M'fg Co.*, 1 Fed. Rep. 138.—WHEELER, 1880.

272. "There is no doubt but that . . . the patent would give an exclusive right to the patented invention for all the uses to which it could be put, whether contemplated by the inventor or discovered by himself or others afterward."—*Id.*

273. "The rule for construction is that each patentee is restricted to the matters set out in his claim." Mere description of a device in the body of the specification gives no ground for claim of exclusive right thereto. *Toohy v. Harding*, 4 Hughes, 253.—MORRIS, 1880.

274. When a product is claimed as made by a

certain process, another similar product not made by such process is not an infringement. *Dittmar v. Rix et al.*, 1 Fed. Rep. 342.—BLATCH. 1880.

275. Example of restricted construction given to a claim in view of the state of the art and the same restricted construction followed in passing on the question of infringement. *Thatcher Heating Co. v. Spear et al.*, 1 Fed. Rep. 411.—BLATCHFORD, 1880.

276. "Patents rightfully issued are property, and are surrounded by the same rights and sanctions which attend all other property. Patentees as a class are public benefactors, and their rights should be protected; but the public has rights also. The rights of both should be upheld and enforced by an equally firm hand, wherever they come under judicial consideration." *Densmore et al. v. Scofield et al.*, 102 U. S. 375.—SUP. CT. 1880.

277. A claim cannot cover every means of accomplishing a proposed result. *McMillan et al. v. Rees et al.*, 1 Fed. Rep. 722.—MCKENNAN, 1880.

278. "Whether two patents cover the same invention must be determined by the tenor and scope of their claims, not by the description in the specifications."—*Id.*

279. The patentee "must stand here upon his claim; for the thing patented is what the inventor claims and not what he shows. If he states these too narrowly the law authorizes him to surrender the patent, and reissue the same with ampler statements; but until this is done the courts cannot give him more than he asks for." *Del. Coal & Ice Co. v. Packer*, 1 Fed. Rep. 851.—NIXON, 1880.

280. Claims to specific devices cannot be construed as claims for combinations of such devices.—*Id.*

281. "The whole description in a patent is to be looked at, as well as the name given to the subject of the invention, in order, according to the settled rule for the construction of all writing, to give effect to every part, and ascertain from the whole what is meant." *Day v. Combination Rubber Co. et al.*, 2 Fed. Rep. 570.—WHEELER, 1880.

282. As there were prior to the patentee's invention, "structures having all these elements arranged in the same order, although of different form and capacity, he was entitled only to his particular form of devices which were really different from those which had been in use or known before, and the combination of these devices with each other or others, so as to produce a new result in a new way." *Sharp v. Tiff*, 18 Blatch. 133.—WHEELER, 1880.

283. Defendants' device may infringe a claim in words when it does not in fact. *Pearl et al. v. Appleton Co. et al.*, 3 Fed. Rep. 153.—LOWELL, 1880.

284. A disclaimer in the body of a patent may embody an error in fact as to the prior art, which error makes against complainant; but "the courts have no right to disregard such disclaimer." *Collins Co. v. L. Coes et al.*, 3 Fed. Rep. 225.—LOWELL, 1880.

285. Where a construction broad enough to cover defendant's structure will invalidate the patent, a narrower construction should be adopted. *Broadnax v. Central Stock Yard & Transit Co.*, 4 Fed. Rep. 214.—NIXON, 1880.

286. "While we cannot look outside of the patent for the explanation of terms in it which are not technical and are free from ambiguity, we can examine into the history of the invention patented, so as to be able to read the specifications in the light of the inventor's knowledge." *Giant Powder Co. v. Cal. Vigorit Powder Co. et al.*, 6 Sawyer, 508.—FIELD, 1880.

287. "It is the office of the claims of a patent to reveal to the world what the characteristics of the invention are for which the patentee desires protection. If he fail to state these fully and correctly he may remedy the omission by surrender and reissue, but until then the court has no power to give him relief against infringers." *Delaware Coal & Ice Co. v. Packer*, 24 O. G. 1273.—NIXON, 1880.

288. Where the prior art, and the invention in view of the prior art, requires it, a part will be construed into the claim which is not specifically mentioned in the claim. And when defendant's structure agrees with such prior art, instead of with complainants' structure, in such a case defendant will be held not to infringe. *Walters et al. v. Crandal*, 20 Blatch. 118.—BLATCHFORD, 1881.

289. Where a claim, unless limited to the devices shown in the patent, will be void, it will be so limited by construction. *Brown v. Deere et al.*, 2 McCrary, 422.—TREAT, 1881.

290. Where the inventor is the originator of a basic idea in an apparatus, differences in minor parts, in defendant's structure, are not of substance. *Putnam et al. v. Vom Hofe*, 19 Blatch. 63.—BLATCHFORD, 1881.

291. When a patentee was the first to employ his improvement "for the peculiar function it performs, he is to be protected not only in the particular devices which he employs for this purpose, but against all other devices which are the mechanical equivalents for his." *Knapp v. Joubert et al.*, 19 Blatch. 148.—WALLACE, 1881.

292. "A patentee may misuse a word, but when we are seeking for his meaning the ordinary definition of the words which he uses must have weight." *Root et al. v. Lamb*, 7 Fed. Rep. 222.—LOWELL, 1881.

293. "The scope of the letters-patent should be limited to the invention covered by the claim, and . . . though the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specifications." "The patentee cannot go beyond what he has claimed and insist that his patent covers something not claimed merely because it is to be found in the descriptive part of the specifications." *Lehigh Valley Railroad Co. et al. v. Mellon et al.*, 104 U. S. 112.—SUP. CT. 1881.

294. "The word 'improved' in this patent is not understood as representing that this design is a mere improvement upon another, especially as no other is mentioned, but is considered to mean that this design is, of itself, new and distinctive and improved as compared with others, and in connection with the new to represent that it was original with the orator." *Schoercken v. Swift, Courtney & Beecher Co.*, 19 Blatch. 209.—WHEELER, 1881.

295. By the court: "But the important comparison is between the two things. If the defendant had taken the plaintiff's invention I should try to construe the claim to conform to the fact rather than leave the parties to the dubious expedient of a reissue." *Consolidated Safety Valve Co. v. Crosby Steam-Gauge & Valve Co.*, 7 Fed. Rep. 768.—LOWELL, 1881.

296. A patentee who is not the pioneer in his line of improvement cannot, "whatever the words of his claim," successfully enjoin the use of a device resembling his own only in its adoption of general ideas found in the prior art.—*Id.*

297. In order to give proper construction to patents and reissues, the courts must consider that state of the art and the object which the inventor proposed to accomplish. *Washburn & Moen M'fg Co. v. Haish*, 7 Fed. Rep. 906.—DRUMMOND, 1881.

298. Wire fences being old, and sharp points on other fences being old, "it was not competent for any inventor" of barbed wire fence "to do more than claim his own special method of forming and affixing the barb which he had devised."—*Id.*

299. It seems that a patent may be construed to cover whatever was new in the art with the patentee, though the terms of the claims do not specially cover it. *Emerson et al. v. Howe*, 8 Fed. Rep. 327.—LOWELL, 1881.

300. A claim which, by its terms, is for a result

must be construed to be a claim for the means used to accomplish that result. *Palmer v. Gatling Gun Co.*, 19 Blatch. 392.—SHIPMAN, 1881.

301. Courts "seek to give the owner of the patent his actual invention, if such favorable construction can fairly be made." *Fitch et al. v. A. N. Bragg & Co.*, 8 Fed. Rep. 588.—SHIPMAN, 1881.

302. "The patentee is entitled to all the benefits which result from his invention, whether he has specified all the benefits in his patent or not." *California Artificial Stone Co. v. Perine*, 7 Sawyer, 190.—SAWYER, 1881.

303. Where a device, as described and shown in a patent, has certain details of construction which are only casually mentioned in the description and not specified in the claim, the claim will not be construed to include such minor details in order to save its validity. *White v. E. P. Gleason M'fg Co.*, 8 Fed. Rep. 917.—WHEELER, 1881.

304. Where the statement of invention in the body of the description differs somewhat from the claim, the latter controls. *McKesson et al. v. Carnrick*, 19 Blatch. 158.—BLATCHFORD, 1881.

305. By the court: "The plaintiff's present position—that the process covers all methods of making waxed paper by machinery, 'and, therefore, whether or not the defendants carry on the making waxed paper by machinery, by the complainant's particular method or by a new method devised by themselves, and which dispenses with some of the steps used by the plaintiff in his particular mode, makes no difference whatever as regards infringement'—cannot be adopted." *Hammerschlag v. Garrett et al.*, 21 O. G. 1199.—BUTLER, 1882.

306. Though patentees must, at their peril, know all that has gone before in the art, yet this is a conclusive presumption rather than a fact; and if they do not have this knowledge, or do not especially exclude, either by name or otherwise, all previous inventions which in many arts would be impracticable, yet it is allowable to construe the claims of a patent with reference to what has gone before, and to give the patentee the benefit of the restricted claim which results from such construction. *Jones v. Barker et al.*, 11 Fed. Rep. 597.—LOWELL, 1882.

307. "Upon a motion for preliminary injunction, and in the absence of an acquiescence by the public in the validity of the plaintiff's patent, the court is confined within the limits of previous adjudications, and ought not, by granting the motion, to give a new construction to previously construed claims, unless such construction is perfectly clear." *Steam Gauge &*

*Lantern Co. et al. v. Edward Miller & Co.*, 11 Fed. Rep. 718.—SHIPMAN, 1882.

308. Naming a part in a claim does not thereby make the claim cover all parts of the same name contained in the machine, but only the part evidently intended. *Hoe et al. v. Kahler*, 20 Blatch. 430.—BLATCHFORD, 1882.

309. Where a patented device is simply an improvement in the details of a prior existing device, the patent will be limited by construction so as to embrace only the devices described in the patent and their equivalents for performing the same functions. *Pelham v. Demarest*, 12 Fed. Rep. 494.—WALLACE, 1882.

310. A patent to two joint inventors cannot be construed broad enough to cover a prior device invented by one of these joint inventors for which he applied for a patent, which application was rejected. *Hopkins & Dickinson M'fg Co. v. Corbin et al.*, 103 U. S. 786.—SUP. CT. 1882.

311. By the court: "The claims in the reissue relating to the apparatus, considered literally, are broader than the claim in the original. Indeed, they describe the invention rather than the mechanism of the apparatus. But they are to be construed with reference to the specification, and so, if consistent with the language used, as to secure the patentee the invention which is described. They are not to be construed if the language will reasonably bear such interpretation, so as to embrace any invention broader in its scope than that in the original patent." *Brainard v. Cramme*, 20 Blatch. 530.—WALLACE, 1882.

312. By the court: "The claim industriously introduces the elements of the vertical curving. The inventor must have regarded that as a material element, and those who claim under the patent cannot now be heard to say that it is immaterial. The question cannot now be left for the domain of testimony. It is determined by the claim." *Le Fever et al. v. Remington & Sons*, 21 Blatch. 80.—BLATCHFORD, 1882.

313. A claim to "so forming," etc., will be construed to be a claim for the structure and not for its results. *Lull v. Clark et al.*, 21 Blatch. 95.—BLATCHFORD, 1882.

314. A claim which is nominally a single claim may, by construction, be divided into two claims. "A reissue, with a division of the claim into two claims, would have been sustainable."—*Id.*

315. Where complainant's patented invention differs from the prior art only in form, then if defendant uses a different form he will not be an infringer. *Barker v. Todd*, 13 Fed. Rep. 473.—BLATCHFORD, 1882.



316. By the court : " In view of the fact that in the prior state of the art Dann and claimants under him must be limited to the specific device for which he obtained a patent, and as there are peculiar and marked variations in the construction of the two boxes in question, I am constrained to think that upon the question of infringement the complainant has failed to establish his case." *Neacy v. Allis*, 23 O. G. 1621.—DYER, 1882.

317. A process claim, which is really a claim to the ordinary mode of using a machine, can only be supported as a claim for the mechanism. *Goss et al. v. Cameron et al.*, 11 Bissell, 389.—BLOGGETT, 1882.

318. By the court : " With structures shown in the older stages of the art, I am therefore clearly of the opinion that Richardson must be confined to his special mode of producing the structure ; and I am also of opinion that whatever of structure the defendants show is more nearly, in the mechanical mode of substituting it and in its mode of operation, like the older devices." *Consolidated Safety-Valve Co. v. Kunkle*, 14 Fed. Rep. 732.—BLOGGETT, 1883.

319. When a " wooden frame " is specified in a claim as an element of a combination, and only a wooden frame is described in the specification, the patent will be limited to a wooden frame. *Harris et al. v. Allen et al.*, 15 Fed. Rep. 106.—BLOGGETT, 1883.

320. Where, in a reissue, the patentee omits an element from his combination claim he cannot have that element again construed into the claim. *Nye v. Allen*, 15 Fed. Rep. 114.—LOWELL, 1883.

321. In a reissue the language of the patent is to be construed strictly, because such patent is taken at a time when the invention is developed and understood. *Hatch et al. v. Moffitt*, 15 Fed. Rep. 252.—LOWELL, 1883.

322. Where the defendant's device is rather an improvement upon some device of the prior art than an improvement upon complainant's device, complainant's patent will not be construed broad enough to cover defendant's machine.—*Id.*

323. Defendant's machine was an entire reversal of complainant's machine, but complainant being a pioneer in the art, defendant was held to infringe. *Standard Measuring Co. v. Teague et al.*, 15 Fed. Rep. 390.—LOWELL, 1883.

324. Where the patented thing differs from the prior art in the presence of a certain feature which must be construed into the claim to give that claim validity, defendant's device, not having that feature, cannot be held to infringe.

*Nat'l Car Brake Shoe Co. v. B. & A. R. R. Co. et al.*, 15 Fed. Rep. 462.—NELSON, 1883.

325. Where a man has two patents, each patent must stand alone as regards the construction thereof on any question of infringement. *Washburn & Moen M'fg Co. v. Griesche*, 5 McCrary, 246.—TREAT, 1883.

326. Although a claim, where only its terms are considered, may cover a part of a machine inoperative in itself, yet it is allowable to consider the specification in connection with the claim, and construe into the claim other operative parts. *Moffitt v. Cavanaugh*, 17 Fed. Rep. 336.—SHIPMAN, 1883.

327. A United States patent cannot be invalidated by a disclaimer found in an English patent for the same invention, nor by the claims found in a later American patent to the same inventor. *United Nickel Co. v. Melchoir*, 17 Fed. Rep. 340.—BLOGGETT, 1883.

328. " A reasonably liberal construction should be given in favor of the person who both originated the idea and made for the first time a good machine." *Dunham v. Kimball et al.*, 17 Fed. Rep. 810.—LOWELL, 1883.

329. The words " folded as described " at the end of a claim held to mean a particular kind of folding. *Howe et al. v. Neems et al.*, 18 Fed. Rep. 40.—DRUMMOND, 1883.

330. " If the patentee specifies any element as entering into the combination either directly by the language of the claim, or such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it.

" If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality." *Fay & Co. v. Cordesman et al.*, 109 U. S. 408.—SUP. CT. 1883.

331. Where the specification of a patent clearly makes a certain construction material, the patent must be construed so as to be confined to such construction. *Snow et al. v. L. S. & M. S. R. Co.*, 25 O. G. 1280.—WALLACE, 1883.

332. Where complainant's device was a combination of old elements, and defendants used in lieu of one of those elements a thing that was not a known substitute therefor, defendants were held not to infringe. *Tower v. Bemis & Call. Hardware & Tool Co.*, 19 Fed. Rep. 498.—LOWELL, 1884.

333. Where complainant's combination claim covered by its terms defendant's device, but in order to be valid was limited to a peculiarity of one of the parts, which peculiarity was absent from defendant's device, defendant was held not to infringe.—*Id.*

334. Where a part described in a patent was necessary to the structure, although not mentioned in the claim, it was by construction made a limitation of the claim. *Lloyd v. Miller et al.*, 27 O. G. 101.—ACHESON, 1884.

335. In the case last referred to, defendants' structure not having the peculiarity which was by construction made a part of the claim, they were held not to infringe.—*Id.*

336. Where a patentee mentions his invention as an "improved" thing, he thereby implies that there were in existence prior things on which his is an improvement. *Doyle v. Spaulding et al.*, 27 O. G. 300.—NIXON, 1884.

337. Where the prior art operates to limit the construction of complainant's claim to his particular form of device, a different form is not an infringement. *Field v. Ireland et al.*, 19 Fed. Rep. 835.—COXE, 1884.

338. Where a part is not specifically mentioned in the claim, and its presence is not essential to the successful working of the parts mentioned in the claim, it will not be construed into the claim. *Bradley et al. v. Dull et al.*, 19 Fed. Rep. 913.—ACHESON, 1884.

339. Where the patented structure has two parts, one of which fulfils the conditions required by the claim and the other does not, the latter cannot be construed into the claim. *Lloyd v. Miller et al.*, 19 Fed. Rep. 915.—ACHESON, 1884.

340. Where the prior art calls for a certain construction of the claim, an article not coming within that construction does not come within the claim. *Fetter et al. v. Newhall*, 20 Fed. Rep. 113.—WHEELER, 1884.

341. Where the claim in a patent makes the shape of a part mentioned material, defendants' device must have that shape in order to infringe. *McMurray et al. v. Mallory et al.*, 111 U. S. 97.—SUP. CT. 1884.

342. Where the prior art approaches very closely to the patented invention, "the defendants cannot be adjudged infringers unless they have appropriated in substantial form of construction the identical elements which the complainant has the right to claim as new in his patent." And further, "to make the defendants liable as infringers it must appear that they have appropriated all the elements of the complainant's combination or their equivalents."

*Saladee v. Racine Wagon & Carriage Co. et al.*, 27 O. G. 1133.—DYER, 1884.

343. Where the complainant's patent is closely approached by the prior art, it must be limited in its scope to the "particular combination of the devices described in the patent." The main improvement in complainant's patented grate bars being the arrangement for letting them suddenly fall, and the defendant's arrangement being one which permitted them to gradually fall, defendant was held not to infringe. *Gould v. Spicer et al.*, 20 Fed. Rep. 317.—COLT, 1884.

344. Where the language of a claim is plain, the court cannot enlarge its meaning by construction in order to make it cover the whole of complainant's invention. *Becker v. Hastings et al.*, 28 O. G. 98.—BUTLER, 1884.

345. Where a feature is essential to the validity of a patent, defendant's structure must embrace that feature or it does not infringe. *Hayes v. Dayton*, 20 Fed. Rep. 690.—COXE, 1884.

346. Where one contestant seeks a construction of language in a patent which is in accordance with the natural meaning of the words used, and the other contestant seeks a construction which the patentee admits he was not the first to make, and which he has endeavored to disclaim, the former and the natural construction is the one which should be adopted. *Brush et al. v. Condit et al.*, 22 Blatch. 246.—SHIPMAN, 1884.

347. A reissue claim is to be "construed in the light of the contemporaneous facts which are shown in the 'file wrapper and contents.'" *Yale Lock M'f'g Co. v. James*, 22 Blatch. 294.—SHIPMAN, 1884.

348. In construing the claim of a patent, the patentee is bound by the proceedings which take place in the Patent Office.—*Id.*

349. Where complainant's patentee described as a part of his structure a certain recess, and described a certain function to it, and prior structures were the same except the recess was of a different form, the court refused a construction to the claim confining it to a recess of the form shown in the patent, and condemned the patent. *Fryer v. Maurer*, 22 Blatch. 268.—WALLACE, 1884.

350. By the court: "It is quite useless to attempt to sustain the patent upon refined distinctions in minor details in structure, which the patentee evidently never contemplated, and which certainly are not within the claims as expressed in the patent."—*Id.*

351. The construction of a claim which will render a disclaimer altogether nugatory must be essentially wrong, and cannot therefore be ac-

cepted. *Atlantic Giant Powder Co. v. Hulings*, 21 Fed. Rep. 519.—ACHESON, 1884.

352. By the court: "The only merit of complainant's invention is the peculiar form of his rock-shaft and the peculiar mode of applying it. He is not a pioneer in this department of machinery. He did not invent the rocking motion as a process, nor the first means of producing it, nor the mode of producing it by the intervention of a rock shaft. He does not stand at the head of the line; he is only an individual in the line. He is entitled to what he has invented and nothing more; and what he has invented is nothing but the specific device which he has patented. His claim is to be construed according to its terms, and is limited by them, and cannot be enlarged by construction." *Goodwin v. Randolph*, 21 Fed. Rep. 575.—BRADLEY, 1884.

353. Where the new thing in a compound is the ratio of the elements used, a patentable invention does not result unless some special and marked benefit comes from the said ratio or proportion. And where the patented proportion was ten parts of kaolin to one part of shellac, the patent was held not broad enough to cover so substantial a variation as equal parts of kaolin and shellac. *Welling et al. v. Crane et al.*, 21 Fed. Rep. 707.—NIXON, 1884.

354. Where alternatives are mentioned in a claim, and defendant uses one of the alternatives, he infringes. *Brown M'f'g Co. v. Deere et al.*, 21 Fed. Rep. 709.—BLODGETT, 1884.

355. When the language of a claim is plain, the court cannot enlarge it by construction, even though it fails to cover the entire invention. *Becker v. Hastings et al.*, 22 Fed. Rep. 827.—BUTLER, 1884.

356. "Inventions may be said to be secondary or primary in their nature." "In the one class of inventions slight differences may avoid infringement. In the other class, there must be substantial differences to ascribe such a change." *Morley Sewing-Mach. Co. et al. v. Lancaster*, 23 Fed. Rep. 344.—COLT, 1884.

357. Where, on the construction of a claim which will make defendant an infringer, the patent in suit is anticipated, the defendant does not infringe. *Buckingham v. Porter et al.*, 26 Fed. Rep. 759.—SAWYER, 1885.

358. Where the prior art differs from the patented thing simply in certain specific points of construction, the patent is limited to such specific details of construction, and a defendant who does not use them does not infringe. *McFarland v. Deere & Mansur M'f'g Co. et al.*, 22 Fed. Rep. 781.—BLODGETT, 1885.

359. "The proper policy of the law is to

limit rather than to amplify the extent of . . . claims." *Schillinger v. Cranford*, 37 O. G. 1349.—HAGNER, 1885.

360. "To eliminate what is a plainly declared element of a combination is beyond the province of judicial construction." *Williams v. Stolzenback et al.*, 23 Fed. Rep. 39.—ACHESON, 1885.

361. It seems that the correspondence between an applicant for a patent and the Patent Office may be considered in construing the claim of the patent. *Farmers' Friend M'f'g Co. v. Challenge Corn Planter Co.*, 23 Fed. Rep. 42.—BAXTER, 1885.

362. "When a patentee, after describing a machine, claims as his invention a certain combination of elements or a certain device or part of the machine, this is an implied declaration—as conclusive, so far as the patent is concerned, as if it were expressed—that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for portions not covered by this, but that will speak for itself. So far as the patent in question is concerned, the remaining parts are old, or common, or public." *Roswell et al. v. Lindsay et al.*, 113 U. S. 97.—SUP. CT. 1885.

363. "In patents for combinations of mechanisms, limitations and provisions imposed upon the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers." *Sargeant v. Hall Safe & Lock Co. et al.*, 114 U. S. 63.—SUP. CT. 1885.

364. Where the state of the art is such that, in order to leave the patent validity, it must be narrowed by construction to certain details, the patentee is estopped from claiming that there is no material difference between the form of detail used by him and the form of the corresponding detail to be found in the prior art. *Watson v. Cincinnati I. St. L. & C. R'y Co.*, 23 Fed. Rep. 443.—WOODS, 1885.

365. Where a claim is functional in form, it will be construed to be for the mechanism having such function. *Peard v. Johnson*, 23 Fed. Rep. 507.—COXE, 1885.

366. Although a reissue is evidently intended to enlarge a claim, yet the court may, by construction, confine it within the original patent. *Hartford Woven Wire Matt. Co. v. Peerless Wire Matt. Co.*, 23 Blatch. 227.—SHIPMAN, 1885.

367. Where a claim, either in terms or by implication, is limited to one form of article, as portable steam-engines having horizontal boilers,

the combinations mentioned in the claims are open to free public use when applied to other forms, as vertical boilers. *Scheidler v. Tustin et al.*, 23 Fed. Rep. 887.—ACHESON, 1885.

368. Where a problem which an inventor has worked out is also originally stated by himself, he is entitled to a broad construction of his patent; but when the same problem has been stated before his time and worked out in other ways, he is not entitled to a broad construction. *Washburn & Moen M'fg Co. et al. v. Grinnell Wire Co. et al.*, 24 Fed. Rep. 23.—BREWER, 1885.

369. "As a rule, a patent for a combination includes the known equivalents for the respective elements of the combination." *Bate Refrigerating Co. v. Eastman*, 32 O. G. 517.—SHIPMAN, 1885.

370. In that case where a certain arrangement of parts is claimed, and "is for an improvement merely in the department of mechanics to which it pertains, it must be limited in its scope to the 'arrangement' of devices described and claimed in it as new; and it cannot be expanded to apply to substituted devices different in character and dissimilar in form merely because they perform some of the intended functions of the patented devices, or because the same general result is effected by both." *Dyer et al. v. Nat'l Hod Elevating Co.*, 24 Fed. Rep. 182.—MCKENNAN, 1885.

371. The state of the art and the proceedings in the Patent Office in obtaining the patent in suit may both be taken into account in arriving at a construction of the claims of a patent. *Fay, J. A. & Co. v. Allen*, 32 O. G. 1355.—BLATCHFORD, 1885.

372. A reference in a claim to the drawings and specification undoubtedly constitutes them to a certain extent, and for some purposes, a necessary part of the claim, for the latter cannot be understood without importing into it the things referred to as a part of it. *Reed et al. v. Chase et al.*, 25 Fed. Rep. 94.—MATTHEWS, 1885.

373. It is "the well-established rule of construing patents in the light of the existing state of the art, so as, by separating things which, although part of the description, were well known and in common use, to eliminate the precise invention which it must be presumed the patentee intended to cover as his own, unless the claim itself is so express and unambiguous as not to admit their exclusion; and also the equally well-recognized rule that a patent, even though it claims a device by a particular description, must be held also to include everything which is a mere equivalent for it, not itself involving invention. Without the aid of these reasonable

and beneficial rules of construction few patents would be of any practical value."—*Id.*

374. Where a patentee has discovered a principle, it is not true that any sort of device which makes use of that principle is within his patent. "It is the device by which he may avail himself of the beneficial influence of his principle, and this court always restricts a party to his device." *Steam Gauge & Lantern Co. et al. v. St. Louis Railway Supplies M'fg Co.*, 33 O. G. 889.—TREAT, 1885.

375. Patents and the like pertaining to the art may be offered in evidence and used at the hearing on the question of the construction of a patent in issue, although not set up in defendant's answer. *Eachus v. Broomall*, 115 U. S. 429.—SUP. CT. 1885.

376. Although a machine prior to that of the patentee may possibly be used for the same purpose, yet, if not practically useful in that way, it will not prevent a construction of the patent so broad that "no mere change in the details of construction should relieve a party from the charge of infringement." *Nat'l Hat Pouncing Mach. Co. v. Thom et al.*, 25 Fed. Rep. 496.—COLT, 1885.

377. A court will not by construction make the patent something not suggested in the patent, as a characteristic or peculiarity of the invention. *Bradley & Hubbard M'fg Co. v. Charles Parker Co.*, 34 O. G. 249.—SHIPMAN, 1885.

378. The proceedings in the Patent Office are to be taken into consideration in construing the breadth of a patent. *Shepard et al. v. Carri-gan*, 116 U. S. R. 593.—SUP. CT. 1886.

379. "Where an applicant for a patent to cover a new combination is compelled by rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by dropping the element which he was compelled to include in order to secure his patent."—*Id.*

380. Where a claim is to a combination of parts, and a prior structure contains the same combination, except a difference in detail of one of the parts, there is no room for the application of the doctrine of equivalents on the question of infringements. *Phipp v. Yost*, 26 Fed. Rep. 447.—WALLACE, 1886.

381. "The scope of letters-patent must be limited to the invention covered by the claim; and while the claim may be illustrated, it cannot be enlarged by language used in any other part of the specification." *Yale Lock M'fg Co. v. Greenleaf*, 117 U. S. 554.—SUP. CT. 1886.

382. Where a suit is brought upon two patents, they cannot supplement each other; each is to be considered by itself. *Blades v. Rand, McNally & Co.*, 27 Fed. Rep. 93.—BLODGETT, 1886.

383. Where an applicant for a patent, being rejected upon a prior rejected application, acquiesces in the rejection, he is estopped thereby, and his patent is to be construed thereby.—*Ib.*

384. For an example of a patent on a ticket case held limited to the exact devices shown and described, in view of the prior art, see —.—*Ib.*

385. Such a construction should be given to a claim as will cover the real invention. *Hoff et al. v. Iron-Clad M'f'g Co.*, 23 Blatch. 481.—WALLACE, 1886.

386. "The claims of the patent are to be read in the light of, and in connection with, the specifications. This is an elementary principle in patent law." *May v. County of Fond du Lac*, 27 Fed. Rep. 691.—DYER, 1886.

387. Patentees are bound by concessions and amendments which they make in their applications for patents. *Roemer v. Peddie et al.*, 27 Fed. Rep. 702.—WHEELER, 1886.

388. "The fact that the machine in which the patented combination is used is a different machine from that in which the combination was first described is not a valid defence in a suit for infringement, where the combination patented is only a part of the machine described." *La Rue v. Western Electric Co.*, 28 Fed. Rep. 85.—BROWN, 1886.

389. For an example of a patent strictly limited in view of the prior art, and thereupon the defendant held not to infringe, see —.—*Frost et al. v. Chase*, 28 Fed. Rep. 102.—COLT, 1886.

390. Where a patented invention "is in effect a primary one, the word 'substantially' will 'be made to cover differences alike numerous and important.'" *Hubel v. Dick*, 28 Fed. Rep. 132.—SHIPMAN, 1886.

391. A part not specified in a claim, and only referred to in the specification to explain the mode of operation, will not be read into the claim by construction. *Grain Drill Manufacturers' Co. v. Hart et al.*, 28 Fed. Rep. 367.—BLODGETT, 1886.

392. Although the claim of a patent may be limited in view of the approximate prior art, such limitation does not prevent the patentee from covering not only the specific devices he shows, but also the known equivalents therefor. *Belle Patent Button Fastener Co. v. Lucas*, 28 Fed. Rep. 371.—COLT, 1886.

393. Where an "invention is of decided originality, . . . the patent will deserve to be so

construed as to afford to the inventor and his assignee the amplest protection against devices which, however greatly differing in form, yet copy the principle of the invention or its mode of operation." *Penn. Diamond Drill Co. v. Simpson et al.*, 37 O. G. 218.—ACHESON, 1886.

394. "As a patent is read by persons skilled in the art to which it relates, so should it be read by the court." *Tondeur v. Stewart et al.*, 28 Fed. Rep. 561.—ACHESON, 1886.

395. Courts will not "ignore the salutary rule which, discarding subtleties and technicalities, interprets a patent according to its true intent and meaning, so as to give the inventor the benefit of what he has actually invented, even though his claims be carelessly or inartificially drawn." *Steam Gauge & Lantern Co. v. Ham M'f'g Co.*, 28 Fed. Rep. 618.—COXE, 1886.

396. "Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction by merely referring to the specification, so as to make it include something more than or something different from what its words express. The context may undoubtedly be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim, but not for the purpose of changing it and making it different from what it is. The claim is a statutory requirement prescribed for the very purpose of making the patentee define precisely what his invention is, and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms." *White et al. v. Dunbar et al.*, 119 U. S. 47.—SUP. CT. 1886.

397. A patentee "is not at liberty . . . to insist upon a construction of his patent which will include what he was expressly required to abandon and disavow as a condition of the grant." *Sutter v. Robinson*, 119 U. S. 530.—SUP. CT. 1886.

398. Where the prior art does not call for the construction of a patent narrower than is expressed by the terms of its claims, it will not be narrowed by construction. *Lamson Cash R'y Co. v. Osgood Cash. Car Co. et al.*, 29 Fed. Rep. 210.—COLT, 1886.

399. No change in the form or shape of the parts of a patented machine is material on the question of infringement so long as the defendant's machine does not vary from the essential character of those parts as they exist in the description given in the plaintiff's patent. *Royer et al. v. Coupe*, 29 Fed. Rep. 358.—CARPENTER, 1886.

400. Where a patent is for a combination, the

fact that its main features are old, considered singly, does not limit the complainant to the exact form of mechanism found in the patent. The patent is to receive a reasonably broad construction, and those should be held to be infringers who accomplish the same result with substantially the same or equivalent means. *Boston Electric Co. v. Fuller et al.*, 29 Fed. Rep. 515. —COLT, 1886.

401. Where a term, as read in a claim, is capable of two meanings, and therefore ambiguous, the true meaning must be ascertained by resort to the descriptive part of the specification in order to discover what the patentee describes as new, and what the public have a right to understand was intended to be claimed. *Allison v. Trustees of N. Y. & Brooklyn Bridge*, 29 Fed. Rep. 517. —WALLACE, 1886.

402. A construction of a patent which is called for by necessity cannot be carried further than is called for by that necessity. *Stiles v. Rice et al.*, 29 Fed. Rep. 445. —CARPENTER, 1887.

403. "A limitation introduced by construction must be based on the express words of the instrument, and most stand in the same terms in which it is introduced." —*Ib.*

404. "A method or feature which is mentioned only by the way of recommendation, in describing an invention, must generally be considered as a subordinate or secondary and not an essential part of the invention, and, in the absence of apt language in the claim, it cannot be read into the claim, even to limit the claim to the real invention of the patentee." *Holliday et al. v. Pickhardt et al.*, 29 Fed. Rep. 853. —WALLACE, 1887.

405. Where a patent has two claims, one of which covers the real improvement of the patent and the other covers something else, and the defendant infringes the terms of that claim, but not the claim which covers the real improvement, defendant will not be held to be an infringer. *Bragg et al. v. Fitch et al.*, 121 U. S. 478. —SUP. CT. 1887.

406. A statement in a patent that a thing can be done, without showing how to do it, cannot serve to broaden the construction of the claims. *Lamson Cash R. R. Co. v. Martin et al.*, 30 Fed. Rep. 824. —COLT, 1887.

407. "Where change of form or combination only is invented, each inventor must be content with the structure described and claimed by him." In such case the doctrine of equivalents cannot be invoked to suppress improvements on a well-known machine. *Hill v. Sawyer et al.*, 31 Fed. Rep. 282. —COXE, 1887.

408. "It sometimes happens that an invention

contains features of utility which may be adapted to other uses than those specifically contemplated by the inventor, but those uses are kindred uses, or are an extension of the features into use in the development of art. In these cases the feature of utility exists in the patent and is expressed by the claims, but the use is not broadened. That principle would not support a patent claimed and granted for a feature which was not novel, as protecting it for another feature which was dormant in it and afterward proving to be useful." *Ingham et al. v. Pierce et al.*, 31 Fed. Rep. 822. —SEVERENS, 1887.

409. Although the wording of a claim may be broad and general, yet if the state of the art requires it to be specific, such meaning will be given to the claim by construction; and if the defendant has not the specific parts he will not be held to infringe. *Wheeler et al. v. Hart et al.*, 32 Fed. Rep. 78. —BLATCHFORD, 1887.

410. Where, in an application for patent, the Patent Office objects to a claim because of a name given to a part therein, and the applicant acquiesces in the change of name, that does not create an estoppel as regards a broad construction of the claim. *Yale Lock M'g Co. et al. v. New Haven Sav. Bank*, 32 Fed. Rep. 167. —SHIPMAN, 1887.

411. A construction of a claim of a patent which makes it a mere duplication of another claim of the same patent is to be avoided. *Filley v. Littlefield Stove Co. et al.*, 30 Fed. Rep. 434. —COXE, 1887.

412. "Specifications cannot be used so as to enlarge the claims in the patent and make them cover more than is contained in such claims." *Byerly v. Cleveland Linseed Oil Works*, 31 Fed. Rep. 73. —WELKER, 1887.

## CONSTRUCTION OF PATENT—SPECIFIC CASES.

1. A patent for an improvement in the art of making nails by means of a machine which cuts and heads the nails at one operation is not a patent for an abstract principle, nor for the different parts of the machine, but for a combination of the various mechanical powers. *Gray et al. v. James et al.*, 1 Peters' C. C. 394. —WASH. 1817.

2. The patent of Oliver Evans, of January 22d, 1808, covers the improvements in the several machines and the machinery as a whole. *Evans v. Eaton*, 3 Wheat. 454. —SUP. CT. 1818.

3. The patent in suit was for the mould-board of a plough. In description the patentee stated

that a certain shape should be "about" so and so. The word "about" rejected as surplusage. *Davis v. Palmer*, 2 Brock, 298.—MARSHALL, 1827.

4. The patent of Gideon Davis, of October 1st, 1825, is not for a mould-board of a spiral curve, nor for a mould-board worked to circular or spheric lines generally, but for a mould-board with face formed by transverse segments of circles whose radii bear to each other the proportion of thirty-six to twelve.—*Id.*

5. Plaintiff's claim was: "I claim as my invention the connection of the reed with the yarn-beam, and the communication of the motion from the one to the other, which may be done as above specified." *Held*, "that the patentee limits his invention to the specific machinery and mode of communication of the motion from the reed to the yarn-beam set forth and specially described in the specification." *Stone v. Sprague et al.*, 1 Story, 270.—STORY, 1840.

6. Complainant's ice plough had a double series of cutters in parallel planes; defendant's plough had a single series in one plane. Both had a series of chisels each progressively below the other, and an adjustable guide; complainant's guide was a duplicate of his chisel-plate; defendant's guide was a smooth iron. *Held*, that defendant infringed. *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

7. The claim of complainant's patent was: "I now claim as my invention and desire to secure by letters-patent the increasing of the depth or space between the upper or outer surface of the rib, and the lower or inner surface of it, at the part where the cotton is drawn through the grate, so that it shall be equal to the length of the fibre of the cotton to be ginned [whether this be done by making the ribs thicker at that part, or by a fork or division of the rib, or by any other variation of the perpendicular form]; and I also claim as part of the same improvement the sloping up of the lower or inner surface of the rib so as to meet the upper or outer surface above the saws, leaving, when the rib is inserted into the frame, no break or shoulder between the two surfaces, but a smooth and uninterrupted passage upward between the ribs, as above described." The court construed this claim as follows: "That rib is the thing claimed, and not the thickness or depth, or spaces of the rib alone, or the sloping up of the surfaces thereof alone. Both are claimed as parts of the same improvement, but neither alone as constituting it." *Carver v. Braintree M'fg Co.*, 2 Story, 432.—STORY, 1843.

8. The claim in issue was: "We claim as our

invention the construction and use of an endless apron, divided into troughs or cells, in a machine for cleaning grain, operating substantially in the way described." Thereof the court said: "It is . . . clear that it was not a claim of an invention of an endless apron of troughs or cells, but of an endless apron of troughs and cells combined with a particular threshing machine described in the specification." *Pitts v. Whitman*, 2 Story, 609.—STORY, 1843.

9. The claim in a patent was: "I now claim as my invention and desire to secure by letters-patent the increasing the depth or space between the upper or outer surface of the rib, and the lower or inner surface of it, at the part where the cotton is drawn through the grate, so that it shall be equal to the length of the fibre of the cotton to be ginned [whether this be done by making the rib thicker at that part, or by a fork or division of the rib, or by any other variation of the particular form]; and I also claim as part of the said improvement the sloping of the lower or inner surface of the rib so as to meet the upper or outer surface above the saws, leaving, when the rib is inserted into the frame, no break or shoulder between the two surfaces, but a smooth and uninterrupted passage upward between the ribs, as above described." The plaintiff contended that the sloping up of the rib so as to meet the upper or outer surface of the saw, as well as the manner of fastening against the framework of the gin, were not essential parts of his invention. The court held the contrary. *Carver v. Heyde et al.*, 16 Peters, 513.—SUP. CT. 1842.

10. The claim in complainant's patent was: "I claim the application of plaster-of-Paris in the construction of all iron safes, in the manner above described, or in any other manner substantially the same." The court instructed the jury that this claim meant plaster-of-Paris of a certain thickness put in as a liquid paste, and into the door as well as into the body. *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

11. The claim in complainant's patent was: "What we claim as our invention and wish to secure by letters-patent is the manner of constructing the wheels for railroad cars or for other purposes to which they may be applied with double convex plates, one convex outward and the other inward, and an individual limb, the whole cast on one piece, as herein fully set forth." Complainant contended that the words, "One convex outward and the other inward," were inoperative. The court said: "It must be borne in mind that the question is not *what*

might have been done, but what has been done by the patentees." And further: "Although the court will endeavor, *ut res valeat*, so to construe the patent as to make it coextensive with the invention, yet the language used may be too clear to be controlled by any extrinsic evidence, and the statute itself contemplates that errors of description may exist beyond the power of the court to correct, and provides a remedy by a surrender of the patent." The court denied plaintiffs' contention. *Many v. Sizer et al.*, 1 Fish. P. C. 31.—SPRAGUE, 1849.

12. Where complainant's patent on a car-wheel showed a curvature in the wheel-plate, it was held that the patentee was not limited to the degree of curvature therein represented. *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

13. In the specification of complainant's patent for car-wheels, the wheel-plates were described as parallel, or nearly so, one convexed outward and the other inward; they were so mentioned in the claim. It was held that plaintiff was not restricted to plates curved or convexed in the same direction, but that his patent might cover plates both curved inward or both curved outward, 'as well as those which were parallel, or nearly so.—*Ib.*

14. The claim in a patent was: "The extending of the oven under the apron or open hearth of the stove, and the combination thereof with the flues constructed as above specified." "The invention of the plaintiff consisted in adding a close flue or fire-chamber in front, between the front plate of the stove and the front plate of the oven, to what was known as the Hathaway stove. In the latter stove the oven was extended under the apron or open hearth, and there were reverberating flues—that is, two flues starting from the top of the back of the stove, one at each side, running down the back and under the bottom to the front, and there uniting in a centre flue which returned under the bottom and up the back to the stovepipe." Thereof the court said: "The construction of the claim on which the court have agreed is this, that the invention of the patentee is a combination of the extension of the oven under the hearth of the stove, and the flues, as described by him, with the flue or fire-chamber in front of the stove formed by the two front plates." "His claim is for the combination of the extended oven and the several flues, with the flue or fire-chamber in front of the stove." *Buck et al. v. Hermance*, 1 Blatch. 398.—NELSON, 1849.

15. Plaintiff's claim was: "The application of the expansive and contracting powers of a

metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove or other structure in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue." This was held to be "the application of the principle of the contraction and expansion of a metallic rod by the use of certain mechanical contrivances particularly described and set forth, to the cast or sheet-iron stove in common use." *Footo v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

16. The claim in complainant's patent for improvement in street railways was: "The employment of plates or rails, either of cast or of wrought iron, constructed and operating upon the same principle or in the manner herein described; having narrow grooves on each side of the track for the flanches of car-wheels to run in, by which they are adapted to the unobstructed passing over them of the various kinds of common carriages, and to the running of the wheels on slight curves without dragging. I also claim, in combination with such grooved rails or tracks, the employment of plates of cast iron for the covering and crossing of gutters, such plates being constructed as described, and having the necessary flanch channels cast in them." The court said that, in view of the prior art, these plates must be "depressed to a plane exactly corresponding with that of the street in which it may be introduced." Defendant's device consisted "of a double flat rail of cast iron placed on the inner side of a curve or corner intended to be passed, and an ordinary flat rail on the exterior line of the same curve to be passed; and the whole of this machinery . . . constructed on the same plane with the general track of the road elevated to whatever point that track may be raised, and without regard to the convenience of ordinary carriages making transverse passages through the streets." Defendant was held not to infringe. *Stimpson v. B. & S. R. R. Co.*, 10 How. 329.—SUP. CT. 1850.

17. In the Woodworth planing machine the rotary cutter was regularly cylindrical. Defendant's cutter-wheel was a very flat cone set upon a leaning shaft, and made a long shaving cut. Defendant was held to infringe. *Gibson v. Van Dresar et al.*, 1 Blatch. 532.—NELSON, 1850.

18. In the Woodworth patented planer the board was kept to its bed by means of pressure rollers acting upon its face. In defendant's—which was held to infringe—the rotary guides were so arranged and adjusted as to press against the edge of the board; and being somewhat



oblique to the motion of the board, they held the board to its bed.—*Id.*

19. In Blanchard's lathe the model and the rough block had a continuous rotary motion connected with a lateral motion, the former produced by a belt and pulleys, the latter by screws. In defendants' machine the model and the rough block rotated by an intermittent motion, and moved laterally by a rectilinear reciprocating motion, the former being produced by a ratchet-wheel and the latter by a crank. Defendants were held to infringe. *Blanchard v. Reeves et al.*, 1 Fish. P. C. 103.—GRIER, 1850.

20. A reissue of the original Morse patent on telegraphs contained a claim covering the principle involved. It was held to be a claim for the mechanism. The House Printing Telegraph was held not to infringe. *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

21. In a patent for a furnace, it was specified that the gases were to be taken off "at or near that point of the furnace where the limestone employed as a flux is completely calcined, and the reduction or deoxidation has not yet commenced;" adding that this point "will generally be at about one third the height of the whole furnace below the tunnel head, or two thirds above the bottom stone." The claim spoke of drawing off the gases at "one or more points below the top of the fuel." Complainant contended that this was to be construed as meaning that the gases were to be drawn off "below the upper level of the charge." Complainant's contention was refused, and defendants, not coming within the terms of the patent, were held not to infringe. *Detmold v. Reeves et al.*, 4 Am. L. J. 188.—KANE, 1851.

22. When Morse claimed "as the essence of his invention the use of the motive power of the electric or galvanic current, however developed for making or printing characters at any distance," he described and justly claimed a new art. *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—KANE, 1851.

23. In Morse's patent for a local circuit, the electric force was derived from a battery outside the main line. Defendants had the same local circuit operated by a battery within the main line. Defendants were held to infringe.—*Id.*

24. The claim of the patent in suit was to "the application of the expansive and contracting power of the metallic rod to regulate the heat of the stove by opening and closing the damper, the whole being self-acting in the admission or exclusion of air." The court held this to be "a claim independent of any particular arrangement or combination of machinery or contriv-

ance for the purpose of applying the principle to the regulation of the heat of stoves." *Foot v. Silsby et al.*, 2 Blatch. 260.—NELSON, 1851.

25. Such a patented machine as the Blanchard lathe for turning irregular forms may be applicable to turning a variety of articles; and it is an infringement to construct a machine embodying the patented improvement, the use of which is restricted to turning one kind of article. *Blanchard v. Beers et al.*, 2 Blatch. 411.—NELSON, 1852.

26. In the Goodyear patent for vulcanizing rubber, hot air was described as the agent for the application of heat. Defendant used steam, and was held to infringe. *Goodyear et al. v. Central R. R. of N. J.*, 2 Wall. Jr. 356.—GRIER, 1853.

27. The claim in Goodyear's vulcanizing patent was: "What I claim as my invention and desire to secure by letters-patent is the curing of caoutchouc or india-rubber, by subjecting it to the action of a high degree of artificial heat, substantially as herein described and for the purposes specified.

"And I also claim the preparing and curing the compound of india-rubber, sulphur, and a carbonate of other salt or oxide of lead, by subjecting the same to the action of artificial heat, substantially as herein described." The court construed this claim to cover both the process and the product.—*Id.*

28. The claim of the patent in suit was: "What I claim as my own invention and desire to secure by letters-patent is making the body of the car for the transportation of coal, etc., in form of the frustrum of a cone," etc. It was held that the car need not be of just the form of the frustrum of a cone in order to come within this patent. *Winans v. Denmead et al.*, 15 Howard, 330.—SUP. CT. 1853.

29. Complainant's patented improvement in gold pens was claimed as "reducing or thinning the sides of the pen between the shoulder and the splits," for the purpose of obtaining elasticity. Defendants' gold pen did not have the sides thinned, and had the elasticity given by hammering and polishing. Defendants were held not to infringe. *Rapp v. Bard et al.*, 1 Fish. P. C. 196.—GRIER, 1855.

30. A patented improvement in apple-parers consisted in so attaching the knife-block to the rod which moved it as to allow it to rotate around the rod at right angles therewith, and thus the knife accommodated itself to any irregularity in the surface of the apple. Defendants, instead of making the knife thus movable on the rod, made the rod movable in its socket.

The knife-block had the same motion, but in one machine it was around the rod, in the other with the rod. Defendants were held to infringe. *Sargent et al. v. Larned et al.*, 2 Curtis's C. C. 340.—CURTIS, 1855.

31. Although complainant's patented device may show a roller for holding down the material operated upon, and although defendant may substitute a spring therefor and thereby get additional advantages, yet if the spring performs the function of the roller, so far forth it is an infringement. *Foss v. Herbert*, 1 Bissell, 121.—DRUMMOND, 1856.

32. "' May in fact be ' does not signify ' shall be.' " *Page v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

33. The patent in suit was for a reaper, and a claim thereof was: "4th. I claim the combination of the bow L and the dividing iron M, separating the wheat in the way described." Of the inventor and of the claim the court said: "If he be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a well-known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by the use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first." *McCormick v. Talcott et al.*, 20 Howard, 402.—SUP. CT. 1857.

34. The patent in suit was for a reaper, and a claim thereof was: "4th. I claim the combination of the bow L and the dividing iron M for separating the wheat in the way described." Dividers, broadly considered, were old. Defendants used the above combination except that the divider was of a different form, and defendants were held not to infringe.—*Id.*

35. Complainant's patented wood-bending machine consisted of a stationary form around which timber was bent by means of levers turning upon fixed fulcrums and applied near the end of the timber. The timber to be bent was laid upon a metallic strap having clamps or abutments attached to each end which embraced the ends of the wood, and prevented any stretching of the fibres during the act of bending.

These clamps were made to slide upon the levers as the wood was brought around the form. The claims of the patent were as follows: "I claim the clamps 6 6 to prevent end expansion and the levers 7 7, working on fixed fulcrums, when in operation, all substantially as and for the purposes set forth in the foregoing specifications." Defendants substituted radial arms with rollers to press upon the back of the wood, and used clamps which permitted a partial relaxation or stretching of the fibres at the commencement of the bending operation. Verdict for the plaintiff. *Morris v. Barrett et al.*, 1 Bond, 254.—LEAVITT, 1859.

36. Complainant's patent, which had been sustained by the court in a previous suit, was for the use of sheets of tin-foil in vulcanizing rubber placed upon the surface of the article to be vulcanized. Defendant substituted thin sheets of brass therefor. It was not claimed that all plates of metal were equivalents for tin-foil, and as defendant's plate had not the same flexibility as complainant's, defendant was held not to infringe. *Poppenhusen v. N. Y. Gutta Percha Rubber Comb Co.*, 4 Blatch. 253.—INGERSOLL, 1859.

37. A claim of complainant's patent for part-coloring yarns was: "What I claim as my invention and desire to secure by letters-patent is the method, substantially as specified, of part-coloring yarns that have been reeled by direct and free immersion by means of frames carrying the reeled yarns," etc. The court held this to be a claim for a combination of the parts described. *Smith et al. v. Higgins et al.*, 1 Fish. P. C. 537.—NELSON, 1859.

38. The claim of complainant's patent for a reaping machine was for a combination, having as one element thereof a certain "scalloped cutter." Defendants contended that their scallops were of less depth than those used by complainant; thereof the court said: "This is a formal and not substantial objection. The scallops were not required to be of any particular depth, or that the angle they make should be greater or less. This was necessarily left to the knowledge and experience of the mechanic. Practical utility was the end to be attained in the use of the scalloped cutter. Some mechanics may prefer one angle, some another. A right which may be lost by the variation of an angle can be of no value." *Hussey v. McCormick et al.*, 1 Bissell, 300.—MCLEAN, 1859.

39. In the specification of his patent on a stove, the plaintiff fully described the character and functions of a certain plate. This plate was not mentioned in the claim, which was for a com-

bination, but the court placed it there by construction, saying: "In giving a construction to a patent, it is the duty of the court to look to the whole specification, to the body of the patent." *Vance v. Campbell et al.*, 1 Fish. P. C. 483.—LEAVITT, 1859.

40. In a patent for a seed sower, the inventor describes a certain kind of motive power and a certain means of transportation. The kind of motive power used was held to be immaterial. *Cahoon et al. v. Ring*, 1 Clifford, 592.—CLIFFORD, 1859.

41. The claim in complainant's patent was: "Forming and arranging the teeth of cylinders for burring wool in such a manner that their outer convex sides shall be substantially concentric with the axis of the cylinder, for the purpose of seizing and holding the fibres, and presenting a surface against which the guard can act in removing burrs and other foreign matter therefrom." Thereof the court said: "Forming and arranging the teeth, within the meaning of the claim, includes not merely their points or projections, but also the plain surface in rear and against which, as stated in the claim, the guard is to act in removing the burrs." *Whipple v. Middlesex Co.*, 4 Fish. P. C. 41.—SPRAGUE, 1859.

42. The claim in complainant's patent for a cotton-gin was: "Forming and arranging the teeth of cylinders for burring wool, in such a manner that their outer convex sides shall be substantially concentric with the axis of the cylinder, for the purpose of seizing and holding the fibres, and presenting a surface against which the guard can act in removing burrs and other foreign matter therefrom." In complainant's machine the cylinder had a continuous surface from end to end. In defendant's machine it was not continuous, being formed by plates or rings of metal going around the cylinder, placed near to each other, but with some space between them. Another mechanical difference was that in defendant's machine the teeth were not in straight lines lengthwise with the cylinder. The third change in defendant's machine was in the edges of the rings, and was effected by the passing of a triangular file around the cylinder between the rings to sharpen the teeth. By these changes a new function was introduced, but the defendant was held to infringe.—IB.

43. The claim in complainant's patent was: "Making ladies' bonnet-frames of two thicknesses of cape lace, substantially as and in the manner specified." The court held this to be a claim for a whole bonnet-frame made in that particular way, and that a bonnet-frame made

in parts in the same general manner did not infringe. *Kidd v. Spence et al.*, 4 Fish. P. C. 37.—INGERSOLL, 1859.

44. The claim in complainant's patent was: "The method, substantially as specified, of parti-coloring yarns that have been reeled by direct and free immersion, by means of frames carrying the reeled yarns, and combined with the vat containing the dyeing liquor by means of machinery adapted to let down and draw up the said frame, and measure the extent of immersion, substantially as set forth." In defendants' device the skeins of yarn were strung upon two poles one above the other, and while thus situated the skeins were clamped by a clamp of wood at the distance from the bottom desired to be colored. This clamp was attached to a frame independently of the two poles which supported it. The poles were then withdrawn and the clamp frame attached to and carried by a lever operated by machinery to the vat of liquor, and lowered into it, the clamps which floated determining the immersion. Defendants were held not to infringe. *Smith et al. v. Higgins et al.*, 2 Fish. P. C. 97.—NELSON, 1860.

45. A claim was: "The method, substantially as described, of regulating the velocity of steam-engines by combining a regulator with a liberating valve gear." Thereof the court said: "The claim covers not only the specific arrangement and combination described in the specification, but any arrangement and combination for the purpose mentioned which embodies the ideas, principles, and mode of operation of the patentee." *Corliss v. Wheeler & Wilson M'fg Co.*, 2 Fish. P. C. 199.—NELSON, 1861.

46. The claim in the patent in suit was: "I claim constructing the wrought-iron fence substantially as herein described—that is to say, by forming the top and bottom rails and posts of the panelled or grooved bars through which the ends of the wires, by which the meshes are made, are drawn and the ends turned down into said grooves, and then covered by other similar bars to hold them in place, by which a perfect finish is effected, and the expense and difficulty is avoided." In defendant's device the double grooved bar was not present, and the iron wire was drawn through a hole in the bar and fastened roughly by bending and clinching it without riveting. Defendants were held not to infringe. *N. Y. Wire Railing Co. v. Walker et al.*, 2 Fish. P. C. 179.—GRIER, 1861.

47. The claim in complainant's patent was: "I also claim the employment of the hinged hood [S] to regulate the distribution of the

fibres on the perforated cone or other former, as described.

“ And I also claim providing the lower part or delivery aperture of the tunnel or chamber with a hinged flap [g], for the purpose of regulating the delivery of the fibres to increase the thickness of the bat where more strength is required, as herein described, in combination with the hood, as herein described.” Defendants substituted a rapidly revolving picker for the brushes of complainant's patented machine, and in front of this placed a short curved guide-plate or hood, by means of which the fibres were directed to any part of the cone. Defendants used the cone which was common to complainant's machine and two prior machines, but dispensed entirely with the trunk or curve employed by complainants, as intermediate between the picker and the cone. Defendants were held not to infringe. *Burr v. Duryee et al.*, 2 Fish. P. C. 275.—GRIER, 1862.

48. The claim in a patent was: “ What I claim as my invention is the manufacturing of fat acids and glycerine from fatty bodies at a high temperature and pressure.” In defendant's mode of operation the fatty substances were placed in a tank closed at the top to retain the heat and steam, with six to seven pounds of lime and one hundred and thirty pounds of water to every one hundred pounds of fatty matter; heated steam was introduced which, in connection with the action of the lime and water, produced a lime soap, and set the glycerine free in five hours after the operation was begun; the lime soap was afterward decomposed by the use of sulphuric acids, and the fat acids became free. Defendant was held to infringe. *Tilghman v. Werk*, 1 Bond, 511.—LEAVITT, 1862.

49. Complainant's patent was for “ producing smooth and glossy surfaces upon the hard compound of caoutchouc and other vulcanized gums, by means of the use of oil or other equivalent substance applied to the surface of the prepared gum and the plates of metal or moulds, substantially as therein described.” Defendants used for this purpose spirits of turpentine, with a small quantity of rubber dissolved in it. Defendants were held to infringe. *Poppenhusen v. Falke et al.*, 5 Blatch. 46.—SHIPMAN, 1862.

50. The claim in Rollin White's patent for a breech-loading revolver was: “ Extending the chambers *aa*, of the rotating cylinder A, right through the rear of said cylinder, for the purpose of enabling the said chamber to be charged at the rear, either by hand or by a self-acting charger, substantially as described.” Defend-

ants' revolver differed from plaintiffs' in that the chambers were bored cylindrical, answering the purpose of the conical chamber. Defendants were held to infringe. *White et al. v. Boker et al.*, 3 Fish. P. C. 66.—NELSON, 1862.

51. The claim in complainant's patent was: “ The process of hardening steel wire, or thin steel, in long sections, being kept under a longitudinal strain by means of the wheels D D, while passing through the fire in the furnace C, the guide H, to conduct the wire directly from the fire into the hardening bath, in combination with such hardening bath, as specified.” Thereof the court said: “ It covers the peculiar method which the mechanism carries out, and any mechanism which is *equivalent* to that described in the patent.” *Waterman v. Thompson et al.*, 2 Fish. P. C. 461.—SHIPMAN, 1863.

52. The claim in complainants' patent was: “ A sewing-machine constructed and operating to form a seam, substantially as described.” Thereof the court said: “ The claim is for the *organized machine as an existing whole*, and not merely for some or all of the separate devices of which it is composed, or for some or all of those devices as a mere technical combination.” *Howe v. Williams*, 2 Clifford, 245.—CLIFFORD, 1863.

53. The claim in complainants' patent was: “ What I claim as my invention and desire to secure by letters-patent is the use of a solution of caustic soda [NaO] in a compartment of a rotary vessel, separate from that which contains the steam heat, substantially as described.” Of this the court said: “ The claim cannot be held to extend beyond the use of a vessel with separate compartments for the material to be heated and for the steam heat used in the process, substantially as specified. Such a vessel the defendants do not use, and, therefore, do not infringe the first claim of the patent.” *Buchanan v. Howland et al.*, 5 Blatch. 151.—HALL, 1863.

54. The claim in complainant's patent was: “ I also claim the within-described process for bleaching straw, consisting in boiling it in a solution of pure caustic soda [NaO] 2° to 3° Baume, at a temperature of not less than 310° Fahrenheit, after it has been soaked and cleansed, and before submitting it to the action of chloride of lime, from 1 to 1½, substantially as described.” The court said that this claim was broad enough to cover the actual discovery and invention irrespective of the particular form or construction of the vessel in which the boiling process might be carried on. Again, “ The phrase ‘ not less than ’ fixes a *minimum* limit, without regard to a maximum.”—*Id.*

55. The claim of the complainant's patent was : " I claim the mode of bending the rod and placing it in its proper position between the swageing dies, as above set forth." This was construed to be a claim to the mechanical device used in practising the mode. *Burden v. Corning et al.*, 2 Fish. P. C. 477.—NELSON & HALL, 1864.

56. The claim in complainant's patent for knitting-machine was : " Combining the web-shaping plates S and C with the take-up mechanism, substantially as described and for the purpose set forth." Thereof the court said : " It must be understood to embrace the connection of the moving plates with the take-up mechanism, and their operation together in the peculiar manner set forth." The only important difference between the arrangement and the operation of those plates in complainant's and respondent's machines was that, in the former, they were fixed to the rod or spindle and were revolved by the gear which carried it, while in the latter the spindle to which they were attached were turned freely and without gearing. The court held this to be merely a mechanical equivalent, and held defendants to be infringers. *Tompkins v. Gage et al.*, 5 Blatch. 268.—SHIPMAN, 1865.

57. The claim in complainant's patent was : " ' I claim, etc., first, pressing the whole bonnet-frame or similar article at one operation by dies, substantially as specified, whether formed of one or of several pieces, and irrespective of the particular size or shape. I also claim forming the side-crown and flaring face-piece of a bonnet-frame in one piece or at one operation, as specified.' " Thereof the court said : " The whole scope of the language of the specification, as well as the claim, shows that the means used and relied on by the patentee for forming the shape of the bonnet is pressure upon the whole surface by means of the face of the two dies." *Doubleday et al. v. Bracheo*, 2 Fish. P. C. 560.—NELSON, 1865.

58. Complainant's patent was for an improvement in shoe lasts, and a claim thereof was : " What I claim and desire to secure by letters-patent is the sectional shoe last [a, b, c], formed in the manner specified, with the measurement 4 [which is the line drawn across the last from the corner of the toe to the back of the heel, at the upper part] as short as the measurement, at the line 6 [which is drawn around the base of the last from the corner of the toe to the centre of the heel, at the juncture with the sole], for the purposes as specified." Defendants sought to escape infringement on the ground that they

made their sole lasts of two sections not as described in complainant's patent. Respondents were held to infringe. *Mabie et al. v. Haskell et al.*, 2 Cliff. 507.—CLIFFORD, 1865.

59. Complainants' patent in suit was for the four-motion feed of a sewing-machine, with the feeding device mainly *under* the cloth. Defendants had substantially the same device *over* the cloth, and were held to infringe. *Potter et al. v. Schenck et al.*, 1 Bissell, 515.—DRUMMOND, 1866.

60. Complainants' process patent had two claims, in one of which a certain temperature was specified as essential. The inventor was not a pioneer in the art. Defendant used a less temperature, and was held not to infringe. *American Wood-Paper Co. v. Heft et al.*, 3 Fish. P. C. 316.—GRIER, 1867.

61. The claim in complainants' patent was : " The constructing hoops intended for ladies' dresses, substantially as and for the purposes set forth, consisting of a spiral form of any proper material, metallic or vegetable, as described, with or without a core to support the same, which can be bent into the form of a hoop and inserted into ladies' skirts, as hereinbefore fully made known." In defendants' structure the body of the hoop was made of a plain strip of steel wound spirally with wire, the steel strip being the principal thing. Defendant was held not to infringe. *West v. Silver Wire and Skirt M'fg Co.*, 5 Blatch. 477.—SHIPMAN, 1867.

62. The claim in complainants' patent for a machine for surface sizing fibrous material was : " The employment or use of a heated metallic cylinder B, or one having a metallic exterior or periphery, in combination with a heated pressure cylinder, one or more, and a polishing roller G, or its equivalent, arranged as shown, for the purpose of surfacing and drying simultaneously, or at one operation, fibrous materials, as set forth." Respondents used in place of the heated pressure roller a common solid wooden cylinder, and were held not to infringe. *Fuzard Wadding M'fg Co. v. Dickinson et al.*, 6 Blatch. 80.—SHIPMAN, 1867.

63. The claim in complainant's patent for locks was : " ' In combination with a pack or series of tumblers set separately and in succession, I claim a vibrating fence and bolt, and a proper stop against which the fence may abut, the whole being and operating substantially as set forth.' " Thereof the court said : " The terms ' set separately and in succession,' as used in the second claim of complainant's patent, as well as similar words in the body of the specification, refer not merely to their separate and

successive movement, but to their separate movement and adjustment, under the exclusive control of the operator, to combinations resting entirely in his discretion." *Yale & Greenleaf M'fg Co. et al. v. North*, 5 Blatch. 455.—SHIPMAN, 1867.

64. The Nelson Goodyear patent for hard rubber stated the proportions of the mixture used to be "about from four ounces to a pound of sulphur to a pound of rubber." The court understood this "as meaning any proportion of sulphur between four ounces and a pound, to a pound of rubber." *Goodyear et al. v. Waite*, 5 Blatch. 468.—NELSON, 1867.

65. The claim in complainants' patent for improvement in horse-rakes was: "'Arranging rake-teeth on articulating, tubular, laterally-bracing and vertically-supporting eye-bearings, so that the attaching end of each tooth shall cross or intersect a vertical plane passing longitudinally through the axis of the bearings, substantially as described.'" Defendant's machine differed from complainants' patented machine in that in the former the teeth articulated upon an axis placed over the axle of the moving hay rake. The horse was somewhat differently attached to the machinery, and instead of the operator pressing and bearing down or up by his hand he did it by his foot. Defendant was held to infringe. *Hoffheins et al. v. Brandt*, 3 Fish. P. C. 218.—GILES, 1867.

66. The claim in a patent on knitting-needles was: "'What I claim as my invention is the application of a latch or tongue applied to the hook of the needle, and operated as herein described.'" Thereof the court said: "If the knowledge of latch-needles of the primitive form had been universal or even general among those best acquainted with the use of knitting-machines, the declaration that he constructed his needle in the general form shown in the drawings might, perhaps, have sufficed to restrain the claim to the specific improvement in the curved needles exemplified in the form with a swell, and including, of course, other curvatures of equivalent effect. But this interpretation is morally inadmissible. According to the proofs of the state of the art at that period, the knowledge of the primitive latch-needle, though quite sufficient to defeat a subsequent patent, was very limited—so limited as to exclude all possibility of the inference of any general knowledge on the subject. The patent is therefore broader than the actual novelty of the invention." *Aiken v. Dolan*, 3 Fish. P. C. 197.—CADWALADER, 1867.

67. The Nelson Goodyear hard rubber patent of May, 1851, stated: "The proportions specified

of both these compounds may be considerably varied without materially changing the result, but in no case will a much less quantity of sulphur than four ounces to every pound of caoutchouc be sufficient." Thereof the court said: "There is no foundation for the suggestion that the patentee is limited to a quantity of sulphur not exceeding one pound of gum, or that a quantity of sulphur as great as twenty-two ounces to a pound of gum is not within the claims of his patents, provided the substance produced has the qualities of the substance referred to in his patents." *Goodyear et al. v. Mullee et al.*, 5 Blatch. 429.—BLATCHFORD, 1867.

68. The claim in a patent was: "'Locating the spring of a snap-hook, substantially as shown and described, so as to act upon points intermediate between the hinge and hook proper, in combination with forming recesses for holding the spring, as set forth.'" Thereof the court said: "The statement in the claim that locating the spring in the manner described is combined with forming the recesses is mere absurdity. But a glance at the specification and drawings shows at once what was really meant." *Middletown Tool Co. v. Judd et al.*, 3 Fish. P. C. 141.—SHIPMAN, 1867.

69. Nelson Goodyear's patent on hard rubber specified the minimum amount of sulphur to be used. Defendant used a less amount of free sulphur, but used in addition thereto a quantity of vulcanized oil which contained sulphur. The vulcanized oil alone would not vulcanize the rubber, neither would the amount of free sulphur used by defendant alone vulcanize the rubber, but both together would. Defendant was held to infringe. *Goodyear et al. v. Rust*, 6 Blatch. 229.—SHIPMAN, 1868.

70. Nelson Goodyear's patent on hard rubber was practically for the use of sulphur in the vulcanizing process. Defendant first put the sulphur into another compound for the purpose of making the final product odorless. Defendant was held to infringe. *Goodyear et al. v. Berry*, 2 Bond, 189.—LEAVITT, 1868.

71. The claim of the Nicholson Pavement Patent was construed to be for a combination of two elements, the foundation and the blocks. Defendant did not use the foundation, and was held not to infringe. *Nicholson Pavement Co. v. Hatch et al.*, 4 Sawyer, 692.—FIELD, 1868.

72. Nelson Goodyear's patent of May 6th, 1851, was for vulcanizing hard rubber by the use of sulphur and heat. Defendant's patented process was for incorporating the sulphur in a certain compound previous to the vulcanization,

to make the product odorless. Defendant was held to infringe. *Goodyear Dental Vulcanite Co. et al. v. Evans*, 6 Blatch. 121.—BLATCHFORD, 1868.

73. In complainant's patent for wood-splitting machine, the claim specified the cutters as operating at right angles to the bed or carriage. In respondents' machine the cutter operated not at right angles to the carrying-bed, but in a horizontal position to it. Defendants were held to infringe. *Canover v. Dohrman et al.*, 6 Blatch. 60.—SHIPMAN, 1868.

74. A process patent described the use of a temperature of from two degrees to three degrees. Defendants' temperature was proved to be less than three and one half degrees, and defendants were held to infringe. *Am. Wood-Paper Co. v. Fibre Disintegrating Co.*, 6 Blatch. 27.—BENEDICT, 1868.

75. Complainants' patent, being for a process of treating straw in the manufacture of paper pulp, was held to cover an application of the same process to the treatment of bamboo.—*Id.*

76. The patent in suit was for a harvester, and a claim thereof was: "The hanging of the driving-wheel in a supplemental frame, or its equivalent, which is hinged at one end to the main frame, while its opposite end may be adjusted and secured at various heights or be left free, as desired, whereby the cutting apparatus may be held at any given height for reaping, or be left free to accommodate itself to the undulations of the ground for mowing, as substantially described." In defendant's machine there were two frames, the main and secondary, the one supporting the cutting apparatus and the other the driving-wheel, hinging the two frames together in such a way that the driving-wheel and cutting apparatus might each follow the inequalities of the ground independently of each other, and also be bolted rigidly together for supporting the cutting apparatus at any fixed height. Defendant was held to infringe. *Whiteley v. Kirby*, 11 Wall. 678.—SUP. CT. 1868.

77. The patent in suit was for a soda-water fountain, and a claim thereof was: "The employment of reservoirs in permanent cases or stands, revolving or otherwise, as herein described, with the registering faucets, substantially as and for the purposes herein set forth." The court held a certain vent which was not mentioned in the claim was to be an essential part of the faucet, and as defendant's device did not have this vent, defendant was held not to infringe. *Bigelow v. Matthews*, 7 Blatch. 77.—BLATCHFORD, 1869.

78. The claim of the patent in suit was: "The

employment, in combination with the needle of a sewing-machine, of a plate K, constructed and operating substantially as herein shown and described, for the purpose of laying and holding braid, gimp, or other material upon the surface of the fabric, as set forth." This claim was "construed as claiming the employment, in combination with the needle of a sewing-machine, of a separate detachable plate, constructed and operating substantially as shown and described in the patent, for the purpose of laying and holding braid, gimp, or other material, upon the surface of the fabric, as set forth, as contradistinguished from the employment, in such combination, of a guide not formed in a separate detachable plate." Defendant's device did not have a plate constructed and operating substantially like that of the patent, and was held not to infringe. *Dibble v. Augur*, 7 Blatch. 86.—BLATCHFORD, 1869.

79. A claim in complainant's patent on hose coupling was: "The two thimbles C, D, attached to the ends of the hose A, B, the thimble C being provided with the shoulder *b*, and ground seat or packing *c*, and the thimble D provided with the groove *e* with inclined sides and fitted within thimble C, the above parts being used in connection with conical roller or rollers *g*, fitted in the screw caps *i*, and the whole arranged to operate as and for the purpose set forth." Defendants' coupling had two thimbles, one with the seat and the other with the circumferential bevelled groove, but instead of the conical roller had a non-rotating pin with a conical face. Defendants were held not to infringe. *Bliss v. Haight et al.*, 7 Blatch. 7.—BLATCHFORD, 1869.

80. A claim of complainant's patent on hose coupling was: "The lug G within the butt A, when used in connection with the pin F and the groove *g* of the butt B, substantially as and for the purpose set forth." It was held that the "pin F" must be a rotating pin in order to infringe.—*Id.*

81. A claim in complainants' patent was: "The application to portable engines of a hollow continuous bed-plate, in the manner substantially as described, for the support and attachment of the operative parts of the engine, whereby the latter, in working, is rendered independent of the contraction and expansion of the former, and the boiler relieved from the direct strain of the engine, as set forth." Thereof the court said. "We think the context claims for the patentees as their invention: 1. A hollow continuous bed-plate placed between the boiler and the engine. 2. The bed-plate to have

flanches on its upper and outer side cast with it. 8. The attachment and securing of the operative parts of the engine upon its upper and outer side, by means of the flanches." Defendants' bed-plate and defendants' attachment being in all respects like those of complainants', except a certain longitudinal opening in the bed-plate, defendants were held to infringe. *Blandy et al. v. Griffith et al.*, 3 Fish. P. C. 609.—SWAYNE, 1869.

82. A claim in complainant's patent was: "A whip having the handle or any portion covered with a knit fabric, substantially as herein described." The patentee knit his fabric in a tubular form and then put it upon the whip-handle. Defendants knit their fabrics by machinery in flat strips, and looped the strips together upon the whip-handle. Defendants were held to infringe. *Strong et al. v. Noble et al.*, 6 Blatch. 477.—BLATCHFORD, 1869.

83. The claim in complainant's patent was: "The new manufacture of skeleton skirt, substantially such as described, consisting of a series of tapes woven in the direction of their length in alternate sections, as single and double tapes, with the hoops inserted in the loops formed by weaving the tapes as double tapes, and there secured to prevent the tapes from sliding laterally on the hoops." Defendant sought to escape infringement by leaving out the threads of filling in one or both of the two portions of tape which formed the loop. Defendant was held to infringe. *Doughty v. West et al.*, 6 Blatch. 429.—BLATCHFORD, 1869.

84. A claim in complainants' patent was: "In automatic wool-oiling machinery, we claim the combination of a tank or reservoir with a dipper or equivalent mechanism for performing the double functions of stirring or agitating the oil or lubricating matter in the tank, and of lifting therefrom at each time a quantity of oil or lubricating matter requisite for one oiling operation, and this is claimed only when arranged for operation as described—that is to say, so that the said dipper shall not come in contact with the wool, substantially as set forth." Of the differences between the complainants' and defendants' machine, the court said: "The only difficult question is, whether the operation is performed substantially in the same way. In the plaintiffs' machine the dipper is immersed by its own gravity, and is raised by the action of the incline or lifting shoe operating directly on the pin in the vertical rod. In the defendants', the dipper is immersed by the operation of the incline on the revolving cam, through the medium of the curved arm, strap, and pulley on

the end of the shaft, and is raised by the force of the spring on the shaft bearing on the side of the tank. The same result is reached in both cases, and I am of the opinion that the defendants' mechanism is substantially an equivalent for the plaintiffs', and infringes." *Harwood et al. v. Mill River M'fg Co.*, 3 Fish. P. C. 526.—SHIPMAN, 1869.

85. Complainant's claim was: "'Preserving fish or other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber, substantially as set forth.'" Thereof the court said: "The claim appears to the court to describe clearly and in language incapable of misconstruction what is claimed as the new and useful art or method." *Piper v. Broton et al.*, 1 Holmes, 20.—SHEPLEY, 1870.

86. The claim in complainant's patent for improved dust deflectors for windows of railroad cars was: "I claim the rotary deflector or ventilator, constructed and made to operate substantially in the manner and for the purpose specified." The deflector was reversed by rotating it half round the axis of the circular orifice by means of a joint. In defendants' device the reversal was produced by a partial rotation about a vertical axis, the two halves of the deflector upon the sides of the axis being symmetrical. Defendants were held to infringe. *Cook v. Howard et al.*, 4 Fish. P. C. 269.—CLIFFORD, 1870.

87. The claim in complainant's patent was: "'The said manufacture of printing type, made substantially as described—viz., by the combined process of stamping the letter or figure from a plate or piece of metal, and subsequently reducing the same in the manner and for the purpose set forth.'" Complainant's improvement consisted in first raising the printing surfaces from a thin sheet or piece of metal by means of one or more dies, and afterward planing, filing, or reducing the raised surfaces so as to remove round edges and produce an even, flat, and defined surface. Defendants heated their blank red hot, put it into the die, and then a blow was brought upon it with force enough to make the metal flow laterally into the die. Defendants, incidentally only, sometimes did some filing, but not generally. Defendants were held not to infringe. *Hudson v. Draper et al.*, 4 Cliff. 178.—CLIFFORD, 1870.

88. The claim in complainants' patent was: "'The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described.'" Thereof the court said: "Taken literally, the claim is for the product as manufactured; but when



the introductory words are considered in connection with the words 'substantially as described,' it is clear that it includes not only the plate of hard rubber for holding artificial teeth or teeth and gums, but the process or mode by which they are constructed." *Goodyear Dental Vulcanite Co. et al. v. Gardner*, 3 Cliff. 408.—CLIFFORD, 1870.

89. The claim of the patent in suit was: "Softening the upper parts of paper-bags and making them pliable, substantially as and for the purpose above described." The court held that "it is not softening and making flexible, as a result of some or any means which can be suggested, that is the subject of the patent; but it is the improved bag, as a result, which the patent is intended to protect. The improved bag is the result." Defendant made and sold a bag crimped, softened, and made flexible at the upper end, where a string was to be applied, and was held to infringe. *Arkell et al. v. J. M. Hurd Paper-Bag Co.*, 7 Blatch. 475.—WOODRUFF, 1870.

90. The patent in suit was for hose couplings, and the claims thereof were: "1. The combination of the two thimbles C and D, by means of a pin, operating longitudinally through the outer thimbles C, and against the inclined side of the groove in the thimble D, so that the thimbles will be forced together by the inward movement of the pin, and be liberated by its outward movement, substantially as described. 2. The side of the groove in D nearest to the joint to be formed, or the flanch constructed with an incline, substantially as described." Defendant's device was the same as complainant's device, except the feature of the rotation of the pin when not disconnected from the thimble. Defendant was held to infringe. *Bliss v. Gaylord Patent Coupling & M'fg Co.*, 7 Blatch. 279.—BLATCHFORD, 1870.

91. The claim of the patent in suit was: "The employment, in combination with the needle of a sewing-machine, of a plate K, constructed and operating substantially as herein shown and described, for the purpose of laying and holding braid, gimp, or other material upon the surface of the fabric, as set forth." It was held to be restricted to a "separate, detachable plate, but could not extend to a detachable braiding guide arranged in connection with the presser-foot of a sewing-machine." The operating guide of defendants' device did not have a separate detachable plate—one formed in and as a part of the presser-foot—and was held not to infringe. *Dibble et al. v. Sibley et al.*, 7 Blatch. 209.—BLATCHFORD, 1870.

92. The claim of the patent in suit was: "The application to a shade-roller, provided with a spiral spring for automatically raising or rolling up the shade, of a pawl and ratchet, or notched hub, so arranged that the former will engage with the latter, at any point or height of the shade, by simply checking the rotation of the roller and the upward movement of the shade under the influence of the spring, substantially as set forth." In defendant's shade fixture there was a roller, provided with a coil or spiral spring secured within. Instead of complainant's hub, with two notches on the roller, defendants had a scroll hub, with one notch or rebate fixed to the bracket; in place of the pivoted pawl of complainant's, defendant had a pin or bolt sliding in a socket at the end of the roller. Defendants were held to infringe. *Hartshorn v. Tripp et al.*, 7 Blatch. 120.—BLATCHFORD, 1870.

93. A claim of the patent in suit was: "A wire staple, adapted for use in making window blinds or screens, and constructed substantially as above described." This was construed to mean "not only staples of such a shape that they can be readily inserted into wood and with difficulty be withdrawn from it, but staples made into such a shape by the action of dies, which form the corrugations by swageing;" and to cover a staple that did not have its corrugations deeper near the piercing point than further therefrom; that did not taper in thickness toward the point; that did not have indentations of equal depth over the whole surface indented, and that did not have the shallowest indentations toward the point. *Rogers et al. v. Sargent et al.*, 7 Blatch. 507.—BLATCHFORD, 1870.

94. The patent in suit was for fastening clasps and hooks on the tapes of hoop-skirts, and a claim thereof was: "The combination of the hoop-rest, a clasp-feeder, a clasp-supplier, and a moving clasp-carrier, the combination, as a whole, operating substantially as set forth." Defendant's machine did not have what was substantially a slide moving in guides, and was held not to infringe. *Wilcox v. Komp*, 7 Blatch. 126.—BLATCHFORD, 1870.

95. The patent in suit was for a harvester, and a claim thereof was: "The method of hanging the reel so as to dispense with any post or reel-bearer next to the standing grain, as herein described, thereby preventing the grain from getting caught and being held fast between the divider and a reel supporter." The defendants' machine had but one post. The reel axle, however, was prolonged, and it was supported wholly on that side or end of the reel, and by means of two bearings attached to that post.

Defendant was held to infringe. *Seymour v. Osborne*, 11 Wall. 516.—SUP. CT. 1870.

96. The patent in suit was for an improvement in the mode of building piers for bridges, etc., and a claim thereof was: "Building and setting piers by means of a floating coffer-dam, substantially as set forth." Of this claim the court said: "The claim is for the instrument or device denominated a floating coffer-dam, substantially such as described in the specification, to be used in building and setting piers." *Railroad Co. v. Dubois*, 12 Wall. 47.—SUP. CT. 1870.

97. The patent in suit was for an improvement in building piers for bridges, etc., and the second claim thereof was: "The use of the tube which constitutes the dam for encasing and strengthening the pier, substantially as set forth." The court construed this claim to be for the use of the tube or material of which the dam was made, for encasing and strengthening the pier, no matter whether it were first placed in position entire, or built in sections as the masonry progressed.—*Id.*

98. The patent in suit was for a mode of building piers for bridges, etc., and a claim thereof was: "The guide-piles [AA] in combination with a coffer-dam, substantially as and for the purpose set forth." This claim was construed as follows: "The third claim of plaintiff's patent is for the combination of a floating coffer-dam, as claimed in the first claim, with guide-piles, which are driven into the bottom of the river, around the site of the proposed pier, and reach above the surface of the water, and pass through holes in the platform, and have their tops framed together with ties; when the pier is building they are to sustain upright the tube with its pier inside, and to guide it down to its foundation prepared at the bottom of the river; when the pier is finished they are then to be cut off just above the top of the platform, and their stumps left to prevent any lateral movement of the platform and the pier on its foundation."—*Id.*

99. The patent in suit was for the Blake crusher, and the claims were: "1. The combination, in a stone-breaking machine, of the upright convergent jaws with a revolving shaft and mechanism for imparting a definite reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating as set forth. 2. The combination, in a stone-breaking machine, of the upright movable jaw with the revolving shaft and fly-wheel, the whole being and operating substantially as set forth." The jaws of the Blake machine were straight and vertically corrugated; the jaws of

defendant's machine were curved and smooth. Blake used a toggle between the crank and the movable jaw; defendant used a rod and lever. Defendant was held to infringe both claims. *Blake v. Eagle Works M'fg Co.*, 3 Bissell, 77.—DRUMMOND, 1871.

100. The claim in complainant's patent for fluting-machine was: "'The guide E, constructed with one or more curved or arched portions *a*, in combination with suitable fluting rollers, substantially as herein set forth, for the purpose specified.'" Defendant's machine was described as having two rollers furnished with smooth, narrow annular portions, and with grooved and fluted portions, as in the plaintiff's machine. But instead of having smooth cylindrical portions to form, in connection with the arched guide exterior to the rollers, the crinkled part of the puffing, the defendant had transferred the arched guide to one of the rollers by placing thereon, on the portion between the fluting instrumentalities on that roller, knobs or buttons forming a series circumferentially around the roller, and having between each two of them a depression. Defendant was held to infringe. *King v. Mandelbaum*, 8 Blatch. 468.—BLATCHFORD, 1871.

101. The claim in complainant's patent was for "making nuts by subjecting them, at a welding heat, to compression between swages in a die-box, and punching the eye during the pressure to remedy any imperfections in the iron, and prevent the injury which might arise from the punching process, if the sides were not thus sustained and compressed at the time of its performance." The mechanism of this patent subjected the nut blank, while at a welding heat, to compression in a close-fitting die-box, and then punched it while under pressure. In defendants' machine "the nut blank was cut off and forced into a matrix and against a female die, which retreated, allowing the punch to enter the iron. The movement of the male die being somewhat more rapid than that of the female die, compressed the nut." Defendant was held to infringe. *Wood et al. v. Cleveland Rolling Mill Co.*, 4 Fish. P. C. 550.—SWAYNE, 1871.

102. The claim in complainant's patent was: "1. The application of means to the instrument by which the air may be agitated to produce a tremulous note, substantially as described." Complainant's method of applying the principle of external agitation to the production of the tremolo consisted in the introduction of a revolving or swinging fan, vane, or beater into the instrument in such a position that when it was put in motion the blows upon the air of the

rapidly moving fan imparted to the notes, without impairing the continuity, a tremulousness similar to the tremolo of the voice. Defendants used a hollow, rotating cylinder with a horizontal axis having two openings in it opposite to each other, and extending from end to end of the cylinder. Defendants were held to infringe. *Hitchcock et al. v. Tremaine et al.*, 8 Blatch. 440.—BLATCHFORD, 1871.

103. The claim in complainant's patent was to "so forming and constructing the shuttle-driver of a lock-stitch sewing-machine, that while it performs the required duty of driving the shuttle, it serves to maintain the latter in the desired proximity to the guide-plate, as described hereafter." Thereof the court said: "Considered with reference to the whole specification and the Patent Office model, it imports a claim for a shuttle-driver constructed with a surface upon which the shuttle rests, and is carried with the driver in its oscillation, and formed with a bevel in this surface, whereby the shuttle by its own weight or gravity is caused to impinge upon the surface plate." *Parham v. Am. B. O. and Sewing Mach. Co. et al.*, 1 Pa. Leg. G. Rep. 145.—McKENNAN, 1871.

104. The claim in complainant's patent was: "The use and application of glue, or glue composition in the tubing, substantially as described, for the purpose of making the flexible tubing gas-tight, whether of cloth or rubber, or other gum." Defendants' flexible gas tubes were made by the use of glue and glycerine in connection with animal intestines. The prior art showed the intestines as a known equivalent for the flexible rubber tubes. Defendants were held to infringe. *Taylor v. Archer et al.*, 8 Blatch. 315.—BLATCHFORD, 1871.

105. The claim in complainant's patent was: "The composition I prefer for this purpose consists of about four parts of blanc fix, one part of white wax, and a trace of ultramarine to give the required tint." In order to make his enamelled paper collars he had to improve upon the paper and the enamelling. For enamelling he used blanc fix, white wax, and a trace of ultramarine. Defendants used for enamelling blanc fix, glue, wax, and soap; also another composition of satin white, glue, stearine, and alum. Defendants were held to infringe. *Hoffman v. Aronson et al.*, 8 Blatch. 324.—BLATCHFORD, 1871.

106. The patent in suit was for a cultivator, and a claim was: "But what I claim as new in my invention and desire to secure by letters-patent is: 1. The inclined shovel mould-board B, formed and mounted substantially as described, and constructed highest at its outer

edges, so as to form on each side of the standard A a recess C, through which recess a portion of the earth may, after rising upon the mould-board, descend into the furrow in the rear of the plough." The court held this to be a claim for the mould-board, and not for a combination of which the mould-board formed a part. *Dennis v. Eddy et al.*, 4 Fish. P. C. 423.—WOODRUFF, 1871.

107. The patent in suit was for a cultivator, and a claim was: "2. The combination with the beam A, and mould-board B, of the adjustable wheel F, arranged and operating substantially as and for the purposes specified." Defendants used a shoe in place of the wheel, and were held not to infringe.—*Id.*

108. Complainants' patent for spinning up brass kettles was substantially automatic. Defendant's machine differed therefrom in that a part of the process was governed by the hand of the workman. Defendant was held to infringe. *Waterbury Brass Mo. v. A. Miller & Co.*, 9 Blatch. 77.—WOODRUFF, 1871.

109. The claim in complainant's patent for improvement in refrigerators specified "an air-tight metallic floor." Defendant's floor was not strictly air-tight, for it had a gutter between the air-tight floor and the wall, but was held to be in substance the thing patented. *Chicago Fruit House Co. v. Busch et al.*, 2 Bissell, 472.—BLDGGETT, 1871.

110. For an example of strict construction given to various claims of reissued patents for improvements in corn planters, and under such strict construction defendants held not to infringe, see —. *Brown v. Selby et al.*, 2 Bissell, 457.—DRUMMOND, 1871.

111. The claim in complainant's patent for smut-mill and separator was a combination claim, including as one element a "smutter or scourer." In view of the state of the art, this was limited by construction to mean a tight smutter or scourer; and as defendant used an open smutter or scourer, defendant was held not to infringe. *Knorr v. Murtha et al.*, 9 Blatch. 205.—BENEDICT, 1871.

112. Where a patent for a composition of matter states the proportions of the ingredients used approximately in connection with such a statement as: "It is not intended to confine the patent to the use of the ingredients specified, as those proportions may, in some cases, be advantageously varied;" "exact conformity to these proportions is not required, because they are stated as approximate, and the right is claimed to vary them. But this right is not unlimited. It can only extend to any adjustment

of proportions which will result in the production of a substance possessing the peculiar properties attributed to the substance described in the patent. Substantial identity of result is the test of substantial conformity to the mode of combination in the specification." *Francis et al. v. Mellor et al.*, 8 Phil. 157.—McKENNAN, 1871.

113. The claim in complainant's patent was: "The employment of the pistons D, D, formed at their upper ends into moulds for the tips of the candles, in combination with stationary candle moulds to throw out the candles in a vertical direction, substantially as herein set forth." In defendants' machine the piston was flat, and moulded the candle with a flat end instead of with a convex tip. Defendants were held to infringe. *Thayer et al. v. Wales et al.*, 9 Blatch. 170.—BENEDICT, 1871.

114. The claim in complainant's patent was: "A bonnet, cap, or other head covering, the body of which is made of two or more thicknesses of muslin or other suitable fabric, shaped or formed with a series of raised or embossed strips in imitation of straw or other braid, by means of suitable dies, in the manner herein set forth." Thereof the court said: "The Blake patent, in order to be upheld as a valid patent, must be construed to be limited to a hat in which the embossing is made directly on the muslin, without the intervention of any coating, the required stiffness being given by the embossing itself, without the use of a coating, and the hat being lighter by reason of the absence of the coating. On this construction the patent is valid; but as the defendants use a coating, they do not infringe it." Upon a rehearing with further testimony, the court construed the claim differently, and as follows: "The proper construction of the claim of his patent is, that it claims a bonnet, the body of which is embossed in imitation of straw or other braid, by dies, which at the same time give to it its ultimate shape, such body being made of two or more thicknesses of muslin or other suitable fabric united by starch or other suitable adhesive and stiffening substance," and thereupon defendants were held to infringe. *Baldwin et al. v. Schultz et al.*, 9 Blatch. 494.—BLATCHFORD, 1871.

115. The claim in complainant's patent was: "1. The combination with the cylindrical-formed barrel A, of the stem F, having the reacting spring G attached to it, and operating on the outside of the barrel, as hereinbefore described and for the purposes set forth." Defendants' speaking tube had, in combination with a barrel containing the valve, all the parts

specified in this claim, but the barrel was octagonal instead of cylindrical. Defendants were held to infringe. *Woolcocks v. Many et al.*, 9 Blatch. 139.—BLATCHFORD, 1871.

116. The claim of the patent in suit was: "I do not claim to be the inventor of annealing castings made of metal when done in the ordinary way, nor do I claim to be the inventor of any particular kind or form of furnace in which to perform the process. But what I do claim as my invention and desire to secure by letters-patent is the process of prolonging the time of cooling, in connection with annealing railroad wheels, in the manner above described—that is to say, the taking them from the moulds in which they are cast before they have become so much cooled as to produce such inherent strain on any part as to impair its ultimate strength, and immediately after being thus taken from the moulds depositing them in a previously-heated furnace or chamber, so constructed, of such materials, and subject to such contact that the temperature of all parts of the wheels deposited therein may be raised to a point [say a little below that at which fusion commences], when they are allowed to cool so fast and no faster than is necessary for every part of each wheel to cool and shrink simultaneously together, and no one part from another." Defendant's process consisted in placing in a pit the wheels as they were turned out red hot, with a layer of charcoal beneath the lowest wheel, and between each two wheels, as well as above the uppermost, and covering the pit with a metallic plate; the charcoal was ignited by the hot wheels and just sufficient air was admitted to effect combustion. Thus the wheels were reheated and permitted to cool. Defendant was held to infringe. *Mowry v. Whitney*, 14 Wall. 620.—SUP. CT. 1871.

117. The claim in complainant's patent for a watchman's time detector was: "1. The drum, carrying a removable piece of paper or other suitable material, marked or divided off in a convenient number of parts, in combination with a chronometer movement or time-piece, and with one or more marking devices, substantially as and for the purpose set forth." Defendant's detector employed every substantial device of complainant's detector, except that defendant placed the springs in the lid of the case, "perforating therewith downward instead of placing them under the plate or frame supporting the watch movement, and perforating therewith upward, thereby dispensing with the special form of what is called the fixed index, but for which, as an index serving to point to

the hour at which the revolving dial should be set, he substitutes the mark of an arrow at the same point." Defendant was held to infringe. *Buerk v. Valentine*, 9 Blatch. 477.—WOODRUFF, 1872.

118. Complainant's patented formula for a bookbinders' paste was as follows: "Flour, 2 pounds; common salt [chloride of sodium, NaCl.], 1 ounce; alum,  $\frac{1}{4}$  ounce; corrosive sublimate [bichloride of mercury, HgCl<sub>2</sub>], 6 grains." Defendants' formula was as follows: "Flour, 100 pounds; chloride of zinc, 5 pounds; alum, 5 pounds; bichloride of mercury, 1 ounce; oil of olives,  $\frac{1}{4}$  ounce." Defendants were held to infringe. *Woodward v. Morrison et al.*, 1 Holmes, 124.—SHEPLEY, 1872.

119. Complainant's composition of matter, according to his specification, consisted of rubber, from 20 to 25 per cent; gum-shellac, from 10 to 2 per cent; Paris white, from 20 to 30 per cent; French chalk, from 15 to 25 per cent; litharge, from 11 to 18 per cent; lamp-black, from 2 to 3 per cent; sulphur, from 1 to 3 per cent." Defendants' compound contained: "Rubber, 30.6 per cent; plumbago, 40 per cent; copper and zinc, 14.6 per cent; lead, 8.2 per cent; sulphur, 6.6 per cent." Defendants were held to infringe. *Jenkins v. Walker et al.*, 1 Holmes, 120.—SHEPLEY, 1872.

120. The claim in complainant's patent for a sand blast was: "'The cutting, boring, grinding, dressing, engraving, and pulverizing of stone, metal, glass, pottery, wood, and other hard or solid substances, by sand used as a projectile, when the requisite velocity has been artificially given in it by any suitable means.'" Defendant used gravity, and was held to infringe. *Tilghman v. Morse*, 9 Blatch. 421.—BLATCHFORD, 1872.

121. Complainant claimed his brush-head as having an angular groove or furrow, with a rubber ring fitting therein. Defendant used a circular-bottomed furrow, and was held to infringe. *Murphy et al. v. Eastham et al.*, 1 Holmes, 113.—SHEPLEY, 1872.

122. Roberts's oil-well patent described water as the article used for tamping the torpedo. Defendant used benzine, and was held to infringe. *Roberts v. Roter*, 5 Fish. P. C. 295.—MCKENAN, 1872.

123. For an example of a patent on a whip socket construed narrowly in view of the state of the art, and thereupon defendant held not to infringe, see —. *Merriam et al. v. Drake*, 9 Blatch. 336.—WOODRUFF, 1872.

124. The claim in complainant's patent was: "I claim as a new article of manufacture a

hand or portable toilet-mirror, constructed substantially as described, of a base-piece B, with its handle extension-piece or stiffener C, glass A, and outer back and handle D, made of any suitable composition or cement, substantially as specified." The improvement consisted in "mounting the glass on a base-piece of wood or other material, having a stiffening extension running into the handle, and embedding the whole in a composition of cement of suitable description that, upon hardening, formed the back, edges, and outside handle of the mirror." The hand-mirror of the defendant was "made of a cement applied in a plastic state and afterward hardened, and embedded in the cement and concealed from view were two flat wires or strengtheners made of metal, and running from the body of the mirror part through the neck and into the handle, and serving to strengthen and stiffen the handle, particularly at the junction of the handle with the body." Defendant was held to infringe. *Clark et al. v. Scott*, 9 Blatch. 301.—BLATCHFORD, 1872.

125. The claims in complainant's patent were: "1. A stem-winding watch, so constructed that the setting mechanism is thrown into gear by turning down the pendant ring or bow when the front cap or case E is open, substantially as shown and described. 2. The combination of the cap or guard E, with the pendent bow C, and hand-setting mechanism, whereby the said cap, while closed, is made to prevent the bow from throwing the hand-setting mechanism in gear, substantially as shown and described." In defendants' device the same result was brought about by turning down the ring, but less mechanism was used. Defendants were held to infringe. *Jurgensen v. Magnin et al.*, 9 Blatch. 294.—BLATCHFORD, 1872.

126. A claim of complainant's patent was: "'A skirt-hoop, formed by enclosing one or more wires within a covering, which not only envelopes and protects the wire, but forms an edge A and connection B, substantially as and for the purpose specified.'" Defendant used the same construction in a bustle, and was held to infringe. *Young v. Lippman et al.*, 9 Blatch. 277.—BLATCHFORD, 1872.

127. For an example of a claim construed narrowly in view of the state of the art, and defendant thereupon held not to infringe, see —. *Gallahue et al. v. Butterfield*, 10 Blatch. 232.—WOODRUFF, 1872.

128. The claim in complainant's patent for billiard-table cushion was: "'The catgut or other cord E, partially or fully imbedded or otherwise attached, at the angle *a*, of the rubber cushion

C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth.' ” The invention set forth was the placing and firmly securing along the corner of the rubber cushion a strong narrow cord to receive the impact of the ball and protect the cushion against such impact. In defendants' arrangement the cord was imbedded in the rubber cushion, against its upper edge, and there secured by being placed in it while the rubber was plastic and before vulcanization. Defendants were held to infringe. *Decker v. Grote et al.*, 10 Blatch. 331.—BLATCHFORD, 1872.

129. The claim in complainants' patent was for “the combination of the cutting apparatus of a harvesting machine, with a quadrant-shaped platform arranged in the rear thereof, and a sweep-rake operated by mechanism in such a manner that its teeth are caused to sweep over the platform in curves when acting on the grain, these parts being and operating substantially as set forth in the specification.” In defendants' machine the rake had a revolving motion, while in complainants' machine it had a vibrating or reciprocating motion. Difference held immaterial. *Seymour et al. v. Marsh et al.*, 9 Phila. 380.—MCKENNAN, 1872.

130. The claim in complainants' patent for fire-arms was: “The combination, substantially as set forth, of the breech-closing piece, moving longitudinally with the barrel, the cartridge-chamber at the butt of the barrel, and the reciprocating extraction hook, arranged in such a manner that its bill enters within the periphery of the said chamber, so that it may engage with the flange of the cartridge therein when the breech is closed, by the forward movement of the closing piece, even though the cartridge be not expanded.” The difference between the patented device and the defendant's device were disposed of by the court as follows: “It can make no difference that the flange of the defendant's cartridge radiates outwardly from the longitudinal axis of the cartridge, and that the flange of the plaintiffs' cartridge radiates inwardly toward the longitudinal axis of the cartridge. Nor can it make any difference that the defendant has a rigid blank in the cartridge and causes the hook to spring to engage with the flange, while the plaintiffs have a rigid hook and cause the flange to spring to engage with the hook.” *Renwick et al. v. Pond*, 10 Blatch. 39.—BLATCHFORD, 1872.

131. In the claim of complainant's patent for a corset, “a pair or set of corset-springs” was specified. Thereof the court said: “A pair

or set of corset-springs,’ where it occurs in each one of the three claims, cannot be construed to mean anything else but two corset-springs connected by the clasps referred to, each spring being constructed in the manner described.” *Barnes v. Straus*, 9 Blatch. 553.—BLATCHFORD, 1872.

132. In complainant's patented mode of treating car-wheels, the wheels were reheated in a furnace with a fire at the bottom. Defendant packed his red-hot wheels in powdered charcoal, which became ignited by the contact of the wheels, and was held to infringe. *Mowry v. Whitney*, 14 Wall. 620.—SUP. CT. 1872.

133. In complainant's patented cotton bail ties there were mortises near each end of the plate, and the lips of the mortises were turned downward. In the plate of defendants' device there were no such lips, but the edges of the mortises were serrated. Defendants were held to infringe. *Johnson v. Fassman et al.*, 1 Wood, 138.—WOODS, 1872.

134. Where certain bars were claimed as “thin” and “wide,” defendant's “round” bars were held not to infringe. *Keystone Bridge Co. v. Phoenix Iron Co. et al.*, 5 Fish. P. C. 468.—MCKENNAN, 1872.

135. Where complainant practised his patented invention in bonnets by one operation, defendant was held to infringe by practising it in two operations. *Baldwin v. Bernard et al.*, 5 Fish. P. C. 442.—BLATCHFORD, 1872.

136. The claim in complainant's patent was: “1. An elastic packing composed of at least four tenths of finely pulverized refractory, earthy, or stony material, intimately mingled with and held together by rubber prepared and vulcanized, as and for the purpose described.” Thereof the court said: “The proper construction of the claim of the patent is, that it claims a packing, into the composition of which there enters at least four tenths of refractory, earthy, stony, or mineral matter, which must go in in a pulverized state in order to be intimately incorporated with the caoutchouc or india-rubber, which serves as a vehicle to hold the powder, the compound being then vulcanized by subjecting it to heat in the presence of sulphur, and the result being a packing which is elastic while it is indestructible by heat.” “The ingredients found in the defendants' packing, by analysis, are india-rubber, sulphur, the oxides of lead and iron, and soapstone. The proportion of india-rubber and the proportion of sulphur to the whole mass exceed each of them the highest percentage given the specification for those articles respectively.” Defendants were held to in-

fringe. *Jenkins v. Johnson et al.*, 9 Blatch. 516.—BLATCHFORD, 1872.

137. For an example of a strict construction of a claim in view of the prior art, see —. *Sarven v. Hall et al.*, 9 Blatch. 524.—WOODRUFF, 1872.

138. For an example of a variety of cotton-bale ties held to infringe complainant's patent for a cotton-bale tie, see —. *Cook et al. v. Ernest et al.*, 5 Fish. P. C. 396.—WOODS, 1872.

139. The claim in plaintiffs' patent for a cotton-bale tie was : " 3. The slot cut through one bar of the clasp or buckle, as shown in the diagram, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in the clasp or buckle, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise." Thereof the court said, in its charge to the jury : " I say to you . . . that the third claim of the . . . patent covers the open slot in the cotton-tie buckle used for the purpose of passing the end of the tie sidewise through the slot under the bar, no matter by what other manipulation of the tie that result is attained ; and I say to you, further, that it is not necessarily connected with the remainder of the . . . tie, and it covers the open slot used on other forms of buckle for substantially the same purpose and in substantially the same way." *McComb et al. v. Brodie*, 1 Woods, 153.—WOODS, 1872. .

140. For an example of a patent construed narrowly in view of the state of the prior art, and thereupon respondents' somewhat similar machine held not to be an infringement, see —. *Metropolitan Washing Mach. Co. v. Providence Tool Co.*, 1 Holmes, 161.—SHEPLEY, 1872.

141. The claim in complainant's patent for a device for attaching shanks to mineral and composition buttons was : " ' What I claim as my invention and desire to secure by letters-patent is that improvement in the means for fastening shanks to mineral and other like buttons, which consists in combining a cross-bar *d* with a base-plate *a*, to which latter the shank is attached, both cross-bar and plate secured to the button-head, substantially as described.' " The court held that this " claim cannot be sustained upon a construction broad enough to cover any form of disk which is not circular. As it required no invention, in the state of the art, as it existed at the date of complainant's invention, to substitute a disk with a serrated edge for the old disk with a circular edge, and as this is all the defendants have done, they cannot be considered as infringing upon his patent, which is for the combined cross-bar and disk, both disk and

cross-bar being arranged as described in his patent." *Potter v. Thayer et al.*, 1 Holmes, 298.—SHEPLEY, 1873.

142. The claim in complainants' patent for shingle machine was : " ' I also claim presenting the sides of the fibres of the wood to the action of the saws, in the sawing of a shingle or equivalent articles, for the purpose of giving them smoother surfaces than can be produced by the usual mode of sawing, substantially as herein set forth.' " Thereof the court said : " This claim, if literally construed, calls for a result which cannot be allowed under the patent law ; but I think a fair and liberal interpretation should be given, and I construe this as a claim for the mechanism by which the result is attained : or, in other words, the mechanism by which the sides of the fibres of the block are presented to the saw, as set forth in the specifications." Defendant's machine, being operated by hand, was held not to infringe. *Everts et al. v. Ford*, 6 Fish. P. C. 587.—BLODGETT, 1873.

143. The claim in complainants' patent for machine for making paper-bags was : " ' Making the side-cutters B with curved ends, substantially as and for the purpose set forth.' " It was held that any degree of curve to the inner end of the cutter, which would produce the result described, was within the claim. *Union Paper-Bag Machine Co. et al. v. Newell et al.*, 11 Blatch. 379.—BLATCHFORD, 1873.

144. " If a spoke tenoned into a wooden hub, and having a shoulder resting on the surface of the hub, were new and were patented, it is not possible that any one who should pass a metallic band around a wooden hub and make a mortise therein, and a mortise in the wooden hub beneath, and insert the tenon in the mortise so that the shoulder should bear either squarely or obliquely on the metal, could escape the charge of infringing such a patent." *Sarven v. Hall et al.*, 11 Blatch. 295.—WOODRUFF, 1873.

145. The claim in complainant's patent was : " ' A receiver for pan water-closets, formed and constructed so that the side A, D, into which the pan C swings for emptying, will conform to the shape of the pan and avoid the waste space behind the pan, as in ordinary or common receivers, substantially as and for the purpose set forth.' " Thereof the court said : " It is a claim not merely for conformity, but conformity attained by the particular means which are here in the specifications set out, and shown in the implement of which he has given a drawing." *Smith v. O'Connor*, 2 Sawyer, 461.—SAWYER, 1873.

146. Where an improvement in cans for paint

and the like consists in using an annulus of thin tin in one end and near the periphery, so as to be easily cut, he infringes who makes the whole top of thin tin. *Masury v. Anderson et al.*, 11 Blatch. 162.—BLATCHFORD, 1873.

147. The claim in complainant's patent for mortising machines was: "'What I claim as my invention is the afore described combination for reversing the chisel by power applied by friction [with band or otherwise], and stops operated so as to stop the chisel when reversed, in the manner essentially as set forth.'" Thereof the court said: "The claim is held to be for the combination of the power of reversing by friction, with a stop to arrest it, as distinguished from the specific devices." *Smith v. Fay et al.*, 6 Fish. P. C. 446.—EMMONS, 1873.

148. A claim in complainants' patent was: "1. A rotary blower-case, the interior of which is rendered true and accurate by means of plaster-of-Paris or its equivalent, applied substantially as described." The court held that the adoption of any plastic material which would harden in the conditions described, which could be applied as described, and which would accomplish the results described was within the claim. *Roots et al. v. Hyndman*, 6 Fish. P. C. 439.—EMMONS, 1873.

149. A claim in complainants' patent was: "4. A rotary blower-case having concave arcs B, B, in combination with end-plates I, I, arranged so as to admit of abutments being introduced or removed without requiring the case to be taken apart, substantially as set forth." Thereof the court said: "What is meant when all is read together is simply this: When the machines are small, I cast case, table or stand, and legs altogether. If large, so as to render this too cumbersome, I cast them in two or more pieces."—*Id.*

150. A claim in complainants' patent for machine for making paper-bags was: "1. I claim the machine as a whole, composed of mechanism for forming, feeding, cutting, pasting the tube or bag, combined or arranged, and operating substantially as described." This was held to be a combination claim. *Union Paper-Bag Co. v. Nixon et al.*, 6 Fish. P. C. 402.—EMMONS, 1873.

151. A claim in complainant's patent for paper-bag machine was: "2. I also claim the use of a supporting-bar or its equivalent, around which the bag may be formed into a tube, and in connection with which the said paper tube may be severed, each and the whole, substantially as described." This was held to be a claim "for a supporting-bar, with its end dis-

tended and shaped so as to enable the oblique cut to sever the tube and form a lap for the bottom of the bag."—*Id.*

152. A claim in complainant's patent for paper-bag machine was: "3. I also claim giving the paper the variable feeding motion, for the purpose and in the manner substantially as described." This was construed to be "a combination claim, including the roller which works in the supporting-bar, and the devices more immediately concerned in carrying forward the paper and giving it tension while it is served."—*Id.*

153. The claim in plaintiff's patent for saw-mill was: "'Having thus described the best mode with which I am acquainted of embodying my improvements, what I claim as my invention and desire to secure by letters-patent is giving to the saw in its downward movement a rocking or rolling motion, by means of the combination of the cross-head working in curved guides at the upper end of the saw, the lower end of which is attached to a cross-head working in straight guides and pivoted to the pitman below the saw with the crank-pin, substantially as described.'" In the patent drawings the curved guides were represented as set with their concaves facing in the same direction as the edge of the saw, and nothing was said as to whether they were to be set with the lower end perpendicularly under the upper end or in an inclined position. Defendants used the guides in an inclined position, and were held to infringe. *Hamilton v. Ives et al.*, 6 Fish. P. C. 244.—LONGYEAR, 1873.

154. In complainants' patented apparatus for making extracts from tan bark, there was nothing new in the form or structure of the leach nor in the mode or purpose of its use except connecting it with the exhaust of the engine rather than with the boiler; and as defendants' device had a direct connection with the boiler, defendants were held not to infringe. *Bridge et al. v. Brown et al.*, 1 Holmes, 205.—SHEP-LEY, 1873.

155. The claim of the patent in suit was: "I claim as my invention the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure." One provision of the specification was: "No steam or air shall be allowed to accumulate in the tubes, and . . . the tubes shall be kept entirely full of the mixture." The inventor was "not the original and first inventor or discoverer of the scientific truth that beef tallow and palm-oil may be decomposed by heat, or by heat and water combined, nor of the scientific



truth that fat acids of commercial value may be obtained from such substances as tallow and palm-oil by means of heat and water." The court held that "the invention must be limited to the described method of producing free fat acids and the solution of glycerine from the fatty and oily substances." The court further held that the method or process embodied in the patent included high heat and rapid manipulation. Defendant's apparatus was for the same purpose, and produced chemical decomposition by means of superheated steam and water, employing only moderate heat and employing steam as well as water in the vessel, which was never filled by the fatty substance, or with water or with both combined. Defendant was held not to infringe. *Mitchell v. Tilghman*, 19 Wall. 287.—SUP. CT. 1873.

156. The patent in suit was for a clothes-wringing machine, and the claims thereof were: "1. The employment or use of a portable frame or yoke B, with uprights SS or their equivalents, for supporting a clothes-wringing mechanism in position on one side of a common wash-tub, for the purposes set forth. 2. The application of an adjustable clamping device, when employed to attach a clothes-wringer to one side only of a wash-tub, substantially in the manner described and for the purposes set forth." Thereof the court said: "Regarding these two claims as descriptive of two distinct things, the first must refer to the U-shaped yoke or frame for supporting a wringing-machine, as exhibited in the drawings and explained in the specification, and the second to a combination of the yoke with a clamping device, when employed to hold a clothes-wringer to the side of a tub." Clothes-wringers of many kinds were old, and clamp devices of many kinds were old. Defendant's machine was shaped like an inverted M, and was held not to infringe. *Washing Machine Co. v. Tool Co.*, 20 Wall. 342.—SUP. CT. 1873.

157. "The claims are to be construed with reference to the state of the art at the time when the alleged invention was made."—*Id.*

158. A claim of the patent in suit was: "The employment of fat liquor in the treatment of leather, substantially as specified." The court held that "the . . . claim was intended to cover, and does cover, only the use of heated liquor." *Klein v. Russell*, 19 Wall. 433.—SUP. CT. 1873.

159. The patent in suit was for an improvement in stoves, and a claim thereof was: "1. The flaring fire-pot supported by a base, the diameter of the pot narrower at the bottom

than at the top." The court held this claim limited to a closed combustion chamber over the fire-pot formed by the flange of the reservoir resting on the upper edge of the pot and provided with projections or ears in connection with two flues passing downward. On this construction the defendant was held not to infringe. *Hailes et al. v. Van Wormer et al.*, 20 Wall. 353.—SUP. CT. 1873.

160. The patent in suit was for an improvement in stoves, and a claim thereof was: "Holes or openings in the iron case of the stove in which to put plates of mica so as to let the fire in the stove be seen through it, and to give light to the room in which the stove is." The court held that one element of this combination was a closed combustion chamber formed in part by the circular flange extending outward on the top of the fire-pot, with perforations in it or ears for connection with the downward flue. On this construction defendant was held not to infringe.—*Id.*

161. The patent in suit was for an improvement in stoves, and a claim thereof was: "Reverible flues outside of the pot to conduct the products of combustion downward to the base of the stove and thence to a main draft-flue leading to the mouth." Also: "A direct shaft for such stoves as are constructed with reverible flues, the direct shaft being obtained by a flue passing out above the fire-pot, and provided with a damper to be closed after the fuel has ignited." A closed combustion-chamber was construed into the claims. On this construction defendant was held not to infringe.—*Id.*

162. A claim in complainant's patent was: "I claim the above-described new manufacture of deodorized heavy hydrocarbon oils, suitable for lubricating and other purposes, free from the characteristic odors of hydrocarbon oils, and having a slight smell like fatty oil, from heavy hydrocarbon oils, by treating them substantially as hereinbefore described." Thereof the court said: "The thing patented and covered by the first claim in the patent is, 'a heavy hydrocarbon oil produced from heavy hydrocarbon oils, themselves the product of distillation, and having the offensive odors peculiar to petroleum distillates; such patented hydrocarbon oil so far deodorized as to be free from the characteristic odors of heavy hydrocarbon oils, and having a slight smell like fatty oil, suitable for lubricating and other purposes, and the product or result of the treatment described in the patent.' Defendants' process was not a deodorizing or disinfecting process, but so conducted the distillation and dissolution of crude petroleum

as to leave it free from the odorous bodies ; and defendants were held not to infringe. *Merrill v. Yeomans et al.*, 1 Holmes, 331.—SHEPLEY, 1874.

163. A claim in complainant's patent was : " In a registering steam-gauge, the combination of the following instrumentalities—viz. : *First*, a registering wheel ; *second*, suitable mechanism for revolving the same in one direction and for preventing its return ; and *third*, suitable means for adjustment, so that the gauge will be operative as a register only at a prescribed limit of steam pressure, all constructed and operating substantially as set forth." The court held that, in view of the prior art, the claim could not be construed broadly as for the combination of these three instrumentalities, but must be construed literally. *U. S. Steam Gauge Co. v. Am. Steam Gauge Co.*, 1 Holmes, 309.—SHEPLEY, 1874.

164. Complainant's patented gaslight reflector employed glass with a silver coating. Defendants used, in the same place, a metallic body having a bright surface behind glass, and were held to infringe, the two being held to be mechanical equivalents. *Frink v. Petry et al.*, 11 Blatch. 422.—BLATCHFORD, 1874.

165. The claim in complainant's patent for glass-cutter was : " I do not claim simply a revolving cutter, but what I claim as new and desire to secure by letters-patent is : 1. The cutter A constructed substantially as shown and described and for the purposes set forth." The specification contained the following : " The bevelled portion of the sides should be at an angle of about forty-five degrees to the axis of the cutter, and consequently will be at near right angles to each other. It is not necessary that the angles of the bevelled sides should be at exactly right angles to each other, but near that angle, or a very little more obtuse, the cutter is found to operate to the best advantage." The court said : " The invention, . . . so far as the cutter is concerned, must consist in its form, in the fact that the sides are made parallel and then bevelled toward each other at an angle of about forty-five degrees to the axis of the cutter, so as to meet about midway between the same in a cutting edge." *Monce et al. v. Adams*, 12 Blatch. 1.—SHIPMAN, 1874.

166. Complainant's patented process for making white oxide of zinc was found " to consist in the employment of a thin bed-fire of chestnut coal and of a superincumbent layer of pulverized ore and pea coal of the approximate thickness of three inches ; the enforced passage of atmospheric air in numerous jets through the mass by

which its combustion is maintained ; the vaporization of the zinc and its oxidation in the furnace above the charge, when the zinc in the ore is expelled, and the repetition of the process." The bottom of the patented furnace chamber was composed of perforated iron grate-bars. The double function of these bars was to support the burden of the bed-fire and the charge, and to diffuse through it a blast of air forced into the closed ash-pit below. Defendant's furnace had a like large superficial area, with a wide door opening into it, and provided with a blast underneath the charge, but without grate-bars. Defendant was held to infringe. *Wetherill v. New Jersey Zinc Co.*, 1 Bann. & Ard. 105.—MCKENNAN, 1874.

167. A claim in complainant's patent for looms was : " In combination, the lay and its rigid shuttle-box, the pivoted vibrating wire trough, the reciprocating driving slide, and the latch moving thereon, the latter being operated by the wire box, the combination being and operating substantially as described." " The only difference . . . found in the combination used by the defendants and the combination patented by the complainant . . . was the substitution by the former of a wire bar or trough, mounted upon a horizontal rock-shaft supported by two arms and reciprocating equally throughout its whole length, for a wire bar or trough mounted on a vertical shaft, pivoted at the outer end, with the end nearest to the loom oscillating to the extent required to transport the wire into the shed." The horizontal shaft supporting the wire trough by two arms, substituted by defendants for complainant's pivoted shaft, was not new ; it did not perform substantially different functions, and at the date of complainant's patent it was known as a substitute for the omitted mechanism. Defendant was held to infringe. *Webster et al. v. New Brunswick Carpet Co.*, 1 Bann. & Ard. 84.—NIXON, 1874.

168. A claim in complainant's patent for hydraulic mining apparatus was : " The two curved sections A, B, connected by a horizontal swivel joint, in combination with a nozzle connected by a semi-universal joint, constructed and arranged substantially as set forth." It was held, in view of the prior art, that the claim must be limited to the peculiar joint described, which was a semi-cylindrical joint. Defendant used a ball and socket joint, and was held not to infringe. *Fisher v. Craig*, 3 Sawyer, 69.—SAWYER, 1874.

169. The difference between complainant's patented watchman's detector and defendants' watchman's detector was that, instead of forcing

the points upward to perforate the paper, as was done by complainant's device, defendants forced the paper downward upon, and to receive an impression from stationary projections from the surface below. Defendants were held to infringe. *Buerk v. Imhaeuser et al.*, 1 Bann. & Ard. 337.—WOODRUFF, 1874.

170. Claims in complainants' patent for portable and adjustable still-water dam were: "1. The construction and arrangement of a portable and adjustable dam in sliding or telescopic sections, in the manner and for the purposes herein described. 2. The combination of the self-anchors 3, with the dam, in the manner and for the purposes herein described." In view of the prior art, the court said: "When . . . the first claim of the patent claims 'the construction and arrangement of a portable and adjustable dam in sliding or telescopic sections, in the manner and for the purposes herein described,' it is a necessary part of the manner of construction and arrangement of the dam in such sections that it shall be suspended from the deck when in use, and such suspension is a necessary element of the claim." And again: "The term 'self-anchors,' in the specification and in the second claim, means anchors capable of self-adjustment by having at all times free play, because not attached to their sockets, and so not moving with the movement of the bottom section to which the sockets are attached; and the term 'the dam,' in the second claim, means a dam suspended from the boat, with the resulting consequences in its movement, in operation, before stated." In defendants' apparatus the dome was not, when in position for work, suspended from the float, nor was the funnel self-adjusting to various depths of water, nor did it have self-anchors free to slide at all times while the apparatus was in use and self-adjusting at all times. Defendants were held not to infringe. *Cam-meyer et al. v. Newton et al.*, 12 Blatch. 122.—BLATCHFORD, 1874.

171. A claim in complainants' patent for portable and adjustable still-water dam was: "The combination of the boats, supports, or floats with the dam, as above described, and the arrangement of anchors to hold such boats in position, in the manner and for the purposes described." Thereof the court said: "In order to make the dam a member of the combination, the anchors which are connected with the boat by chains passing through the eye-bolts on the bottom sections of the dam must be included." And defendants were held not to infringe.—*Id.*

172. A claim in complainants' patent for portable and adjustable still-water dam was: "'The

combination of windlasses, chains, and boats with the dam, as above described, so that, by the construction thereof, a series of drills may be operated within and enclosed by the dam, in the manner and for the purposes herein described.'" Defendants' device had no chain combined with the dome, nor were the drills operated in the manner described by the patentee; and defendants were held not to infringe.—*Id.*

173. The claim in complainant's patent for improvement in rings for martingales was: "The rings for martingales, etc., manufactured as set forth, with a metal ring enveloped in composition, as and for the purpose specified." Complainant's mode of manufacture was to envelop the metal ring in artificial ivory composition and give exterior finish by pressing and solidifying the composition. Defendants took iron rings, coated them with rubber, vulcanized the rubber, and then formed them in a lathe or the like. Defendants were held to infringe. *Welling v. Rubber-Coated Harness Trimming Co. et al.*, 1 Bann. & Ard. 382.—NIXON, 1874.

174. The claim in complainant's patent for exercising apparatus was: "1. The handle B, driven by any suitable mechanism by which a vibrating or oscillating motion is imparted to it, substantially as and for the purpose set forth." In defendant's machine the handle and foot-hold had a rotary motion, but defendant was held to infringe. *Taylor v. Wood*, 12 Blatch. 110.—BLATCHFORD, 1874.

175. In complainant's patent for medical rubbing-machine, a claim was: "1. The rubber A, composed of india-rubber, and having its outer surface coated or covered with india-rubber, the said outer surface being furnished with projecting rims, points, or corrugations." Defendant used a rubber having a surface of cloth or leather stuffed with some material, and very slightly elastic and corrugated. Defendant was held to infringe.—*Id.*

176. The claim in complainant's patent was: "I do claim as my invention and desire to secure by letters-patent . . . the combination of the lead and india-rubber or other erasing substance in the holder of a drawing-pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth." In view of the prior art, the court held that such a claim must be limited to the construction exhibited in the specification in those respects only in which it differs from the devices of the prior art. *Reckendorfer v. Fuber*, 12 Blatch. 68.—WOODRUFF, 1874.

177. The claim in complainant's patent was:

“ ‘I claim my improved caoutchouc cutting-machine, having its several parts constructed and arranged in manner and so as to operate substantially as described, such machine not only having a single drum or cylinder to support and a revolving knife to cut a sheet of caoutchouc as explained, but having machinery for traversing the rotary knife with reference to the drum, and also having machinery for moving such knife toward and away from the drum, as specified.’ ” Thereof the court said : “ He invented no new machine, but he operated an old machine in a different manner, and produced a new and different result. That he did not make a patentable invention we are not disposed to decide ; but the discovery of a new mode of operating an old machine to produce a new result does not give him the right to a monopoly of the old machine. Broadly as courts are disposed to construe patents for the sake of upholding a meritorious invention, yet when it is too clear to admit of a doubt that the patent is for a machine, the court cannot change it into a patent for an art.” *Boston Elastic Fabric v. East Hampton Rubber Thread Co.*, 1 Holmes, 372.—SHEPLEY, 1874.

178. The claim in complainant's patent was : “ ‘2. The safety-valve C, with its overhanging downward curved lip or periphery and annular recess D, substantially as herein shown and described, and for the purpose set forth.’ ” Thereof the court said : “ From the history of the art as previously given, and from a comparison of the original with the reissued Naylor patent, as well as from the language of the claims in the reissued patent, it is manifest that if these claims can be sustained, it can only be for the combination of the described valve, with its overhanging downward curved lip, with precisely such an annular recess surrounding the central chamber as he describes.” *Ashcroft v. Boston & Lowell R. R. Co.*, 1 Holmes, 366.—SHEPLEY, 1874.

179. The claim in complainant's patent was : “ ‘The plate of hard rubber or vulcanite or its equivalent for holding artificial teeth, or teeth and gums, substantially as described.’ ” It was held by the court that this was “ for a new article of manufacture, consisting of a plate of hard rubber or vulcanite, with teeth, or teeth and gums secured thereto in the manner described in the patent. The patent is not for a process or art, but for the new product resulting from the manipulation by the described new process. It is one of those products, as will be seen by examination of the specifications describing the process of manufacture, in which the process so inheres that the described product can only be made by the described process.” *Goodyear*

*Dental Vulcanite Co. et al. v. Smith*, 1 Holmes, 354.—SHEPLEY, 1874.

180. The claim in complainant's patent for spark arrester was : “ ‘The combination of the compound blast-pipe, with a spark or return flue communicating with the fire chamber, provided with a bell-shaped mouth, which is located above, adjacent to, and coincident with the exit aperture of the blast-pipe, substantially as and for the purpose specified.’ ” The court found that the “ invention consisted in the combination, with the compound blast-pipe, of the described bell-mouthed return flue, operating together in such a manner that the sparks were driven into the mouth of and through said flue in a continuous current, without resting, into the fire chamber by the force of the continuous action of the blast.” The court further found that in the complainant's patent “ the current from the blast-pipe ” was “ received into the bell-shaped mouth and deflected in one direction only, into a tubular or cylindrical return flue. In the spark arresters and consumers used by the defendants the current from the blast-pipe ” was “ received on a cone and deflector, making together a bell-shaped deflector, itself deflected so as to deflect the sparks in all direction outward and downward into the annular chambers surrounding the blast-pipe, which annular chamber ” terminated “ in two tubes passing through the boiler and connecting with the fire-box.” Defendants were held to infringe. *Pike v. Providence & Worcester R. R. Co.*, 1 Holmes, 445.—SHEPLEY, 1874.

181. The claim in complainant's patent was : “ ‘The combination and arrangement of the perforated end *a*, of the wheel-tube around which the wire screen or gauze *B* is placed ; point *D*, secured to the end of said tube, forming the chamber *E* and air passage *G*.’ ” The court held this to be a claim for a combination of the wire screen, enlarged drill-head, and the air passage, and that as the first two features were old in severalty and in combination, defendants could not be charged with infringement by making use of these two without the air passage, and defendants were held not to infringe. *Craig v. Smith et al.*, 4 Dillon, 349.—DILLON & FOSTER, 1874.

182. The claim in complainant's patent was : “ ‘A wooden bung rendered impervious to the passage of fluids through the pores of the wood by means of the described or other suitable substances.’ ” The court found that “ the invention of the patentee consisted in a wooden bung rendered impervious to the passage of gases, or beer, or other liquids.” *Geier v. Goetinger*, 1 Bann. & Ard. 553.—SWING, 1874.

183. The claim in complainant's patent was : " 'The forming of one, two, or more creases in cloth by means of markers on opposite sides of the cloth, which markers are the notch and blade or the notch and point, one connected with the bed of the machine and the other operated simultaneously with the vibrations of the needle-bar in a sewing-machine.' " Of this claim the court said : "It does not mean every kind of tuck-creasing mechanism having its upper and lower parts connected and together adjustable, but any tuck-creasing mechanism substantially such as described, which words are very important, and essentially qualify the preceding words. It must, therefore, mean the kind of mechanism—mechanism such as here described—not any form of mechanism, however different it might be, but this particular form of mechanism or that which is substantially the same." *Fuller et al. v. Yentzer et al.*, 6 Bissell, 203.—DRUMMOND, 1874.

184. A claim in complainants' patent for saw was : "1. The saw herein described, having a series of alternate sets of fleam and curved planing teeth, located upon the same plate or blade, the sets of fleam teeth for scouring the sides of the kerf, and sets of curved planing teeth for removing the wood between the scores when constructed and arranged to operate in the manner shown and described." Thereof the court said : "The position and use of these different teeth in the 'manner described in the specification' is the plaintiffs' invention." In defendants' saw one set of teeth planed out and the other rasped. Defendants were held not to infringe. *Wheeler et al. v. Simpson et al.*, 1 Bann. & Ard. 420.—HUNT, 1874.

185. A claim in complainant's patent for saw was : " 'The employment of alternate clearing teeth, *ad*, the ends of which are concaved or notched so as to form sharp or pointed corners in combination with the triangular pairs of cutting teeth A A, arranged on a single blade, substantially as and for the purposes herein set forth.' " The court held complainants' patent to be "limited to the use of notched clearing teeth in combination with the particular triangular pairs of cutting teeth which he describes." Although the operation and function of the teeth in defendants' saws were the same, they were produced by means of instruments quite different in their construction, and defendants were held not to infringe.—*Id.*

186. A claim in complainant's patent for egg-beater was : " 'The beaters I and J revolved in opposite directions by suitable mechanism, substantially as set forth.' " Defendant's beaters revolved in opposite directions, but concentric-

ly, while the axes of the beaters in the complainant's patent worked some distance apart. Defendant was held not to infringe. *Monroe v. Dover Stamping Co.*, 1 Holmes, 413.—SHEPLEY, 1874.

187. A claim in complainants' patent was : " 'As a new article of manufacture, a hand or portable toilet-mirror, constructed substantially as described, of a base-plate B, with its handle extension piece or stiffener C, glass A, and outer back and handle D, made of any suitable composition or cement, substantially as specified.' " Defendant's hand-mirror had no "wooden or other base-piece of suitable material" behind the "glass designed to be mounted," and no extension from such base-piece into the handle. In the smallest and weakest part of the handle two nails of iron were embedded. Defendant was held not to infringe. *Florence Mfg Co. v. Boston Diatite Co.*, 1 Holmes, 415.—SHEPLEY, 1874.

188. A claim in complainant's patent for refrigerator was : "The combination of the descending conduit or cold-air flue, or either, with a reservoir for containing cooling materials, substantially in the manner and for the purposes described." Thereof the court said : "A combination, to be the same combination, whether as an infringement or as anticipatory, must not only be a combination of such two instruments, but must be one having the principle and mode of operation, and operating in the same manner and effecting the same purpose of the combination described in the patent." *Lyman Ventilating & Refrigerator Co. v. Lalor*, 12 Blatch. 303.—BLATCHFORD, 1874.

189. A patentee described his invention as follows : "My said invention consists in the employment, in a locomotive engine, of a truck or pilot wheels provided with pendent links to allow of a lateral movement, so that the driving wheels of a locomotive engine continue to move correctly on a curved track in consequence of the lateral movement allowed by said pendent links, the forward part of the engine travelling in a tangent to the curve, while the axles of the drivers are parallel, or nearly so, to the radial line of the curve." The court said that, "in view of the history of the art," the invention "was the combination with, or the employment in, such an engine of a truck fitted with divergent pendent links to allow lateral motion, and having the properties and capabilities of the peculiar truck described in the specification." *Locomotive Engine Safety Truck Co. v. Penn. R. R. Co.*, 1 Bann. & Ard. 470.—STRONG, 1874.

190. A patent was for a process of treating

straw and other fibrous materials for procuring paper pulp. Defendants applied the process to bamboo, and were held to infringe. *Am. Wood-Paper Co. v. Fibre Disintegrating Co.*, 23 Wall. 566.—SUP. CT. 1874.

191. The patent in suit was for a picker staff motion in looms, and the claims thereof were : " 1. The combination of a rocker of a picker-staff with its bed by loose journals projecting on each side of the picker-staff, and arranged beneath the picker-staff, substantially as described. 2. The combination with the rocker, the bed, and the journals of the open boxes, substantially as and for the purpose described. 3. In combination with the rocker and its bed, the journal-bearing arm, operating substantially as and for the purpose specified." The court construed these claims to embrace "every combination with a rocker of a bed and loose journal-bearing arms, arranged so as to produce the result described in the specification as effected by the combination." In defendants' machine the arm was attached to the second journal, not, as in the patented machine, by a slot in the rocker ; and the form and the location of the arms differed, but they performed the same function and in substantially the same manner. Defendants were held to infringe. *Mason v. Graham et al.*, 23 Wall. 261.—SUP. CT. 1874.

192. The patent in suit was for the Blake stone crusher. Where the Blake machine used a connecting-rod for communicating motion from the revolving shaft to the movable jaw, defendants introduced a column of water ; defendants were held to infringe. *Blake v. Robertson et al.*, 6 O. G. 297.—BENEDICT, 1874.

193. A claim in complainant's patent for billiard-table cushion was : " 'The catgut or other cord E, partially or fully embedded or otherwise attached at the angle  $a$  of the rubber cushion C, so as to protect said cushion against the impact of the ball, substantially as herein shown and described, and for the purposes set forth.' " An alleged infringement consisted in the use of a flat strip of metal fitted in a slot moulded in the india-rubber cushion and running from end to end thereof, and strained by a straining-key at its end. Another alleged infringement consisted in the use of a round metallic wire arranged in like manner as the flat strip of metal, and situated in close proximity to the inner, upper corner of the cushion. A patent prior to that of the patent in suit set forth the invention thereof as consisting in the introduction of a strip of spring steel or equivalent material into a crease or groove cut into the face of the rubber near the angle thereof, in such manner that the steel was

protected from injury by the rubber, which thus intervened between the steel and the ball ; under this patent, and prior to the patent in suit, there had been many billiard-tables with the added feature of an arrangement for tying down the steel strip to the cushion by means of holes in the lower edge of the strip, and wires put through them and fastened to the under side of the rail to keep the strip in place in the rubber. It also appeared that, prior to the patent in suit, another party had made india-rubber cushions for billiard-tables which had a French clock spring placed in a slit cut in the upper face of the rubber parallel to and near the inner face of the rubber, bringing the upper edge of the spring near the upper corner of the rubber, the spring being cemented into the slit, with cloth glued over the slit, and the spring was thus embedded entirely within the rubber. In view of this prior art, the patent in suit was held to be limited to a cord applied outside of the upper corner of the cushion, and defendants' device was held not to infringe. *Decker v. Griffeth et al.*, 13 Blatch. 189.—BLATCHFORD, 1875.

194. A claim in the patent in suit, for a ruffle, was : "As a new article of manufacture, the gathered cloth A [the ruffled strip], being secured to the binding B [the band] by a single series of stitches C, which perform the double duty of confining the gathers and of securing the gathered cloth to the binding, substantially as set forth." In the patented ruffle the distinguishing features were "the single series of stitches and the unvarying regularity of the plaits or gathers, thus dispensing with the gathering thread, avoiding the injurious process of whipping or scratching the fabric with a sharp needle, and the perforations in the ruffled piece which the needle and thread make in the gathering." The plaintiff's ruffle was an unfinished article to be attached by the band to garments. Defendant's ruffle was a finished article designed to be worn as a neck ruffle. Yet defendant's ruffle had the distinguishing feature of plaintiff's patented ruffle in that it contained a row of stitches performing the double office of confining the gathers and attaching the ruffled cloth to the band ; and, although it had a second series of stitches, was a completed article, different in appearance, and was used for a different purpose from plaintiff's ruffle, it was held to be an infringement. *Magic Ruffle Co. v. Elm City Co.*, 13 Blatch. 151.—SHIPMAN, 1875.

195. The claims of the patent in suit, for improvement in looms, were : "The two rollers B and C continuously rotating at a suitable distance apart, and the series of sectional rollers or

wheels D, mounted and operated so as to be pressed wedgewise when the take-up is to act, all substantially as and for the purpose set forth.

[3] A series of needles *k k*, in combination with a take-up composed of rollers or wheels D, arranged to take up at intervals on parts of the work and to liberate other parts, substantially as and for the purposes herein specified." Defendant's take-up consisted of an endless sheet or sheets of rubber pressing the fabric against a roller. The pressure was regulated by set screws. All parts of the roller bore at all times with equal pressure against the whole width of the fabric. The effect of the take-up was sectional, but that effect was not due to the sectional action of the take-up, but to the action of the lay. Defendant was held to infringe. *Carsteadt v. U. S. Corset Co.*, 13 Blatch. 199.—SHIPMAN, 1875.

196. A claim in the patent in suit, for improvement in looms, was: "The needles or points *k k*, fixed on a stationary bar K, and arranged as specified, so that the fabric, being drawn by the take-up proper, is continuously carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth." The court held that "the take-up which is mentioned in the second claim does not mean every kind of a take-up, or the take-up in every kind of looms, but refers only to the take-ups which are designed or adapted to the weaving of irregular fabrics."—*Id.*

197. The patent in suit being for an improvement in planing machines, a claim thereof was: "'I also claim the arrangement of matching cutters to be adjusted both laterally with each other and vertically upon the bed-piece, essentially as described, in combination with the platen, so that the planing and matching of the piece may both proceed at the same time, or either the planing or matching may be done separately, whether the platen be made movable with the piece secured thereon, or the platen be fixed and the piece be made to move thereon.'" Thereof the court said: "A construction which should compel the patentee to the declaration that his machine could neither match or plane the boards when placed upon a movable platen, the matching cutter being upon stationary arbors projecting through the platen, would be a construction of the utmost rigor and in violation of the liberal rules in regard to the interpretation of patents, which have prevailed in courts of this country. It is a just and reasonable construction to hold that the concluding clauses of the claim were introduced parenthetically, and related to the platen

which the patentee had previously claimed, and had no reference to the planing or matching which are mentioned in the clauses which immediately precede those now under discussion." *Strover et al. v. Halsted et al.*, 15 Blatch. 95.—SHIPMAN, 1875.

198. The claim of the patent in suit for a fluting-machine was: "'The guide E, constructed with one or more curved or arched portions *a*, in combination with suitable fluting rollers, substantially as herein set forth, for the purpose specified.'" Thereof the court said: "The patentee calls the whole instrument in front of the rollers a guide, but the only material part of it is the curved or arched portion. The expression in the claim—the guide, constructed with a curved or arched portion—is the same thing as saying the curved or arched portion of the guide." Defendant's device had simply a curved or arched portion opposite the plain parts of the rollers between the fluted parts of the rollers, and defendant was held to infringe. *Kursheedt v. Werner*, 12 Blatch. 530.—BLATCHFORD, 1875.

199. A claim in complainant's patent was: "'A shirt collar composed of paper and muslin, or its equivalent, so united that the muslin will counteract the fragile character of the paper.'" Thereof the court said: "The claim is not . . . for the mere effect resulting from a union of paper and muslin, nor for the fabric thus produced, nor for the special mode of preparing it; but it covers the use of it for making collars where its constituents are incorporated with each other, so that the textile strength of the one is made available to reinforce the fragility of the other. And such original application of it to the production of a most useful article, the inventor can lawfully claim to appropriate." *Union Paper Collar Co. v. White*, 2 Bann. & Ard. 60.—MCKENNAN, 1875.

200. The patent in suit for shade-roller was: "For the application to a shade-roller, provided with a spiral spring for automatically raising or rolling up the shade, of a pawl and ratchet, or notched hub, so arranged that the former will engage with the latter at any point or height of the shade, by simply checking the rotation of the roller and the upward movement of the shade under the influence of the spring, substantially as set forth." The court gave this claim a construction embracing, "In combination with the other elements, any pawl and ratchet or notched hub, so arranged that the former will engage with the latter at any point or height of the shade by simply checking the rotation of the roller and the upward movement of the shade

under the influence of the spring, substantially as set forth." *Hartshorn v. Almy et al.*, 1 Holmes, 493.—SHEPLEY, 1875.

201. The claim of the patent in suit for centrifugal machine was: "The construction of the openings I in the bottom of the cylinder in such machines, and the valve J, for the purpose of closing the same, substantially as described." Thereof the court said. "'Such machines' means such centrifugal machines as are constructed as to admit of the application and operation of the claimed devices in substantially the described mode and by substantially the described means. The unauthorized use of the complainant's openings and valve would be an infringement if used in centrifugal machines, to which they could be usefully applied by reason of there being an unobstructed space at the bottom of the machine into which the sugar could fall, although the cylinder were not suspended from a flexible elastic bearing like that described in the complainant's patent." *Weston et al. v. Nash et al.*, 1 Holmes, 488.—SHEPLEY, 1875.

202. For an example of a patent strictly construed in view of the state of the art, and thereupon the defendant held not to infringe, see — *Tufts et al. v. Boston Mach. Co.*, 1 Holmes, 459.—SHEPLEY, 1875.

203. The claim in complainant's patent for elevator was: "'Equalizing the strain upon the series of ropes or chains of my improved elevator or hoisting-machine by automatic adjustment, substantially as described.'" Thereof the court said. "This claim can only be construed as a claim for the described means of performing this function, and for well-known substitutes or equivalents of those described means." One of these modes was by means of a rocking lever or system of rocking levers to the ends of which the suspensory ropes were attached. There was no evidence tending to show that the contrivance used by the defendant, of a series of pistons fitting into a set of cylinders with connecting pipes, the cylinders being filled with an incompressible fluid, were at the date of the patent known substitutes for either of the means of adjustment found in the patent. No infringement was found.—*Id.*

204. The claim in complainant's patent for elevator was: "'Means for manipulatory relative adjustment, within reasonable limits, of the series of ropes or chains, which are independently attached to the winding drum and to the car of the elevator, so that an equal degree of tension can be had upon each rope or chain of the series by proper attention or manipulation on the part of the party having such an elevator in charge.'" "

Defendant had put into its elevators means of manipulatory adjustment, but such means did not perform the function described by the patentee because the tension of the ropes or chains could not be varied by any manipulations of the nuts. No infringement was found.—*Id.*

205. The claim of the patent in suit for feed-water heater was: "'The overflow box *c*, the pipe *b*, arranged with reference to the vessel A, substantially as described, and for the purpose specified.'" In the machine the end of the induction pipe *b*, through which the water flowed, was so placed in the overflow box *c* as to be completely immersed, whereby the steam was prevented from entering the pipe. In defendant's machine the end of the induction pipe was not immersed, and the court found no infringement. *Stilwell & Bierce M'fg Co. v. Cincinnati Gaslight & Coke Co. et al.*, 1 Bann. & Ard. 610.—SWING, 1875.

206. Complainants' patent in suit was for an improvement in saw-mills, and a claim thereof was: "Giving to the saw in its downward movement a rocking or rolling motion, by means of the combination of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw with the crank-pin, substantially as described." In the patented device the guiding grooves at the upper end of the saw were curved, with the concave part of the curve turned down toward the approaching log, as the saw descended the top at first retreated before the log and afterward moved up toward it at the same time that the bottom was moved back and forth in just the opposite direction by being attached to the pitman above the cross-head. Defendants used a saw in which the guides were not curved, but they each consisted of two straight lines and represented two consecutive chords in the curves of the complainants', but they were arranged in other respects in the same manner as this curve—namely, having the anterior angle, like the concave side of the curve, turned toward the approaching log, the effect being exactly the same. Defendants were held to infringe. *Ives et al. v. Hamilton*, 92 U. S. 426.—SUP. CT. 1875.

207. The patent in suit was for an ejector, and "the patented device consisted of a vertical discharge-pipe having a conical lower end immersed in the water, and a steam or air-pipe entering the lower end and discharging a jet of steam or air into the discharge-pipe under the surface of the water, whereby the latter was raised and ejected from the pipe. Defendant's



device consisted of the vertical water-pipe provided with a T or globe-head at the upper end, through which a jet of steam passed across the upper end of the water-pipe, exhausting the air therein and causing a vacuum, which permitted the water to rise and be discharged." The claims of the patent were : " ' 1. The combination of the pipes *b c*, arranged so as to be used for the purpose of forcing, blowing, or ejecting the liquids from wells, ships, or other place, as herein described and set forth. 2. The ejector composed of the pipes *b* and *c*, the lower end of the pipe *b* entering within the conformed mouth of the pipe *c*, substantially as herein described. 3. The construction and combination for immersing in oil or water, in wells or other place, the lower end of pipes arranged so that, by the use of steam or air forced down one pipe, liquids will be forced upon the other, substantially upon the principle as herein described and set forth.' " The court found no infringement. *Scaife v. A. Fulton Sons & Co.*, 2 Bann. & Ard. 235.—McKENNAN, 1876.

208. In a patented shade-roller the invention was : " In combination with a spring roller; such an arrangement of pawl and ratchet, with the varying speed of the revolution of the roller mutually acting with each other through the manipulation of the roller, that the pawl would engage with the ratchet by checking the rotation of the roller and the upward movement of the curtain by the simple manipulation of the shade, merely varying the speed of the rotation of the roller." In defendants' device one edge of the recess in the spindle contained a little ball, and the recess was so constructed that when the ball fell into the recess it was forced against the side of the chamber and operated as a detent to stop the revolution of the roller. Defendants were held to infringe. *Hartshorn v. Shorey et al.*, 2 Bann. & Ard. 233.—SHEPLEY, 1876.

209. The patent in suit was for flasks for casting iron pipes, and a claim thereof was : " ' The combination, substantially as set forth, of the two halves A and A' of the flask hinged together, the staples I or their equivalents, the flanges *a*, and clamps B B or their equivalents, for the purpose specified.' " None of the elements of this combination were novel. Complainants did not use hinges on their flasks, but in lieu thereof the faces of the flasks were fastened together by means of bolts and nuts applied to the flanges on one side, through holes therein provided for that purpose, and defendants were held not to infringe. *Smith et al. v. Marshall et al.*, 2 Bann. & Ard. 371.—McKENNAN, 1876.

210. The patent in suit was for a loom for

weaving irregular fabrics, and a claim thereof was : " The needles or points *k k*, fixed on a stationary bar K and arranged as specified, so that the fabric, being drawn by the take-up proper, is continually carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth." Defendant's needle-bar consisted of a number of small independent needle-rollers mounted upon a fixed shaft running across the width of the cloth. Each of these rollers rotated forward to the take-up when the cloth was being taken up, but the rollers were prevented from moving backward, when the reed receded, by a ratchet and pawl applied to each roller. Each roller then became stationary, arrested the fabric when a reverse movement commenced, and prevented the cloth from being drawn back when the take-up mechanism released it. Defendant's rotating bar was a stationary bar when not needed, but when needed it accomplished the practical result of arresting and holding the cloth. Defendant was held to infringe. *Carstaedt v. U. S. Corset Co.*, 13 Blatch. 371.—SHIPMAN, 1876.

211. A claim of the patent in suit was : " The screw-threaded metallic bung-bushing, made tapering upon both its outer and inner sides, and provided with the flange B, having the V-shaped notch *d*, as and for the purpose described." Thereof the specification said : " We do not wish to confine ourselves exclusively to the V-shaped projection, as any form that will prevent the core from turning independently of the bush will produce the same result." Defendant's wrench did not carry a core fitting closely into the bush, nor engaging with it by any projection or corresponding cavity. It carried an eccentric ribbed boss or bit of metal fitted upon a part of the surface of the loosely fitting core and, upon turning the core, the eccentric boss was pressed against the inner surface of the bush, and the friction thus caused was sufficient to turn the bush into the barrel. Defendant was held not to infringe. *Cornell v. Littlejohn*, 2 Bann. & Ard. 324.—JOHNSON, 1876.

212. The patent in suit was for a cotton press. One claim thereof was for a press-box confined within a revolving frame composed of *metallic* bars and cross-ties and a bed bottom. Defendant used *wooden* bars, bolts, and rods, and was held to infringe. *Wicks v. Stevens*, 2 Woods, 310.—BRADLEY, 1876.

213. The patent in suit was for a cotton-press. One claim thereof was for a collar surrounding a stationary nut and placed between the metallic

cross-ties or their mechanical equivalents. Defendant used, instead of a collar having the specific form of complainant's patent, a metallic arch having an eye in it, accomplishing the same purpose, and was held to infringe.—*Id.*

214. The claim in Andrews' driven-well patent was: "'What I claim as my invention and desire to secure by letters-patent is the process of constructing wells by driving or forcing an instrument into the ground until it is projected into water, without removing the earth upward as it is in boring, substantially as herein described.'" The court said: "The words 'the process of constructing wells, substantially as herein described,' are . . . equivalent to 'the herein-described process of obtaining a supply of water from the earth.'" The court construed the patent to be a "patent for a process, and . . . that the element of novelty in this process consists in the driving of a tube tightly into the earth, without removing the earth upward, to serve as a well-pit, and attaching thereto a pump, which process puts into practical use the new principle of forcing water in the water-bearing strata of the earth from the earth into a well-pit, by the use of artificial power applied to create a vacuum, in the manner described." *Andrews et al. v. Carmen*, 13 Blatch. 307.—BENEDICT, 1876.

215. In complainants' patented device there was a handle, and in one end of the handle a small engine for furnishing motive power for actuating the cutting bar, the steam being brought into the handle in a flexible tube. The claim in the patent was: "'The shearing implement, consisting of the handle and comb-plate extending from its end, the engine supported by said handle and a moving shearing cutter arranged to operate with the comb-plate, and operated by said engine through power supplied from a reservoir situated at any desired point, substantially as described.'" Defendants' device differed from the patented device in that the whole handle was divided at its rear portion into two air-tight chambers by a central flexible partition, operated by the alternate admission and withdrawal of air so as to vibrate laterally a lever connected with the diaphragm, which communicated the desired reciprocatory motion to the cutting device. Defendants were held to infringe. *Earle et al. v. Harlow et al.*, 2 Bann. & Ard. 264.—SHEPLEY, 1876.

216. Complainant's different patents in suit all related to a class of machines for polishing the edges of the heels and soles of boots and shoes, in which there was a combination of certain mechanism for holding the sole or heel or

both to be polished with the mechanism of the polishing tool, under such conditions of mechanical combination that either the holding mechanism, with the material held, could be so moved as to bring the surfaces to be polished in proper relation to the polishing tool, or the polishing tool could be so altered as to bring it into proper relation with the surfaces of the material to be polished, held by the holding mechanism. In defendants' machine the holding mechanism was dispensed with, and the operator put the shoe into proper relation with the polishing tool and held and kept and guided it there by and with his own muscular strength and will. Defendants were held not to infringe. *Sweetser v. Helms et al.*, 2 Bann. & Ard. 263.—SHEPLEY, 1876.

217. Complainants' patent was for vulcanized rubber as a part of the valve of a steam gauge. Defendants used for that purpose "an elastic packing composed of at least four tenths of finely pulverized refractory earthy or stony material, intimately mingled with and held together by rubber, for vulcanizing, and then vulcanized, as and for the purpose described." Defendants had taken the principle or idea of the complainants' patent, and were held to infringe. *Dalton et al. v. Nelson et al.*, 13 Blatch. 357.—SHIPMAN, 1876.

218. The claim in complainant's patent for clothes-wringer was: "In a wringer having a pair of squeezing rollers, and an operating crank and two uprights or standards, the employment of clamping means arranged to take hold of the tub at or near the base of each standard." The court held that this claim must be limited to a combination in which a swivel or its equivalent was employed as a part of the clamp, and under that construction defendant was held not to infringe. *Metropolitan Wringing Mach. Co. v. Young et al.*, 14 Blatch. 46.—WALLACE, 1876.

219. The claim in complainant's patent was for "the combination of nitro-glycerine with infusorial earth or other equivalent absorbent substances as a new explosive compound." Defendants used a so-called mica powder prepared by pouring thereon tri-nitro-glycerine at a temperature of about seventy degrees, in the proportions of about fifty-two and one half pounds of tri-nitro-glycerine to about forty-seven and one half pounds of mica scales, in such a manner that the surfaces of the scales were coated with the tri-nitro-glycerine. Defendants were held to infringe. *Atlantic Giant Powder Co. v. Moubray et al.*, 2 Bann. & Ard. 442.—SHEPLEY, 1876.

220. A claim in complainants' patent for improvement in boots and shoes was: "The self-

inclining metallic screw-peg A, having a flattened wedge-shaped end, whereby, as it strikes the metal plate upon the last, in the act of driving, it is adapted to be bent down into the inner sole of the boot or shoe." In the prior art there was a corrugated nail having a uniform diameter from head to point, with a head of the usual and common form, with the point conical or four sided, and the body was corrugated or serrated, but not in the form of a screw; it differed from complainants' patented screw-peg in three particulars: *first*, it had a head; *second*, a conical or four-sided point; *third*, the body was corrugated. One vital difference between complainants' screw-peg and that of defendants' was that complainants' had a body of the same size, while defendants' nail was cut tapering from the driving to the entering end of the nail. Defendants were held not to infringe. *Estabrook et al. v. Dunbar et al.*, 2 Bann. & Ard. 427.—SHEP-LEY, 1876.

221. The patent in suit was for a tailor's pressing machine, and a claim thereof was: "The lever, the jointed arm, the goose, and the treadle, when connected together and arranged relatively with each other and the press-board, so as to operate as and for the purpose set forth." In the machine of complainant's patent the lever was described as being in a perpendicular position, while in defendants' machine it was shown in a horizontal position. The difference was held to be formal, and defendants were held to be infringers. *Storrs v. Howe et al.*, 4 Cliff. 388.—CLIFFORD, 1876.

222. The invention of the patent in suit consisted "in uniting the comparatively solid substances which are employed at or near the front part of billiard cushions with the elastic foundation of the cushions, by placing the more solid substances in a mould and allowing the melted rubber to flow against or around the same, so that it shall surround the back and end of the edges, and thus securely confine it." In the manufacture of defendants' cushions the compound band was surrounded entirely by rubber along the whole length of the cushion, and just within it, in a line parallel to the face, against which, in the use of the table, the ball struck, the location of the compound band was attained by suitably securing it in the rubber cushion mould before vulcanization. Defendants were held to infringe. *Collender v. Came et al.*, 4 Cliff. 393.—CLIFFORD, 1876.

223. The claims of the patent in suit were: "1. The forming one, two, or more creases in cloth by means of markers on opposite sides of the cloth, one of which is connected with the

feed of the machine and the other operates simultaneously with the vibrations of the needle in a sewing-machine, whereby the crease or creases are formed in the cloth itself, parallel to the line of sewing, in such manner that the cloth is ready for doubling over at the creases for the next line of sewing." "2. Marking a line on the surface of cloth or other material sewed in a sewing-machine, by means of a pencil or similar article pressed upon the surface of the cloth at the time the needle perforates the same, and is raised therefrom when the deed takes place, so as to produce a series of marks parallel and simultaneous with the line of sewing." The court said: "The invention described in the first claim is merely the described apparatus for forming one, two, or more creases in cloth by means of markers on opposite sides of the cloth, for the purpose and in the manner and by the means therein described, it being clearly understood that the patentee does not claim the described means of attaching the patented apparatus to a sewing-machine. [2]. . . The invention described in the second claim is merely the described apparatus for marking a line on the surface of cloth or other material sewed on a sewing-machine by means of a pencil or other similar article pressed upon the surface of the cloth at the time the needle perforates the same, for the purpose and in the manner and the means described, excluding the means by which the patented apparatus is attached in a sewing-machine." The court further said: "The distinct features of the invention consist in the elevated bar projecting out of the frame attached to the presser-foot, and the described spring-arm, the bar projecting out from the needle-arm with the described points, and the bed-plate on which they strike." Of defendants' apparatus the court said: "There is in the apparatus of the respondents a pivoted double-spring blade operating on both sides of an upwardly-projecting point. Effective means for operating that blade are also shown, and it appears that they consist in a spring-arm attached to the bed-plate of the marker, which extends over the double blade, and that a vertical slot is made in the spring-arm through which the needle passes, and allows the lower end of the needle-arm to force the spring down on to the double blade while the cloth passes under the blade and over the sharp point, by which the elasticity of that portion of the cloth is lessened, so that it will readily bend to form a tuck at the marker." Defendants were held not to infringe. *Fuller et al. v. Yentzer et al.*, 94 U. S. 288.—SUP. CT. 1876.

224. A claim of the patent in suit was : " I claim the above-described new manufacture of the deodorized heavy hydrocarbon oils suitable for lubricating and other purposes, free from the characteristic odors of hydrocarbon oils, and having a slight smell like fatty oil from hydrocarbon oils, by treating them substantially as hereinbefore described." This was held to be a claim for the process and not for the product. *Merrill v. Yeomans et al.*, 94 U. S. 568.—SUP. CT. 1876.

225. A claim of the patent in suit was : " The plate of hard rubber or vulcanite or its equivalent for holding artificial teeth, or teeth and gums, substantially as described." Of this the Supreme Court said : " The invention . . . is a product or manufacture made in a definite manner. It is not the product alone separated from the process by which it is created." *Smith v. Goodyear Dent. Vul. Co. et al.*, 93 U. S. 486.—SUP. CT. 1876.

226. The claims of the complainant's patent in suit were : " 1. The construction and arrangement of a portable and adjustable dam in sliding or telescopic sections, in the manner and for the purposes described. 2. The combination of the self-anchors with the dam, in the manner and for the purposes set forth. 3. The combination of the boats, supports, or floats with the dam, and the arrangement of anchors to hold the boats in position, in the manner and for the purposes described. 4. The combination and arrangement of windlasses, chains, and boats with the dam, so that by the construction thereof a series of drills may be operated within and enclosed by the dam, in the manner and for the purposes described in the specification." Defendant's apparatus was held not to infringe : " [1] Because the dam, when in position for work, is not suspended from the boat or any other floating structure. [2] Because the funnel of the dome in the respondent's apparatus, though it is capable of being adjusted at different heights, is not and never was self-adjusting to various depths of water. [3] Because it has no self-anchors, free to slide and self-adjusting at all times while the apparatus is in use." *Cam-meyer et al. v. Newton et al.*, 94 U. S. 225.—SUP. CT. 1876.

227. A claim of a patent for a middlings purifier was for a collecting chamber in connection with a blower, air-pipes, and valves for feeding and delivering the meal without allowing the air to pass therewith. Defendants used a flat bolter instead of a reel, and used different kinds of valves for feeding and delivering the meal, but were held to infringe. *Cochrane*

*et al. v. Deener et al.*, 94 U. S. 780.—SUP. CT. 1876.

228. Complainant's patent in suit was for a toy, and the claims thereof were : " First, for the combination of a hollow elastic toy of rubber or the like, with a reed or other speaking device, so that by compressing the toy the reed or other device is made to speak ; and, second, for joining the two parts by a groove in the frame of the reed, around which the rubber will close tightly by its elasticity when the reed frame is inserted through a small hole cut out of the rubber." Defendants manufactured the exact thing and something more ; they prolonged the frame of the whistle so that it also served as a handle to the toy, and added a common whistle to the end of the handle. Defendants were held to infringe. *N. Y. Rubber Co. v. Chaskel et al.*, 9 O. G. 923.—JOHNSON, 1876.

229. The patent in suit was for a whip-socket. In the patented device there was a tightening lever in one side of the socket. Defendants used an entire half of the socket as a lever, and were held to infringe. *Searles et al. v. Van Nest et al.*, 3 Bann. & Ard. 121.—WHEELER, 1877.

230. Complainant's patent was for the Blake stone crusher, in which the movable jaw received its movement from the revolving shaft through iron rods and levers, while in respondent's machine it was communicated from the revolving shaft through a confined column of water. Respondents were held to infringe. *Robertson et al. v. Blake*, 94 U. S. 728.—SUP. CT. 1877.

231. A claim of the patent in suit was : " Making the cutter which cuts the paper from the roll in such form that in cutting off the paper it cuts it in the required form to fold into a bag, without further cutting out." " The assignor of the complainants was the first person to organize an operative machine to make paper-bags from a roll of paper in the flat sheet by a transverse cut across the same with a knife having five planes, so that the blanks, so-called, when cut and folded, will represent a paper bag of the form and description given in the specification and drawings of the patent." Wide differences existed between the patented machine and that of respondents as regards certain operating parts, but respondents were held to infringe. *Union Paper-Bag Co. et al. v. Murphy et al.*, 97 U. S. 120.—SUP. CT. 1877.

232. The patent in suit was for a fluting-machine, the operation of which was to crimp the material in parts and to irregularly puff the uncrimped parts ; that part of the machine to accomplish the irregular puffing consisted of a double-plated segment of a hollow cylinder, the

arch of which was upward and so arranged with regard to the fluting rollers that the part of the material intended to be puffed passed first between the plates of this arched guide and was presented to the plain surface of the roller with the width of the strip, increased by the difference between the lines of the curved or arched surface of the cylinder and the plain or horizontal surface of the roller which received it. The claim was: "What I claim as new and desire to secure by letters-patent is the guide E, constructed with one or more curved or arched portions *a*, in combination with suitable fluting rollers, substantially as herein set forth, for the purpose specified." In respondent's machine the redundancy of material was produced by passing it over a smooth flat surface and, while passing, a detent or finger was applied to that part not to be fluted which, by reason of the pressure of a spring, held back that part of the material. Respondent was held not to infringe. *Werner v. King*, 96 U. S. 218.—SUP. CT. 1877.

233. The patent in suit was for a printer's galley, and a claim thereof was: "The combination of the edge-rail and its metallic facing or lining by means which secure their union and leave the metallic facing or lining smooth or free from perforations or similar interruptions, substantially as and for the purpose set forth." Defendants used L-angle metal facings for ledges, with smooth, unperforated face, supported by a wooden rail attached to it by screws through the bed-plate and the bottom part of the L. Respondents were held to infringe. *Hoe et al. v. Cole et al.*, 13 O. G. 500.—WHEELER, 1877.

234. The claims of the patent in suit were: "1. A rotary blower-case the interior of which is made true by means of plaster-of-Paris or its equivalent, applied as described. 2. Such a blower-case the ends of which are made true by the application of plaster or a like material, as described. 3. Such a blower-case the concaves of which are made true by the use of such material, applied as described." The court considered these claims together; what was done by respondents differed in nothing from the process and means employed by complainant, except that respondents used a compound of glycerine and litharge instead of plaster-of-Paris; and respondents were held to infringe. *Hyndman v. Roots et al.*, 97 U. S. 224.—SUP. CT. 1877.

235. A claim of the patent in suit was: "4. Such a blower-case having the concave arcs, in combination with the end plates, so arranged as to admit of the abutments being introduced or removed without requiring the case to be taken apart, as described." Respondents' case

was cast in two parts, but was held to infringe.—*Id.*

236. The patent in suit was for an improvement in iron bridges, and the claims thereof were: "I do not claim the use of the eye-bars or links as chains of suspension bridges, but what I claim as my invention and desire to secure by letters-patent is: 1. The construction in the lower chords of truss-bridges of series of wide and thin drilled eye-bars CC, applied on edge between the ribs SS on the bottom of the posts, and connected by pins PP, supported in the diagonal tension-braces D and E, all substantially as herein described." It was held that the claim of the inventor did not extend to any other eye-bars or chords than such as were made wide and thin and applied *on edge*; and as those constructed by respondent were cylindrical in form, only flattened at the eye, for insertion between the ribs or projections of the posts, the respondent was held not to infringe. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274.—SUP. CT. 1877.

237. The patent in suit was for an improvement in sieves. The claim of the patent was: "The combination of the hoop A and sieve-cloth C when the edge of the sieve-cloth is clasped within the hoop and thus fastened by swaging, substantially as and for the purpose specified and shown." The defendant's sieve had a wire mesh connected with the rim by what is known in the mechanical arts as "double seaming." Defendant was held not to infringe. *Adams & Westlake M'fg Co. v. St. Louis Wire Goods Co.*, 3 Bann. & Ard. 77.—TREAT, 1877.

238. A claim of the patent in suit was: "I claim the combination of the separate bearings of the cylinder with a single shaft-bearing in the cylinder, shorter than the cylinder and larger than the shaft, in the manner and for the purposes substantially as specified." The court held that "the words 'shaft-bearing in the cylinder, shorter than the cylinder and larger than the shaft,' were intended to be limited to that class of machines having cylinders, and not flanged disks or wheels, for the distribution of seeds;" and as defendants' machine was not of the cylinder class, defendants were held not to infringe. *Moore et al. v. Thomas et al.*, 3 Bann. & Ard. 13.—BROWN, 1877.

239. The claim of the patent in suit was: "I claim a distributing-cylinder for seeding-machines, having a bevelled bearing, substantially in the manner and for the purposes specified." The court held this claim to be limited to that class of seeding-machines having distributing cylinders, complainant evidently having refer-

ence to a periphery-feeding cylinder set forth in his specifications; and as defendants used disks, they were held not to infringe.—*Id.*

240. Complainant's patent was for improvement in the manufacture of bolts and round rods. The claims of his patent were: "1. The process, substantially as hereinbefore set forth, of forming, from a round piece of metal, a heated bolt blank, having an angular neck and a round stem, which process consists in subjecting a portion of the length of the round piece of metal to lateral swaging or compression on all sides simultaneously to form the angular neck, and, while the piece is firmly held with the neck portion enclosed at all sides, upsetting the projecting end of the swaged piece of metal to form the head of the bolt blank. 2. The process, substantially as hereinafter set forth, of forming the angular neck and protuberant head of a bolt, which consists in subjecting a round piece of metal to lateral swaging between angular-grooved dies, the end surfaces of which dies, when closed, form the anvil against which the projecting end of the swaged piece of metal is upset and formed into a head by proper machinery." The court held that what the patentee had invented was a new way of manufacturing bolt blanks by the described swaging dies to be used in connection with upsetting machinery, and that his invention was a method or process consisting in the combination of the operation of swaging the blank laterally by the said dies with the operation of upsetting the end of the bolt to form the head. Defendants' machine brought about the same results, but in a somewhat different way, and was held not to infringe. *Clark v. Kennedy M'fg Co. et al.*, 14 Blatch. 79.—SHIPMAN, 1877.

241. Complainant's patent in suit was for a machine for cutting the soles of shoes by means of a die borne upon a shaft. After each cut the die rose, made a half revolution, and then made another cut. In defendants' device a shaft was not present, but there was used in lieu thereof a sleeve. Defendants were held to infringe. *Maynadier v. Tenney et al.*, 2 Bann. & Ard. 615.—SHEPLEY, 1877.

242. Complainant's patent was for making cartridge cases, and the claims thereof were: "First, the mandrel which carries the cartridge shell in combination with the die D, which admits the same, and against which the closed end of the cartridge shell is headed, substantially as described. Second, the die constructed and operating for the heading of cartridge shells, substantially as described." In defendants' machine there was found the same die, mandrel,

and bunter operating in the same manner to form the flanged head of the cartridge, except that in defendants' machine the bunter moved toward the die to head the shell, while in complainant's machine the die moved toward the bunter. Defendants were held to infringe. *Union Metallic Cartridge Co. v. U. S. Cartridge Co.*, 2 Bann. & Ard. 598.—SHEPLEY, 1877.

243. Complainant's patented improvement was a marine paint compounded of, first, a suitable vehicle or medium; second, the oxide of copper, yielding a poisonous solution in water, and, third, such earthy and mineral matters as separate the particles of oxide and retard such solution. Defendants used as the poisonous ingredient an arsenite of copper, and they were held to infringe. *Wonson v. Gilman et al.*, 2 Bann. & Ard. 590.—SHEPLEY, 1877.

244. Complainant's patent was for an improvement in augers, bits, etc., and the claims thereof were: "1. The combination of the barrel A, provided with a socket C, jaws B and D, and nut N, working on a screw for holding a boring-tool, substantially in the manner described and specified. 2. The socket C of the barrel A, having cavities *b b*, in combination with the jaws B D, having curved ends to fit therein, to allow the necessary lateral movement in the socket without falling out, substantially as described and specified." The peculiar features of the patented handle consisted in combining with the handle a slotted cylinder, provided with a rectangular tapering bore for holding a tool-shank and hinged jaws working in the slot, having lateral movement and receiving different sizes of tools, and a nut moving on a screw-thread upon the circumference of the cylinder. In defendants' tools there was a threaded and slotted cylinder, loosely holding a pair of movable jaws pivoted at the foot, and enclosing a bit shank, which they were made to clamp by the action of an encircling nut. The tapering bore of complainant's patent was transferred in defendants' braces to the faces of the jaws. Defendants were held to infringe. *Miller's Falls Co. v. Ives et al.*, 14 Blatch. 169.—SHIPMAN, 1877.

245. The claims of complainant's patent in suit were: "1. In a trunk, and in combination therewith, a tray, removably hinged in the body of said trunk, substantially as and for the purpose set forth. 2. In a trunk a compartment tray provided with the strap hinges in combination with sockets attached to the back and inside of the trunk body, substantially as described, for the purpose of removably hinging the tray." There had been removably hinged trays in the covers of trunks, but not in the bodies, and the

court held complainant entitled to a broad construction of the claims. Defendant did not use complainant's strap hinge and socket, or roller and socket, but was held to infringe. *Volger v. Semple*, 7 Bissell, 382.—BLODGETT, 1877.

246. A claim of complainant's patent in suit was: "A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described." Complainant formed his joint by the permanent interposition of some material between the blocks. Defendant formed his joint by the insertion of a cutting instrument between the blocks; then removed the instrument, leaving the joint an open one for a time. Defendant was held to infringe. *Schilling v. Gunther*, 14 Blatch. 152.—SHIPMAN, 1877.

247. A claim in complainant's patent in suit was: "A plug of tobacco having a hard label pressed into one of its faces, as specified." As the specification described only the mode of applying the label to the plug underneath the outer covering, defendants contended that the words "as specified" limited the claim to that particular mode. The court held otherwise. *Lorillard et al. v. McDowell et al.*, 2 Bann. & Ard. 531.—MCKENNAN, 1877.

248. Complainant's patent in suit was for a rock-drill. The claim thereof was: "In combination with a revolving and progressing boring-head, having cutting points projecting beyond the periphery thereof, a hollow central drill rod through which the water is forced or passed." Defendants' drill was an exact imitation of the complainant's device, with the exception that, in the place of the annular boring-head, there was substituted a convex boring-head, with two holes in its surface. Defendants were held to infringe. *Am. Diamond Rock-Boring Co. v. Sullivan Mach. Co. et al.*, 14 Blatch. 119.—SHIPMAN, 1877.

249. A patent for an improvement in bushings and wrenches for barrels was reissued in two divisions. The claim of Division A was: "The wrench herein described, consisting of a shank A, plate B, projection D, and core E, the said core adapted to fit the opening through the bushing, whereby the same is prevented from assuming an oblique position when being turned into place, substantially as described." The claim of Division B was: "The screw-threaded metallic bung-bushing, made tapering upon both its outer and inner sides, and provided with the flange B, having the V-shaped notch d, as and for the purpose described." The court considered these patents as constituting substantially one patent to accomplish a particular purpose. Defendant used a bushing, and also a wrench

with a core, but adopted another method than that shown in the patent by which the engagement took place between the wrench and the bushing, so as to hold the bushing fast while it was being inserted in the barrel. Defendants were held to infringe. *Cornell v. Downer & Bemis Brewing Co. et al.*, 7 Bissell, 346.—DRUMMOND, 1877.

250. Complainant's patent in suit was for "a combination of nitro-glycerine with infusorial earth or other equivalent substance." The substance used by defendants in combination with nitro-glycerine was meal powder of nitrate of soda, charcoal, and sulphur, in proportions the same as in some gunpowder in common use in granular form. This meal powder of defendants, like complainant's infusorial earth, retarded the explosion of the nitro-glycerine under similar circumstances. But when it was exploded the meal powder co-operated in the explosion, which the infusorial earth could not do. Defendant was held to infringe. *Atlantic Giant Powder Co. v. Goodyear*, 3 Bann. & Ard. 161.—SHEPLEY, 1877.

251. A claim of the patent in suit was: "A wooden pavement composed of blocks of any desired wood, cut from the trunks or branches of trees or saplings, of any desired length, in their natural form, the bark only being removed, placed with their fibres vertically upon a bed of broken stone and gravel or sand, or either of them, the spaces between the blocks being filled with gravel or sand, the whole made compact by ramming, rolling, or other proper method, as herein shown and described." Defendants' blocks were cut from the trunks and branches of trees or saplings in their natural form, except that a segment of from one half an inch to one and a half inches in thickness was split from one side of the block. The court held that this was merely a substitute. *Phillips et al. v. City of Detroit*, 2 Flippin, 92.—BROWN, 1877.

252. The claim of the patent in suit was: "[1] The within-described method of forming the eye of picks, consisting in first punching the bar; second, in setting down the metal on either end around the eye; and, lastly, drawing down on a mandrel between rolling dies, substantially as described and shown. [2] The dies E, constructed as described, for drawing down the eye, substantially as shown." The distinguishing merit of the invention consisted in supplying dies of novel construction and form, adapted to forming the eyes of picks by a new method, and combining with the old steps in forming the eyes of picks a new element, drawing them down on a mandrel in rolling dies, which completely en-

compassed the walls of the eye. Defendants, after punching the iron bar out of which the pick was to be formed, set down the metal on either side of the eye, and then drew down the eye on a mandrel between rolling dies which entirely enveloped the wall of the eye. The dies of complainant and defendants differed somewhat in form and in number of parts. Defendants were held to infringe. *Klein v. Park et al.*, 3 Bann. & Ard. 145.—MCKENNAN, 1877.

253. Following the decision of the Supreme Court, the Circuit Court held the Cummings patent for artificial gums or palates to be for a "product or manufacture made in a defined manner. It is not a product alone separated from the process by which it is created. The claim refers in terms to the antecedent description, without which it cannot be understood. The process detailed is thereby made as much a part of the invention as are the materials of which the product is composed." Defendant used celluloid for making his dental plates, and the process of making, therefore, differed from the Cummings process. Defendant was held not to infringe. *Goodyear Dental Vulcanite Co. v. Davis*, 3 Bann. & Ard. 115.—SHEPLEY, 1877.

254. Complainants' patented improvement in cans consisted in providing for opening cans, without cutting them or unsoldering, by making a slot around the part to be removed, placing a wire in the slot, with one end projecting and connecting the sides of the can with solder over the wire, so that by pulling on the wire it would divide the solder to leave the part to be removed free. Defendants' device consisted in placing a narrow strip of metal with a projecting end over a similar slot and soldering the end of the strip to those of the slot, so that, by lifting the strip outward, it would divide the solder at the edges, uncover the slot, and leave the part to be removed free. Defendants were held not to infringe. *De Flores et al. v. Reynolds et al.*, 14 Blatch. 505.—WHEELER, 1878.

255. The patent in suit was for a machine for fixing metallic rings to umbrella-cases, and a claim thereof was: "In a machine for claspings the metal binders to umbrella-covers and cases, a hollow heated post or holder, E, for the umbrella-case, for the purpose stated." Defendant substituted for the hollow, fixed, internally heated iron post of complainant's patent, a solid, removable and externally heated iron post over which the umbrella-case, having been drawn inside out, was drawn or passed. The metallic ring which was to be fixed to the smaller end of the umbrella-case was fitted over the end of the anvil-post, and then, instead of bringing down the hammer

upon the post, he raised up the post by means of a treadle until it struck the immovable case having a hollow, into which the top of the post entered, whereby the claspings of the ring to the umbrella-case was effected. Defendant was held to infringe. *Odiorne v. Denney*, 3 Bann. & Ard. 287.—NIXON, 1878.

256. Complainant's patent was for improvement in tempering umbrella ribs and similar articles, and a claim thereof was: "Constructing the tempering die with a square hole, corresponding in size to the wire to be tempered, in order that the wire may be straightened in all directions and the flattened portions of the wire be brought in line with each other, as and for the purpose specified." Defendants made umbrella frames with ribs of U-shaped wire; defendants' dies were formed of two plates, one above and one below, the groove in one plate being shallow and semi-elliptical and the groove in the other plate broader and deeper; the hole in defendants' dies was not a square hole. Defendants were held to infringe, the court saying: "The fair construction of the first claim, in connection with the body of the specification, is a claim to the mode or process of tempering and straightening a rib which has a body, and flattened portions other than such body, by drawing the rib through a straight hole or groove in a heated metallic die of the proper size and shape to at once embrace closely the body of the rib, and yet, by supplemental spaces in the groove, to allow such flattened portions to pass through freely and be brought in line with each other." *Am. Mfg. Co. v. Lane et al.*, 14 Blatch. 438.—BLATCHFORD, 1878.

257. The patent in suit was for a machine for graduating carpenters' squares, and a claim thereof was: "In a machine for cutting graduations on squares, etc., the combination of the gravers I and their holders H with cams G and springs d, for throwing the gravers out of action at predetermined periods of time during the stroke of the same to cut graduation marks of varying lengths, substantially as described." Complainant's machine contained an entire set of gravers revolving in a true circle, while the square remained stationary. Defendants' machine had but one graver, and the square was moved along by an intermittent feed. The graver returned to its work after one mark had been made in the flattened circle. Both machines had the "flying cut." Defendants were held to infringe. *Hart, Bliven & Mead Mfg. Co. v. Sargeant et al.*, 3 Bann. & Ard. 263.—SHIPMAN, 1878.

258. A claim of the patent in suit was:



“ ‘ Artificial alizarine produced from anthracene or its derivatives by either of the methods herein described, or by any other method which will produce a like result. ’ ” Defendants contended that alizarine was a well-known substance long before the patent, and that the patent was void as claiming such substance broadly. The court held otherwise, and held that the patent covered a new composition of matter and new manufacture having the properties described, produced from anthracene by any process capable of producing that new product. *Badische Anilin & Soda Fabrik v. Hamilton M'fg Co.*, 3 Bann. & Arl. 235.—SHEPLEY, 1878.

259. The patent in suit was for an india-rubber door-mat having three essential features, to wit: first, a flexible gum mat; second, flexible gum ridges to serve as scrapers; third, cells to contain the dirt. Defendants manufactured certain articles designed to constitute the steps of wheeled carriages and cars; they had little hemispheres of rubber projecting less than a quarter of an inch, or small pyramids of rubber half an inch square at the base and one eighth of an inch high. Defendants were held not to infringe. *Brown et al. v. Rubber Step M'fg Co. et al.*, 3 Bann. & Arl. 232.—SHEPLEY, 1878.

260. A claim of the patent in suit was: “Uniting the parts employed in forming combination billiard cushions by placing the harder or more dense and less elastic substance in a mould, and allowing the melted rubber to flow against, around, or into the harder or more dense and less elastic substances, or causing the plastic rubber, by pressure, to unite with the same, and then vulcanizing the india-rubber, substantially as and for the purpose set forth.” This was held to be a claim for a process, and articles having the same resulting construction, but not made by the process in question, were held not to infringe. *Collender v. Bailey*, 3 Bann. & Arl. 217.—SHEPLEY, 1878.

261. The patent in suit was for an attachment to whip-sockets for fastening them to carriages; the device used was a clamp, one arm of which was formed of projections on the side of the socket, and the other of a lever of the third order, both curved to fit the dash-rail of a carriage, the same being worked by a screw and nut. Defendants used two different kinds of attachments which had a clamp; one was made up of projections from the socket, a bar to go behind the dash-rail, and two screws with nuts, one each side of the rail. The other had like projections and a bar to go behind the rail, with the bar hinged to one projection at one side of the rail, and worked by a nut and screw at the other side

of the rail. The prior art approached close to the patentable invention. Defendants were held not to infringe. *Merriman et al. v. Van Nest et al.*, 3 Bann. & Arl. 209.—WHEELER, 1878.

262. The patent in suit was for a sash-lock, and a claim thereof was: “ ‘ A vibrating lever, provided with a bolt, in combination with a striking-plate or hook, and with a catch segment behind which the bolt can pass, formed upon the plate upon which the lever is pivoted, the whole constituting a sash-fastener, and the parts enumerated in the claim being and operating substantially as specified. ’ ” The difference between complainant's device and defendants' device consisted in the fact that in defendants' device the bolt moved in a line perpendicular to the line of the lever instead of moving in a line parallel to the line of the lever, and engaged with a socket upon the base-plate instead of engaging with a projection from the base-plate. This invention was a joint invention. The joint invention was within a very narrow compass, and it was held that the devices held to be equivalents had anticipated it, and that the joint invention could not be made to relate back and include the pre-existing devices, although they were the sole invention of one of the joint patentees. *Hopkins & Dickinson M'fg Co. v. P. & F. Corbin et al.*, 14 Blatch. 396.—SHIPMAN, 1878.

263. The patent in suit was for a printers' galley; the improvement consisted of galleys of wooden ledges faced with metal, secured with fastenings back of, and not interfering with, the smooth faces of the ledges, the metal faces being fastened to the wooden ledges by extending the metal back at the top and bottom, and turning flanges on the extensions to be forced into corresponding grooves in the wooden rail. The claim of the patent was: “The combination of the edge-rail and its metallic facing or lining by means which secure their union and leave the metallic facing or lining smooth or free from perforations or similar interruptions, substantially as and for the purpose set forth.” Defendants used an L-angle, metal facing for ledges, with smooth unperforated face, supported by a wooden rail attached to it by screws through the bed-plate and the bottom part of the L. Defendants were held to infringe. *Hoe et al. v. Tuthill et al.*, 5 Dillon, 495.—WHEELER, 1878.

264. Complainant's patent for improvement in skates was for a combination of movable Y-slotted blocks, with clamps on the guide rod. Respondent used a lever and eccentrically pivoted cam, and was held to infringe. *Turrell v. Speath*, 14 O. G. 377.—NIXON, 1878.

265. For an example of a patent construed strictly, and thereupon respondent held not to infringe, see — *Chicago & Northwestern R. R. Co. v. Sayles*, 97 U. S. 554.—SUP. CT. 1878.

266. Complainant's patent was for "a bronze dressing for leather composed of spirit varnish and aniline fuchsine, . . . either with or without the addition of aniline blue or bronze powder." Instead of aniline blue the respondent used aniline violet, which consisted largely of fuchsine and aniline blue mixed. The defendant was held to infringe. *Cahill v. Brown*, 3 Bann. & Ard. 580.—CLIFFORD, 1878.

267. Complainant's patent was for improvement in carburetting apparatus, and a claim thereof was: "The application and use of the meter wheel, with its case and contents, as an air-blast apparatus, operated by weights or otherwise, not meaning to claim the method of using the meter for measuring gas." The court said that: "Taking the claim and specification together, it is intended to claim the meter itself as described, and for the purposes set forth, as contradistinguished from an ordinary meter for measuring the flow of gas." *Munson et al. v. Gilbert & Barker M'fg Co.*, 3 Bann. & Ard. 595.—LOWELL, 1878.

268. The claims of complainants' patent were: "1. In a machine for shaping whip-stocks, the combination of the two rotating and adjustable clamps for holding the whip-stocks, with revolving cutters whose axis of rotation is at right angles to the axis of the stock, substantially as described, for the object set forth. 2. In a machine for shaping whip-stocks, the combination of revolving cutters, the adjustable and rotating clamps for holding and revolving the whip-stocks, and the guides through which the stock is passed for firmly holding the stock while being dressed by the cutters, as described." Defendant made changes in two of the devices; instead of burrs to scrape off enamel he used numerous blades, and he combined the clamping and advancing mechanism in one device. Defendant was held to infringe. *Am. Whip Co. v. Lombard*, 4 Cliff. 495.—CLIFFORD, 1878.

269. A claim of complainants' patent was: "The electro plating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact." The court held this to be "a claim to the product or coating named in it, having the qualities described in it, when such product or coating is produced by employing the invention covered by the first claim."

*United Nickel Co. v. Harris et al.*, 15 Blatch. 319.—BLATCHFORD, 1878.

270. "A claim to the method herein described, for preparing the solution of the double sulphate of nickel and ammonia, and the double chloride of nickel and ammonium, . . ." is the same thing as a claim to each solution prepared by the method described for preparing each.—*Id.*

271. A claim of complainant's patent in suit was: "The arrangement, in a reed musical instrument, of the reed-board A, having the diapason set *a* and its octave set *b*, and the additional set L extending from about tenor F upward through the scale, substantially as and to the effect set forth." The court held that the invention covered by this claim was not the mere addition to the reed-board of an organ, having two sets of reeds, of an intermediate partial set from tenor F upward, but the addition to such reed-board of such an intermediate set combined in the manner set forth in the specification. *Burdett v. Estey et al.*, 15 Blatch. 349.—BLATCHFORD, 1878.

272. A claim of complainant's patent was: "The reed-board A and the foundation board G, constructed with the contracting valve openings D, F, F', and the reeds arranged in relation thereto, all in the manner described." Of this the court said that "the expression 'the reeds' in this claim means the reeds in the two sets and the additional set."—*Id.*

273. The patent in suit was the Cummings patent for improvement in artificial gums and palates. Defendant made a gold plate mounted with rubber holding a single tooth. It was held that defendant infringed. *Goodyear Dental Vulcanite Co. v. Preterre*, 15 Blatch. 274.—WHEELER, 1878.

274. Complainants' patent in suit was the Cummings patent for artificial gums and palates, using dental vulcanite; defendant used celluloid, also rose pearl, and was held to infringe.—*Id.*

275. The claim of the complainant's patent in suit was for "the arrangement of tar paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose set forth." It was held that the patent was infringed by laying sectional cement pavement, leaving metal plates in the joints, afterward withdrawing the plates and pouring pitch into the joints; also by filling the joints with cement. *Schillinger v. Gunther*, 15 Blatch. 303.—BLATCH, 1878.

276. Complainant's patent for gas-burner was for a combination of the regulating valve with a perforated burner and a surrounding tube; in view of the state of the art, the claim was limited

to the form described, and the defendants held not to infringe. *Clough v. Gilbert & Barker M'fg Co. et al.*, 3 Bann. & Ard. 523.—BLATCHFORD, 1878.

277. Complainant's patent in suit was for improved catch for spectacle cases, and the invention consisted in producing two coincident indentations in the two parts. Defendant made a hole in one part and an indentation in the other, and was held to infringe. *Parker v. Remhof*, 17 Blatch. 206.—BENEDICT, 1878.

278. The patent in suit was for a mode of pitching the insides of barrels. Complainant's device was a furnace with grate-bars in the bottom; underneath the grate-bars was a pipe coming from the blower; and the heated air went out through the pipe into the bung-hole of the barrel. Defendants had different devices: one in which the fan or blower was attached by a pipe at the bottom; the air was driven through the fire, there being a grate-bar in the bottom, and the cask attached upon the pipe. Defendants' other machine involved the same principles, but was so adjusted as to receive the casks suspended upon hooks, so that the air nozzles fitted in the bung-holes. Defendants were held to infringe. *Gottfried et al. v. Bartholomae et al.*, 8 Bissell, 219.—BLDGGETT, 1878.

279. A claim of the patent in suit, for clock-escapement, was: "The anchor-escapement, constructed as described, with one pallet, D, having a flag flange, *d*, and the other pallet, E, bent out, whereby one pallet is made dead beat and the other recoil." The question was whether this claim should be limited to a bent verge. The construction did not appear upon the face of the claim; there was nothing in the specification which showed that the essence of the invention was a bent verge, and a broad construction of the patent was supported by its history. It was held that the claim was not to be limited to a bent verge. *Terry Clock Co. v. New Haven Clock Co.*, 3 Bann. & Ard. 332.—SHIPMAN, 1878.

280. The complainants' patent in suit was for a fabric composed of a layer of bituminous material between sheets of saturated paper increased in thickness by the addition of layers of bituminous material when and as desired. Defendants made four kinds of fabric; each one had one or more layers of bituminous composition. In each of defendants' fabrics the layers were protected on the upper side by saturated paper and in two of them on the under side; in one of the others unsaturated manilla paper and in others unsaturated felt was used. In some of defendants' fabrics cloth, and in others unsaturated manilla,

and in still others unsaturated felt paper, was inserted between the layers. All defendants' four fabrics were held to be infringements. *Ready Roofing Co. et al. v. Taylor et al.*, 15 Blatch. 94.—WHEELER, 1878.

281. The claim in complainant's patent for grain separator and scourer was for: "The combination, with a suction fan, scouring mechanism, perforated enclosing shell, and outer tight casing, of a draught passage connecting the chamber outside of said perforated shell directly with the fan case, said passage being provided with auxiliary air inlets or openings, substantially as and for the purpose set forth." Defendant's machine had "a suction fan arranged above the scourer; a scouring mechanism, consisting of revolving wings or beaters, attached to the same shaft to which the fan is attached; a perforated shell enclosing the revolving beaters; an outer tight casing surrounding the perforated shell, but so as to leave a space or chamber between such outer casing and such shell; a draught passage connecting such chamber directly with the fan case, in such manner that the smut and other adherent matter which pass through the perforations in such shell into such chamber are conducted to the fan without commingling with, or again coming in contact with, the scoured grain, and auxiliary air inlets, in the shape of holes in the upper end of the scouring shell, instead of holes through the outer casing, as in the plaintiff's machine." Defendant was held to infringe. *Hovos et al. v. McNeal*, 15 Blatch. 103.—BLATCHFORD, 1878.

282. A claim in complainants' patent for grain separator and scourer was: "In a combined scourer and grain separator the arrangement of the two wind-trunks side by side, in the manner shown and described, and for the purpose hereinbefore set forth." Defendant's machine had two wind-trunks arranged side by side, each provided with a separate valve and each approximating the form of the separator set forth in complainant's patent; both wind-trunks were connected with the fan; the scourer had a perforated case. Defendant's machine was held to infringe.—*Id.*

283. Complainants' patent was for a machine for making paper bags. The cutter was of the following form:

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The first claim of the patent was for "making the cutter which cuts the paper from the roll or piece of the form described, so that in cutting off the paper it also cuts to the required form to

fold into a bag, without further cutting out." Defendants' cutter was of the following form :



Complainants' cutter produced no waste of the paper, which was severed between the two blades at the right and left extremities; defendants' cutter did produce waste paper. Defendants were held to infringe. *Union Paper-Bag Mach. Co. et al. v. Pultz & Walkley Co. et al.*, 15 Blatch. 160.—SHIPMAN, 1878.

284. "In order to ascertain the proper construction of the patent, it is important to know the nature and extent of the invention which was made up by the patentee."—*Id.*

285. Complainants' patent for improvement in a paper-bag machine was dated July 12th, 1859. July 25th, 1856, E. W. Goodale, brother of the patentee, made application for patent, which was rejected; the model in that application contained a cutter of the same kind as that used by defendants and judged to be an infringement; E. W. Goodale never made a machine of full size. William Goodale knew of what E. W. Goodale had done. Defendants were held to infringe.—*Id.*

286. Complainant's patent was for a marine paint composed of oxide of copper, an earthy or mineral base, and a vehicle or medium. Defendants used in their paints sulphuret of antimony, an earthy or mineral matter, which dissolves in water more slowly than the oxide of copper; defendants used it in combination with oxide of copper and a suitable vehicle or medium. Defendants were held to infringe. *Wonson v. Peterson et al.*, 3 Bann. & Ard. 249.—SHEP-LEY, 1878.

287. The claim of the patent in suit was: "In combination with a stove-oven a hinged shelf fitted to fall outward and down automatically when the oven door is opened, and to be raised up by closing the oven door, adapted to operate upon it for that purpose, substantially in the manner and for the purposes herein set forth." Respondent's stove had the same hinged shelf to which the patent related, but instead of operating from below, as described in the patent, it operated in a similar manner from above. It was old to use a hinged shelf in combination with a stove-oven, without the patentee's device for raising it up and letting it down by means of the opening and closing of the door; the cam used for this purpose by the patentee was old; and respondent was held not to infringe. *Bridge, Beach & Co. v. Excelsior M'f'g Co.*, 17 O. G. 259.—DILLON, 1879.

288. Complainant's patented invention consisted of "a skirt protector having a fluted or plaited border bound with or composed of enamel cloth or other water-proof material, as distinguished from a skirt facing." Defendant's article did not have a fluted or plaited border, and was held to infringe. *Macdonald v. Sidenberg et al.*, 4 Bann. & Ard. 586.—BLATCHFORD, 1879.

289. Complainants' patent was for a machine for making gutters for buildings, and claims thereof were: "1st. The rotary cutter-stock R, with its cutters, to form the grooves of the gutter, in combination with the inclined frame S, to operate as herein described and for the purposes set forth. 2d. The combination of this part with that which moulds the bottom of the gutter at one operation of the machine." Defendants used a gouging cutter with an inclined frame in combination with cutters for moulding the bottom of the gutter at one operation of the machine; they brought their cutter into connection with the stock by screws and not by a lever, and could not operate the cutter without stopping the feed of their machine. Complainants' lever had the power of bringing the gouging cutter in contact with the stock and taking it away again instantly. Gutters with both ends stopped had been used on a prior machine. Defendants were held not to infringe. *Buffam et al. v. Oakland M'f'g Co.*, 4 Bann. & Ard. 599.—LOWELL, 1879.

290. Complainant's patent in suit was for a composition for soap, consisting of ingredients in proportion as follows: "To one thousand pounds of tallow and caustic soda sufficient to saponify the tallow, add two hundred pounds of resin and lye sufficient to saponify the resin and water, enough to make the mass weigh about seven thousand pounds; then add from three and a half to four pounds of pulverized quartz to one part of the above mixture." And a claim was: "A soap composed of the ingredients and in about the proportions given." Defendants used a greater proportion of resin, and also added sal-soda and borax. Defendants were held to infringe. *Eastman v. Hinckle et al.*, 5 Bann. & Ard. 1.—BUTLER, 1879.

291. Complainants' patented improvement was for pitching the interior of casks, and a claim thereof was: "The application of heated air, under blast, to the interior of casks, by means substantially as described, and for the purposes set forth." Each of the parts of complainants' mechanism, when taken separately, was old. The court held that "it is the combination of these parts in a mechanism by which the dis-

tinctive character of hot-blast, capable of successful use in heating barrels for pitching purposes is produced, which constitutes the invention; and the claim must . . . be regarded as a claim to the particular means and mode of operation described in the specifications." *Gottfried et al. v. Phillip Best Brewing Co.*, 5 Bann. & Ard. 4.—DYER, 1879.

292. Complainant's patent was for an improvement in glove fasteners, consisting in the combination of a spring inserted in the material of the glove and extending around the edges of the slit, which permitted drawing the wrist of the glove over the hand and closing automatically, and overlapping itself. Defendants made and sold for use springs for gloves to be inserted into the material, with arms extending along each edge of the slit and joined at the apex and working together like the blade and handle of a jack-knife. Springs had been previously combined with the wrists of gloves, but in a different form. Defendants were held not to infringe. *Field v. De Comean et al.*, 5 Bann. & Ard. 40.—WHEELER, 1879.

293. Complainants' patent in suit was for an improvement in bit braces, and a claim thereof was: "The combination of the socket F, having cams *bb*, and a nut B, provided with dogs C C, substantially, etc." Defendant had organized on the inside of the nut or sleeve a pair of grasping jaws, which worked like those of complainant, and was held to infringe. *Miller's Falls Co. v. Backus*, 5 Bann. & Ard. 53.—LOWELL, 1879.

294. Complainant's patent in suit was for an improvement in spring bed bottoms. The specification describes the improved compound bar as being composed of two or more thin bars of wood laid one upon another and having their bolt holes sufficiently larger in diameter than the bolts which passed through them to allow each bar to spring independently of its fellow. Defendants used a double bar, with each two bars riveted together tightly, so that one bar could not move upon the other. Defendants were held to infringe. *Ladd v. Tucker M'fg Co.*, 4 Bann. & Ard. 344.—LOWELL, 1879.

295. The claim of the complainant's patent in suit was: "A postage or revenue stamp having a portion of its surface composed of thin or fragile paper, or other suitable material, loosely attached, and on which a portion of the design or other matter is printed, substantially as and for the purpose or purposes set forth." Defendants' stamp was composed of a piece of paper of one thickness, bearing the printed matter; a slip of red blank paper was attached to the out-

side edges of the back of the body of the stamp, which slip was about one third of the length of the body of the stamp and was of the same width: when the stamp was used it was tacked to a barrel head, varnished, cancelled by a stencil, and sometimes a portion of the red slip which was not attached to the barrel and some of that portion which was attached to the barrel, in consequence of the intervention of the slip, was cut out and preserved, the blank slip adhering to the pasted surface of the barrel. Defendants were held to infringe. *Fletcher v. Selden*, 16 Blatch. 468.—SHIPMAN, 1879.

296. A claim of complainant's patent in suit was: "An elastic packing composed of at least four tenths of finely pulverized refractory, earthy, or stony material, intimately mingled with and held together by rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described." Defendant's packing was composed of Para rubber, 10 pounds; gutta-percha, 5 pounds; sulphur, 4½ pounds; bone black, 22½ pounds—or Para rubber, 14 pounds; gutta-percha, 7 pounds; sulphur, 6 pounds; bone black, 28 pounds. The language of the specification of complainant's patent apparently excluded from its scope a combination where the proportion of sulphur used was such that the product was vulcanite. Defendant's packing invariably contained vulcanite, and was held not to infringe. *Clarke v. Johnson*, 16 Blatch. 495.—BENEDICT, 1879.

297. The court construed the expressions "insoluble india-rubber" and "gutta-percha" to mean one and the same thing. *Colgate v. Gold & Stock Tel. Co.*, 16 Blatch. 503.—BLATCH, 1879.

298. A claim of complainant's patent in suit was: "The bottle-stopper described and shown, the same consisting of the cap A, the elastic water-proof filling *a*, and the swinging spring frame B, the whole being constructed, arranged, and combined together so as to operate, when applied to the mouth and neck of a bottle, substantially as described, for the purposes specified." Defendant's device consisted of an elastic disk-stopper provided with a stem inserted in the flange thimble; the opening and closing mechanism consisted of a V-shaped yoke made of a stiff piece of wire, the central portion of which passed loosely through the stem of the stopper; the ends of this yoke were bent inwardly and pivotally connected with the lever, which lever was V-shaped, made of stiff wire bent around the neck of the bottle, and had each of its legs coiled for the purpose of forming two eyes for the reception of the inwardly bent ends

of the yoke. Defendant was held not to infringe. *Hicks v. Moller*, 4 Bann. & Ard. 434.—SHIPMAN, 1879.

299. A patent for a concrete pavement laid in detached blocks or sections is not to be construed as covering the case where blocks of cement are made in one place and carried to another place and there laid. *Schillinger v. Gunther*, 17 Blatch. 66.—BLATCHFORD, 1879.

300. A claim in complainant's patent in suit was for "a non-conductor of heat used as a packing between the stove and the oil-holder, arranged substantially as described and set forth." The specification contemplated only a solid non-conductor; defendants used water, and were held not to infringe. *Couse et al. v. Johnson et al.*, 4 Bann. & Ard. 501.—MCKENNAN, 1879.

301. Complainant's patent in suit was for an improvement in lanterns, and the leading feature of this patent was "the construction of a loose-globe lantern, so arranged that the globe can be readily removed and replaced, and at the same time have the metallic parts of the frame permanently attached together so as to make a basket in which the globe will be held or retained, even if the catch holding the top or dome to the frame of the lantern is unfastened." Loose-globe lanterns were old in the prior art; so was the idea of so constructing the lantern that the globe was held in place simply by the guard. Thereupon complainant's patent was construed strictly, and defendant held not to infringe *Adams v. Illinois Mfg Co.*, 4 Bann. & Ard. 543.—BLODGETT, 1879.

302. The claim of complainants' patent for bell-punch was: "The combination of the ratchet-wheel *f*, and pawl *g*, and lever *h*, either with or without the bell attachment, arranged and operating substantially as and for the purposes described." Defendant used a ratchet-wheel, pawl, and lever, but the arrangement was so different, especially in the mode of operating the lever, that, in view of the state of the art, defendant was held not to infringe. *Railway Register Mfg Co. v. Highland St. R. R. Co. et al.*, 4 Bann. & Ard. 116.—LOWELL, 1879.

303. A claim of complainants' patent in suit was: "In a passenger fare-register and alarm, the combination of the operating lever *H*, double pawl *I*, registering disks *F F*, striking hammer *K*, and alarm bell *E*, substantially as herein described." In the machine of this patent the lever operating through the pawl turned the registering disk, and the disk, by means of a pin, engaged with the bell hammer, which sounded the alarm. Defendant changed the register and the alarm so that they operated independently

of each other. Defendant was held not to infringe.—*Id.*

304. A claim of complainants' patent in suit was: "The combination, with alarm and registering mechanism, simultaneously operated for registering the number of times the alarm has been sounded, of one or more ratchet-teeth or bearing-places adapted in shape to receive a detent, and such detent serving to prevent the sounding of the alarm until the detent has been tripped or withdrawn by a tripping piece or cam, operating coincidently with the actuating registering mechanism, for the purpose set forth." Another claim was: "In an alarm register, the combination of the actuating mechanism with a tripping piece or cam, serving to withdraw or disengage a detent adapted to control the operation of the alarm mechanism, for the purpose set forth." Defendant's device operated with a tripping piece to withdraw a detent which controlled the operation of the alarm mechanism in a direct manner; it did not work in exact coincidence with the registering mechanism, and it did not, therefore, necessarily sound the alarm whenever registration took place; but the organization was such that the alarm could never be sounded unless registration had taken place. Defendant was held to infringe.—*Id.*

305. Complainant's patent in suit was for a tub for distilling essential oils, and the claim thereof was: "The cover when provided with a rubber ring, substantially as described." Defendants inserted a rim within the tub a short distance below the top of the staves, and upon this placed the rubber packing. Defendants were held not to infringe. *Van Marter v. Miller et al.*, 15 Blatch. 562.—WALLACE, 1879.

306. Complainants' patent was for a machine for winding thread on spools, and a claim thereof was: "Adjustable lips, substantially such as set forth, in combination with a traverse charger, whereby spools of different lengths may be wound by the use of the same traverse charger." Complainants' traverse chargers revolved, while defendants' slid. The one was in the form of a wheel and the other a plate shaped like a triangular wedge, with its point cut off parallel to its base; the gradually increasing length of the teeth of the periphery of the wheel determined the length of the traverse in the plaintiff's machine, and the same was determined in the defendants' machine by projecting forward the plate for each successive course of thread, so that the longer sections of the shaper should be successively traversed. Defendants were held to infringe. *Willimantic Linen Co. et al. v. Clark*

*Thread Co. et al.*, 4 Bann. & Ard. 133.—NIXON, 1879.

307. Complainants' patent in suit was for plating with nickel. The patent pointed out the fact that the solution must be so used as to be free from the presence of potash or soda. Defendants introduced into their solution sulphate of potash and chloride of soda. The court found that the salts of soda potash and soda are not potash and soda, and that defendants infringed. *United Nickel Co. v. Manhattan Brass Co. et al.*, 16 Blatch. 68.—BLATCHFORD, 1879.

308. A claim of complainant's reissued patent in suit was : "A circular saw constructed with cuts, slots, or openings in its inner or central portion to prevent the warping or buckling of the saw when any part of it is expanded by heat." It was apparent from the original patent that the main thought of the inventor was the use of the slots extending from the eye into the plate of the saw and short of the periphery ; slots in circular saws were part of the prior art. Defendants' slots were not from the eye outward, but had solid surfaces on all sides of such slots. Defendants were held not to infringe. *Curtis et al. v. Branch et al.*, 4 Bann. & Ard. 189.—TREAT, 1879.

309. Complainants' patent in suit was for a preparation of artificial alizarine based upon the action of caustic alkalies upon bibrom-anthrakinon or bichlor-anthrakinon. Defendants reached a similar result by substituting sulphuric acid for bromide or chlorine in the above process, and they were held to infringe. *Badische Anilin & Soda Fabrik v. Cochran et al.*, 16 Blatch. 155.—WHEELER, 1879.

310. Complainant's patent in suit was for an improvement in machines for making heel stiffeners in counters for boots and shoes ; the patent described the use of two rollers for this purpose. Defendant used a spheroidal roller in combination with a stationary mould, and as complainant's patented invention was not completely new, defendants were held not to infringe. *Moffit v. Rogers et al.*, 4 Bann. & Ard. 225.—LOWELL, 1879.

311. A claim of complainants' patent in suit was : "The combination of nitro-glycerine with infusorial earth or other equivalent absorbent substance as a new explosive compound." Defendants' powder contained "in one hundred parts, by weight, the following ingredients in the following quantities : nitro-glycerine, 37.71 parts ; nitrate of potash, 52.68 parts ; sulphur, 5.84 parts ; woody fibre, charcoal, and resin, in nearly equal proportions, 6.77 parts." Defendants were held to infringe. *Atlantic Giant*

*Powder Co. v. Rand et al.*, 16 Blatch. 250.—BLATCHFORD, 1879.

312. A claim of complainants' patent in suit was : "The combination of nitro-glycerine with infusorial earth or other equivalent absorbent substance as a new explosive compound." A powder made by defendants was composed of 56 parts nitrate of soda, 14 parts of charcoal, and 30 parts of nitro-glycerine. Defendants were held to infringe. *Atlantic Giant Powder Co. v. Parker et al.*, 16 Blatch. 281.—BLATCHFORD, 1879.

313. Complainant's patent in suit was for an improvement in padlocks, and the claim thereof was : "I claim in combination the grooves *g*, in the dogs *a*, and the flanges or pins on the projecting parts of the heel of the shackle, substantially as and for the purpose described." The patented invention consisted in the manner of constructing the flanges or pins upon each projection which answered the purpose of a stump, and in the manner in which it engaged with the tumblers. The invention was one of narrow limit. Defendants' lock had a long, grooved, L-shaped arm extending from the heel of the shackle upon its pivot, and the key was inserted in a keyhole which opened in the bottom of the case and was brought to bear upon a set of slotted, loosely pivoted tumblers resting upon each other, raising them until their slots came in a line with each other, and directly opposite the end of the arm of the shackle which had rested against the shoulders of the tumblers, and it was then caused to enter the slot. Defendants were held not to infringe. *Miller v. Smith et al.*, 4 Bann. & Ard. 314.—SHIPMAN, 1879.

314. By the court : "A chair is produced . . . which contains the combination of the second claim, unless that claim should be construed as confined to a chair not having an arrangement not described in the claim itself—that is, to such chairs, and not only such, as are the subject of the first claim. I see no ground for thus limiting the second claim, which would seem to have been made broad on purpose to include a class or classes of chairs not included in the first claim." *Stewart v. Mahoney*, 5 Fed. Rep. 302.—LOWELL, 1879.

315. Complainant's patent was for a copper-cable lightning-rod, and the thing which the specification treated as essential was the manner of laying the cable. The claim was the "copper-cable lightning-rod or conductor, when constructed as herein described and shown." The patentee contended that his invention was a coreless cable. Defendant had a coreless cable, but did not employ the complainant's method of

laying the cable, and was held not to infringe. *Fricke v. Hum*, 22 Fed. Rep. 302.—ACHESON, 1877.

316. Complainants' invention was a whip-tip provided with a screw socket by which it was attachable to the whip-stock, and the claim was: "As a new article of manufacture, a whip-tip provided with a socket so as to be attached to the whip proper, as and for the purposes set forth." Defendants' [patented] device was a whip tip having a socket provided with teeth to be pressed into the stock. The idea of making separate tips for whips was original with complainant, and its practical merits were great. Fishing-rods had previously been made with socketed joints; and whips had been made in sections for transportation. *Held*, that if complainant could hold a broad claim to the independent tip there was no doubt of the infringement, but that the patent was for little more than the application of an old article to a new but analogous use, and that it must be confined to the screw-threads, the defendants' device not being an infringement. *Am. Whip Co. v. Hampden Whip Co. et al.*, 1 Fed. Rep. 87.—LOWELL, 1880.

317. A patent for a mowing-machine said of the parts in question: "The shoes also carry rollers F in front of the finger-bar, which run upon the ground and sustain the finger-bar;" it otherwise described the finger-bar and cutters as working between the driving-wheels; the drawing showed the rollers [F] in front of the shoes, and the patent claimed "the combination of the carrying roller F with the hinged and extended shoes E, arranged and located as herein described." *Held*, that this claim covered the location of the rollers in front of the finger-bar and that of the roller-shoes between the driving wheels, and not the location of the rollers in front of the shoes. *Tinker v. Wilber's E. M. & R. M'fg Co.*, 1 Fed. Rep. 138.—WHEELER, 1880.

318. Complainant's claim in issue was: "The cutter and feeding device of a bung-cutting machine, arranged substantially as hereinbefore described, so that each block, as it is fed into the machine, shall serve as a cutting-board for the next preceding block." On motion for provisional injunction, and apparently on inspection of the patent only, the court said: "If the combination for placing one block after another on the fish-mouth cutter, whether underneath or sideways, vertical or longitudinal, so as to operate as a cutting-board through which that fish mouth may penetrate is an infringement of this patent, the complainant would be correct. But if is not so. It is a particular way of doing a

particular thing. It is a mechanical device wrought out by combinations, which combinations are not in defendants' machine." *Kirby Bung M'fg Co. v. White et al.*, 1 McCrary, 155.—TREAT, 1880.

319. In complainants' patented self-closing faucet "the valve was pushed downward from its seat against a spring by a steep, quick-threaded screw turned by hand, with a swivel to prevent turning the valve with the screw, which lets the valve back when the screw is released." In some prior self-closing faucets "the valves were lifted from their seats by stems, having projections on the upper ends working against steep inclines as cams." "In the faucet of defendants the valve was lifted against the spring by a stem, with projections near the valve working against inclines inside the shell of the faucet." *Held*, to be no infringement in view of the narrow construction of the claim—a combination of the screw and valve—necessitated by the prior art. *Zane et al. v. Soffe*, 2 Fed. Rep. 229.—WHEELER, 1880.

320. Complainant patented a machine for "closing the seams of metallic cans," which, in making a can with covers or angles, had the stock notched at the corner, so that there was no excess of metal at that point to be disposed of in the operation. In the reissue he inserted a clause looking toward a method, the use of which would operate upon stock not thus notched. Defendant's machine came within the terms of the claim, but, as a matter of fact, sealed the cans without notching the stock, having a recess to dispose of the excess of stock. *Held*, that if the claim were construed to cover defendants' machine it would be invalid, and, if limited to complainant's real invention, defendants did not infringe. *Covell v. Pratt et al.*, 18 Blatch. 126.—BLATCHFORD, 1880.

321. Complainant's patent was for a combination of parts in a machine for applying flock to belt rubber goods. A prior patent showed a machine for the same purpose, having a corresponding number of parts, performing the same functions, but different in form. *Held*, that complainant could "hold only the improvement in form of the different parts," and that defendants' machine, differing in the form of the parts, was not an infringement. *Williams v. Barker et al.*, 2 Fed. Rep. 649.—WHEELER, 1880.

322. Complainants' patented improvement upon the Arctic shoe "consisted in overlapping the vamp and the quarter beneath the rubber foxing, and extending the vamp and quarter so as to form bellows-like, water-excluding flaps folded on each side of the instep, and buckled



together over the instep." A prior improvement in earlier shoes without buckles "consisted in the insertion of a gore or gusset between the vamp and quarter, which folded upon itself inside the shoe, and excluded water to a certain extent." Defendants sought to limit complainants' patent, in view of said prior shoe, to their exact cut of vamp and quarter and extension into a flap-tongue. The court did not so limit it, and found defendants' shoe—which had the vamp quarter and flap differently shaped—to be an infringement. *Williams et al. v. Candee et al.*, 18 Blatch. 140.—SHIPMAN, 1880.

323. Complainant's patent claimed: "A coffee or similar mill having a detachable hopper and grinding shell formed in a single piece and suspended within the box by the upper part of the hopper or a flange thereon, substantially," etc. The top of the outer wooden box to which the hopper was attached was of wood. In defendants' mill the flange in the outside of the hopper formed the top of the box. Defendants insisted that said "detachable and grinding shell" meant a hopper and shell detachable from the top of the box. *Held* not so, and defendants adjudged infringers. *Strawbridge v. Lindsay et al.*, 2 Fed. Rep. 692.—ACHESON, 1880.

324. The patent in suit said: "If the well above should not be filled with water . . . before the contents of the flask are ignited." The court said: "It is obvious . . . that all the patentee sought was a sufficient column of water. . . . It is not to be inferred from the language used that in all cases the well is to be filled to the very top." A partly filled well was held to be an infringement. *Roberts et al. v. Schreiber*, 2 Fed. Rep. 855.—STRONG, 1880.

325. The improvement referred to in the first claim of Pearl's reissued patent, No. 60,361, for ring spinning spindle and bobbin, is the combination of [1] a spindle having a shortened tip and [2] a bobbin with a central adhesive bearing. The Sawyer spindle, having a central and also an upper bearing for the bobbins, and the bolster bearing for the spindle carried up inside the bobbin, is not an infringement. *Pearl et al. v. Appleton Co. et al.*, 3 Fed. Rep. 153.—LOWELL, 1880.

326. Complainant's patented improvement consisted in the use of layers of roofing felt, roofing cement, and concrete or the like "in sanitary water-proof cellars, cisterns, vaults, reservoirs, and similar underground receptacles" [this from the claim]. Defendant used this construction in a cellar to keep water out. Prior to the patented invention it had been used in a cistern to keep water in. *Held*, that the cistern embodied

the improvement, and that the patent covered such cisterns. *New v. Lawrence*, 3 Fed. Rep. 714.—BENEDICT, 1880.

327. Complainant's patent claimed "the method of utilizing the leather of old card clothing by heating it with gum tragacanth and resetting it with teeth reversely to the original teeth, substantially as described." Complainant claimed that the use of the gum tragacanth was non-essential. Prior use, where the gum tragacanth was not used, and where the leather was turned over instead of around, was proved. *Held*, to anticipate the patent. *Brummitt v. Howard et al.*, 3 Fed. Rep. 801.—LOWELL, 1880.

328. Complainant's claim was: "The above-described method of supplying a city with water—that is to say, by pumping directly into the water mains when the apparatus for that purpose is supplied with contrivances by which the pressure within the mains may be preserved in a degree uniform, sufficient so far as practical purposes or increased or diminished at pleasure, substantially as and for the purpose above shown." *Held*, to be a claim for the combination of contrivances described in the specification. *Holly v. Vergennes Mach. Co.*, 18 Blatch. 327.—WHEELER, 1880.

329. Complainant's two clauses of claim upon a shoe for car brakes were: "Firstly, the shoe A and sole B, both being constructed and adapted to each other, substantially as described, so that the sole can have a lateral rocking movement on the shoe, for the purpose specified. Secondly, the combination of the shoe A, sole B, clevis D, and bolt G, the whole being constructed and arranged substantially as specified." *Held*, that the second clause was infringed by a mechanism not having the "lateral rocking motion" specified in the first clause, and that a court "must give effect to the whole of the description contained in the specification and claims." *Nat. Car Brake Shoe Co. v. L. S. & M. S. R'y Co.*, 9 Bissell, 503.—DRUMMOND, 1880.

330. Complainant's patent claimed "as a new article of manufacture, a skirt protector for ladies' dresses, having a fluted or plaited border bound with or composed of enamel cloth or other water-proof material." *Held*, that "the invention includes a plain as well as a fluted border or plaited form of water-proof skirt protector." *McDonald v. Shepard et al.*, 4 Fed. Rep. 228.—LOWELL, 1880.

331. Coal scuttles being old, complainant patented an improvement thereon consisting of a bottom stamped out of one piece and extending upward outside of the body. Defendant made a scuttle in substantially the same way, except

that the bottom extended upward inside the body. Defendants' structure held not to be an infringement. *Whitman v. Seaman et al.*, 4 Fed. Rep. 436.—WHEELER, 1880.

332. A specification described a double-acting pump, but made a combination claim, among others, applicable, in terms, to a single-acting pump. As a claim to a single-acting pump it was invalid for lack of novelty. The court said patents are to be liberally construed, and that said claim "must be read as if it said, for the combination, in a double-acting pump," etc. *Adair v. Thayer*, 17 Blatch. 468.—WHEELER, 1880.

333. The use of two cylinders together to elevate a load being old, and the only new idea common to complainants' and defendant's device being that of employing the power of either one or both cylinders—in order to economize water—and the two modes of construction and operation being different, it was held that defendant did not infringe. *Stebbins Hy. El. M'fg Co. et al. v. Stebbins*, 4 Fed. Rep. 445.—BLATCHFORD, 1880.

334. By the court: "The first claim is not a claim to any mechanism, but, if not a claim to a function, is a claim to a mode of operation. It amounts to a claim to inserting a stopper through the mouth of a bottle, and then pressing it upward till it is closed tight against a seat inside. It seems to be intended to cover every form of stopper, and any form of mouth, and any means of pressure, and any arrangement of seat; as a claim thus broad it cannot be sustained. It must be limited to the mechanism described, having the mode of operation described." *Matthews v. Schoneberger et al.*, 18 Blatch. 357.—BLATCHFORD, 1880.

335. Complainant's bottle-stopper was pressed to its place by a spring as other similar valves had been similarly held, and had an outward extension whereby to push it down to open the bottle. *Held*, that the claim must be limited to substantially such a form of stopper with substantially such an extension, and that a spherical stopper without such spring and without such extension did not infringe.—*Ib.*

336. The claim in suit was to "an automatically-feeding furnace, in which the ore is carried by the superincumbent weight to be acted on by the heat, substantially as described." The court said: "This claim cannot be sustained. There is no automatically-feeding furnace in the case. The furnace described is fed by hand. . . . The claim does not correspond with or cover the specifications, and in such cases the patentees are confined to what is expressed in the claim."

*Knox et al. v. Quicksilver Mining Co.*, 4 Fed. Rep. 809.—FIELD, 1880.

337. The patent in question was for fixing barbs on wire fences, to prevent lengthwise motion, by kinks or bends in the wire. *Held*, that this could not cover all equivalent methods, because an earlier inventor had suggested keeping the barbs at a suitable distance apart by means of "flanges or otherwise." *Washburn & Moen M'fg Co. et al. v. Haish*, 10 Bissell, 65.—BLODGETT & DRUMMOND, 1880.

338. Complainant's patentee was the first person who made a "machine containing devices which operated successfully to make the sewing of straw braid in the making of hats and like articles otherwise than by hand a practical art," and the claim of the patent was construed to cover a machine which embodied a number of changes in form and operation. *Straw Sewing Mach. Co. v. Eames*, 18 Blatch. 520.—BLATCHFORD, 1880.

339. A claim for "the combination, with a steam fire-engine, of a heating apparatus, constructed substantially as described, for the purposes fully set forth," construed, in view of the prior art, to be not a claim to such parts in general, but to a combination of what was new with the patentee. *Brickill et al. v. New York*, 18 Blatch. 273.—WHEELER, 1880.

340. A patentee claimed a fastening plate for attaching a buckle to a strap, having a prong in the body of the plate and another at the free end thereof, "both being in the same longitudinal line." Defendant's prongs were in the same transverse line; a structure in the prior art had the same position of the prongs. *Held*, that defendant did not infringe. *Holmes, Booth & Hayden v. Osborn & Chessman Co.*, 7 Fed. Rep. 671.—SHIPMAN, 1880.

341. Complainant's patent for hydraulic power accumulator claimed the combination of "the barrel C, piston D, rod *a*, weight *e*, and pipes *d, f*," etc. A combination of those elements existed prior to complainant's invention, with the weight above the piston. Complainant's weight was below the piston, and that combination he claimed was the improvement. The specification made no reference to any improvement residing in so locating the weight. *Held*, that the claim was too broad. *Maquire v. Eames*, 18 Blatch. 321.—BENEDICT, 1880.

342. A patent on a gas-stove, being for a combination of parts, the only new member of which was a flange, the court said: "Perhaps the combination of the flange around the top with the rest of the burner made a new burner, and a new combination in a burner, so as to be pat-

entable; but, if so, the patent would properly cover only the precise form of burner so made, including the flange itself, as a part of the patented combination of patented burner. Hence, the patent would not be infringed but by that exact form of burner throughout, or by such a flange with some other form of burner." *Tift v. Sharp et al.*, 18 Blatch. 138.—WHEELER, 1880.

343. For a case where features not expressed in the terms of the claim were put there by construction of the court, see —. *Whittlesey et al. v. Ames et al.*, 9 Bissell, 225.—BLDGGETT, 1880.

344. Complainant had a patent for a process of producing bronze color on iron, and for the product, the process being to clean the casting from sand and scale, then coat with oil or oil-varnish and subject to high heat. In a prior suit on the merits the complainant had not claimed that his patent covered the case where the iron and oil were not both oxidized. Defendants made articles by first oxidizing the iron, then varnishing and heating to a less degree than would oxidize the varnish. A provisional injunction had been granted in the present suit. Motion for attachment for contempt of court in violating the injunction denied. *Tucker v. Corbin et al.*, 5 Fed. Rep. 810.—SHIPMAN, 1880.

345. The claim of the patent in suit was: "As a new article of manufacture, a side saddle-tree, having the side bars and seat made separate and then united, substantially as and for the purpose shown and specified." Respondents took tough strips of wood, steamed and bent to a proper shape, and attached to them the tree as a part thereof, forming side rails for the seat; and were held not to infringe. *Burns v. Meyer*, 100 U. S. 671.—SUP. CT. 1880.

346. The claim of the patent in suit was for "the plate of hard rubber or vulcanite or its equivalent for holding artificial teeth, or teeth and gums, substantially as described." The court said: "The invention is a product or manufacture made in a defined manner. It is not a product alone, separated from the process by which it is created. The process detailed in the description antecedent to the claim, and referred to thereby, is as much a part of the invention as are the materials of which the plate or product is composed. Both are necessary elements of it. Hence, to constitute an infringement of the patent, both the material of which the dental plate is made or its equivalent, and the process of constructing the plate or a process equivalent thereto, must be employed." Defendant used celluloid, and was held not to infringe. *Good-*

*year Dental Vulcanite Co. v. Davis*, 102 U. S. 222.—SUP. CT. 1880.

347. A claim of the patent in suit was: "A postage or revenue stamp having a portion of its surface composed of thin or fragile paper or other suitable material loosely attached, and on which a portion of the design or other matter is printed, substantially as and for the purposes set forth." The stamp used by respondent was composed of one continuous piece of paper of uniform thickness, upon the face of which was certain printed matter, with blanks in which were inserted, at the proper time, figures and names required by law to appear upon a revenue stamp. No separate paper was attached loosely or otherwise to the face of that stamp. Upon the back of the body of the Government stamp, attached to its outside edges, was a slip of red, blank paper of less width than the stamp; when the stamp was pasted on the barrel that portion of it immediately over the red slip did not adhere to the barrel, but was protected from paste on the barrel by the intervening red slip. Respondent was held not to infringe. *Fletcher v. Blake*, 19 O. G. 221.—SUP. CT. 1880.

348. Complainant stated that in his improvement in bleaching xyloidine he used "any of the well-known means, preferring a solution of chlorine or a solution of chloride of lime or soda." Defendant used permanganate of potash, which was a known bleaching agent. Held, to be an equivalent and an infringement. *Spill v. Celluloid M'fg Co.*, 18 Blatch. 190.—BLATCHFORD, 1880.

349. A patent for a packing material composed of forty per cent and over of refractory matter held together by a skeleton of soft rubber is not infringed by a packing which consists of refractory matter held together by a skeleton of vulcanite, the latter having advantages in use not found in the former. The difference in action is proof of substantial difference in the compound. *Clarke v. Johnson*, 18 Blatch. 450.—BENEDICT, 1880.

350. In complainants' original patent for a paper box it was asserted that certain flaps were not only inserted but *locked*, and the feature was made important. This feature was not made important in the reissue, but the court held that the disclaimer of the original patent was inferentially in the reissue, and that defendant's flaps, not having the locking quality, were not infringements of the reissue. *Novelty Paper Box Co. v. Stapler*, 5 Fed. Rep. 919.—NIXON, 1881.

351. By the court: "The expression, 'all kinds of smooth mouldings,' means, in respect to angular mouldings, 'all kinds of smooth right-

angled mouldings ;' and the expression, 'all sorts of angles,' means 'all the kinds of square or right-angled angles' which can be made by the square dies, and which are shown in Figures 2 and 3." *Fischer v. Hayes*, 19 Blatch. 26.—BLATCHFORD, 1881.

352. The claim in suit was : "In a time lock the combination, substantially as set forth, of the time movements, and two adjustable devices, one for determining the time of locking and the other of unlocking." A prior structure contained "two similar adjusting devices which are operated to open and close a gas-cock much after the plan of the" patented "lock." The court said of the patent : "The language is not to be extended so as to include time movements which are used for any obstructing purposes whatever, but it is to be considered as referring to the time lock of the specification only." *Yale Lock M'fg Co. et al. v. Norwich National Bank*, 19 Blatch. 123.—SHIPMAN, 1881.

353. Complainant's two patents on bottle-stoppers had claims which in terms covered defendants' bottle-stoppers. The prior art contained close approaches to complainant's patented structures. The court limited complainant's claims, by construction, to the 'exact devices found in the patents, and found that the defendants' structure departed more widely from complainant's than complainant's from the prior art ; and that defendants did not infringe. *Matthews v. Chambers et al.*, 6 Fed. Rep. 874.—ACHESON, 1881.

354. By the court : "In this case the plaintiff first united the finger and the jack when they were placed horizontally, but the defendants had already united them for a similar use when vertical. The whole emphasis, therefore, of the plaintiff's claim is on the word 'horizontal ;' now whatever may be the advantages of this horizontal position in the defendants' jack and finger, and whether they took it from the plaintiff's patent or not, they may lawfully take it, because it was old at the time of the plaintiff's invention." *Crompton v. Knowles et al.*, 7 Fed. Rep. 199.—LOWELL, 1881.

355. Complainant contended that he ought to cover all tubes made from a strip of metal wound spirally and locked at the edges. The court said that spiral-welded tubes were old, that the folded seam in tubes with straight seams was old, and that there was no opportunity for a great original discovery. *Root et al. v. Lamb*, 7 Fed. Rep. 222.—LOWELL, 1881.

356. For an example of a pioneer patent construed to cover mechanical parts and steps different from those of the patent, see —. *Hammer-*

*schlag v. Scamoni*, 7 Fed. Rep. 584.—BLATCHFORD, 1881.

357. For an example of a part described in the specification but not specified in the claim put into the claim by construction, see —. *Ib.*

358. Three of complainant's four claims did not mention the "inclined double-end bars," which formed an element of the fourth claim. This feature held to be in each of the claims by construction. *Woven Wire Mattress Co. v. Simmons et al.*, 10 Bissell, 394.—DYER, 1881. v.

359. Complainant patented an improvement in blank and dies for making carriage thill shackles, others having previously made thill shackles by somewhat different blanks and dies. The feature of the improvement consisted in forcing the metal from the central part of the body sidewise to form sharp corners when the arms were bent up. Defendant formed the sharp corners before bending up the arms, and in bending, forced the corners further apart. *Held*, not to infringe. *Clark v. Beecher M'fg Co. et al.*, 7 Fed. Rep. 816.—SHIPMAN, 1881.

360. A patent—for water-closet valves—prior to complainants' showed the combination of a variable chamber, poppet-valve, and escape conduit. Defendants used the variable chamber, cup-leather valve, and the escape conduit of an earlier patent. Defendants were held to infringe. *Blake et al. v. McNab & Harlan M'fg Co.*, 19 Blatch. 73.—BLATCHFORD, 1881.

361. One element of a reissue combination claim was "end bars." *Held*, in view of the state of the art, that they must be construed to be *inclined* and *double end bars*. One element in another of the claims was "standards." *Held*, in view of the state of the art, that they must be construed to be *longitudinally adjustable standards*. *Woven Wire Mattress Co. v. Wire Web Bed Co.*, 8 Fed. Rep. 87.—SHIPMAN, 1881.

362. The claim in the [driven well] patent was : "The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as in boring." The process was construed by the court to consist in the making of a flowing well to consist of the same steps *plus* the addition of a pump to the top of the tube. The use of the pump was held to be a use of the process. *Andrews et al. v. Cross*, 19 Blatch. 294.—BLATCHFORD, 1881.

363. "Bell discovered a new art—that of transmitting speech by electricity—and has a right to hold the broadest claim for it that can be permitted in any case," covering all means and methods though specifically different, whether known or unknown at the date of

Bell's patent, which "transfer to a wire electrical vibrations like those which a sound has produced in the air." And the breadth of this claim is not affected by a prior apparatus [that of Reiss], which made some approach toward Bell's method, but could not transmit articulate speech. *Am. Bell Telephone Co. et al. v. Spencer et al.*, 8 Fed. Rep. 509.—LOWELL, 1881.

364. Complainants claimed in a snap-hook: "The combination of the tongue *g* with the spiral spring [Figure 4] when the spring works on the tension principle, and rests in a recess [as *r*] in the rear end of the tongue, substantially, as herein described." Such a combination, broadly stated, was old, but complainants' side recess in the tongue differed from the prior recess in having an opening underneath, with both ends of the spring projecting through the same. Defendants had the side recess, with the opening underneath, and one end of the spring projecting through the opening. Defendants held to infringe. *Fitch v. Bragg & Co.*, 8 Fed. Rep. 588.—SHIPMAN, 1881.

365. An original patent was for a "spring and friction roller for regulating sash," the roller bearing against the side of the sash to prevent rattling. The reissue introduced a claim to the exteriorly threaded cylinder which held the pulley fork. Defendants used a threaded cylinder for holding the bolt of a sash supporter [to hold the sash suspended] which came within the terms of said claim. Held, that the purpose of the two threaded cylinders were not identical or analogous, and that there was no infringement. *Judd v. Babcock et al.*, 8 Fed. Rep. 605.—SHIPMAN, 1881.

366. In complainant's patent for tobacco sweating apparatus, the box for holding the tobacco was described and claimed as a "tight vessel made of wood," the steam percolating through the pores of the wood. Defendant used common tobacco cases having joints more or less open. Held, that such vessels were "tight" within the meaning of the patent. *Robinson v. Sutter et al.*, 10 Bissell, 100.—BLODGETT, 1881.

367. The patent in issue being for making pills, it was objected that "glycerine," one of the coating materials mentioned, would not answer. The fact held immaterial, and "glycerine" rejected as surplusage. *McKesson et al. v. Carnrick*, 19 Blatch. 158.—BLATCHFORD, 1881.

368. A horizontal band of wire bird cages had been held in place by looping the vertical wires through the band and holding it there by a key. Complainant held the band in place by a bend in the vertical wire. The difference held so

broadly patentable as to underlie all forms of holding the wire in place by bending the vertical wires. *Maxheimer v. Meyer et al.*, 20 Blatch. 17.—WHEELER, 1881.

369. By the court: "Davis is clearly shown to have been the first person to make a successful machine for changing the shoes of a grain drill into substantially the two lines from substantially one line, by a shifting movement applied to any of the shoes, by mechanism operating on and from the rear of the machine, and worked without stopping the machine or seriously interfering with its operation. His invention and patent are entitled to a liberal construction." *Davis et al. v. Brown et al.*, 19 Blatch. 263.—BLATCHFORD, 1881.

370. A claim for a water-closet read: "In combination with the main bowl A, tangential receiving nozzle B, and connecting *a*, the spreader and showeret *c*," etc. Defendant used no showeret, but was held to infringe. *Stockton v. Maddock*, 10 Fed. Rep. 132.—NIXON, 1881.

371. For example of limitation of a claim, in view of the prior art, and rejection of a statement in the specification which would give the claim a broader construction, see —. *Mallory Mfg Co. v. Marks et al.*, 20 Blatch. 32.—BLATCHFORD, 1881.

372. An original patent was for a take-up for looms, one element of the claimed combination being the "lay" which operated the take-up. In the reissue "operating mechanism" was substituted for "lay." Defendants used the same take-up in a knitting machine, but operated by cams, using no "lay." It was held that the reissue was valid, but that the claim must be restricted to looms, and that defendants did not infringe. *Holmes et al. v. Plainville Mfg Co.*, 20 Blatch. 123.—SHIPMAN, 1881.

373. A claim of complainant's patent in suit was: "1. In a lemon-squeezer, the convex perforated bed to receive the lemon, in combination with a concave presser, substantially as specified." The court held this to be a claim "for a combination, one of whose essential elements is a bed on which the lemon is to rest while subjected to pressure, such bed having holes pierced therein for the purpose of permitting the juice of the lemon to pass through the bed, and so into the concentrator below." In defendants' machine the bed was not perforated, but was grooved or corrugated, and was held not to infringe. *Onderdonk v. Fanning et al.*, 19 Blatch. 363.—BENEDICT, 1881.

374. The patent in suit was for a nail-driving machine, and the claims thereof were: "1. The employment of the grooved spring-jaws H, sub-

stantially as described, for the purpose of receiving the nails and to guide them to their proper places. 2. The combination with the spring-jaws H of the rising and falling plungers E, constructed and operating substantially as and for the purpose described. 3. Arranging the plunger E, with the disk-shaped collar *i* or its equivalent, to operate in combination with the spring-jaws H, substantially as and for the purpose specified. 4. The arrangement of the circular portion *e f* on the cam C, to operate in combination with the gate B and treadle *d*, substantially as and for the purpose set forth. 5. The arrangement and combination of one or more adjustable carriages F, table J, and slide L, constructed and operating in the manner and for the purpose specified." This machine was an upright machine; respondent's was a horizontal machine, and did not use the spring-jaws on the peculiar-shaped plunger of the patented machine; and was held not to infringe. *Wick v. Ortrum*, 103 U. S. 461.—SUP. CT. 1881.

375. A claim of the patent in suit was: "The manufacture of fat acids and glycerine from fatty bodies by the action of water at high temperature and pressure." This was held by the Supreme Court to be a claim for the process described in the patent and not for the means used for carrying out that process, as had been previously held by the Supreme Court in *Mitchell v. Tighman*, 19 Wall. 237. Respondents used a different kind of patented machine from that described in the patent. They added lime; the mixture of water and fat was heated by steam; and they used a lower degree of heat than that pointed out in the patent. They were held to infringe. *Tilghman v. Proctor et al.*, 102 U. S. 707.—SUP. CT. 1881.

376. The patent in suit was for an improvement in ovens, and a claim thereof was for "the combination of the following elements, to wit: a furnace or fireplace [one or more], a baking chamber arranged above such furnace or fireplace and in direct communication therewith, and a rotating reel located within said baking chamber and provided with gravitating pans or shelves arranged or hung around the shaft of said reel from rods attached to the end plates or arms thereof, substantially as and for the purpose described." It was held that, in view of the prior art, the patent must receive a very limited construction. Respondents' oven differed from the patented oven in that the bottom of the baking chamber was not separated by any partition from the fire chamber, and there were no flues to take the heat into the chamber. Respondents

were held not to infringe. *Garneau v. Dozier et al.*, 102 U. S. 230.—SUP. CT. 1881.

377. Complainants' specification for a patent for a cultivator stated *inter alia* that the invention consisted "in applying to the shank of the tooth a curved brace bar, the upper end of which passes through a slot or mouth in the beam." Defendants used the slotted beam, the shank of the tooth, and the clamping bolt, but not the curved brace bar. Held not to infringe. *Rowell et al. v. Lindsay et al.*, 10 Bissell, 217.—DYER, 1881.

378. By the court: "So far as this case discloses, the positive connection between the jack and the finger was first used by defendants; but the horizontal position of the finger was not first used by the plaintiff. The only change made by the defendants in the actual from their patented machine is in this horizontal position, and this was not the plaintiff's property. This fact forbids the application of the formula of known substitutes." *Crompton v. Knowles et al.*, 7 Fed. Rep. 199.—LOWELL, 1881.

379. By the court: "If the correct construction of complainant's patents requires that one element of their combination shall consist of a holding mechanism, in which the shoe is rigidly held by the mechanism, the defendant, by dispensing with this, may or may not have effected a practical improvement; but he has done that which distinguishes his machine from the class to which the complainants refer, and has not appropriated the invention." *Dodge v. Feary et al.*, 8 Fed. Rep. 329.—WALLACE, 1881.

380. The claim in issue being one to a rod and lever together, both being new with the patentee, defendant, who omitted the lever and used the rod, was held to infringe. *Davis et al. v. Brown et al.*, 19 Blatch. 263.—BLATCHFORD, 1881.

381. Complainant coated cast iron with as thin a coat of oil [or oil and varnish] as was practically possible, and then subjected the article to high heat, which, acting on the oil and iron jointly, produced a handsome bronze-colored surface. A thicker coat of oil varnish baked on at a heat of 420° Fahrenheit was old. Defendants first oxidized the iron at a heat of 280° and then baked on a tolerably thick coat of copal varnish at 300°. Defendants held not to infringe. *Tucker v. Sargent & Co.*, 19 Blatch. 538.—SHIPMAN, 1881.

382. A patent for graduating marks extending partly around the inner surface of a glass vessel is infringed by graduating marks in the shape of shoulders extending entirely around the inner surface. *Hobbs et al. v. King et al.*, 8 Fed. Rep. 91.—ACHESON, 1881.

383. Complainant's claim was: "An improved Coes wrench, so constructed that the thrust or back-strain of the rosette screw, when the wrench is used, shall be borne by the shank instead of the handle of the wrench, substantially as described." *Held*, that, in view of the prior art, this claim must be limited to the exact device shown. *Coes v. Collins Co.*, 20 Blatch. 221.—BLATCHFORD, 1882.

384. For an example of a broad claim in a reissue construed strictly in view of the state of the art, and a slightly different device held not to infringe, see —. *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1882.

385. For example of broad claims limited by construction to the shape of lamp-shade holder shown in the drawings, and defendants' different shape held not an infringement, see —. *Schneider v. Lowell et al.*, 20 Blatch. 311.—BLATCHFORD, 1882.

386. The claim in suit was for "figures and fractions in printing type cast upon a block equal to two thirds the width of the body of the 'em' or standard type." The court said: "The claim is to be read in connection with the specification as if there was added to it the phrase 'as specified' or 'as set forth.' Read in that light, the claim is for the broader type, as well as for the body of the type." *Bruce v. Marder et al.*, 20 Blatch. 355.—WHEELER, 1882.

387. An original patent having described and claimed a limitation that was omitted from the reissue claim, the limitation was put into the reissue by construction. *Campbell et al. v. Kavanaugh*, 20 Blatch. 256.—BLATCHFORD, 1882.

388. The first claim in a reissue was: "A knitting-burr blade A, having on its inner end a dovetail or flaring projection *b* and lateral shoulders *c, c*, substantially as herein described." Of this the court said. "Claim 1 must be limited to a wing to be used in a hollow slotted hub. Otherwise it is not a claim to any mechanism or to any patentable structure, but only to a piece of metal of a certain shape, incapable of use till incorporated in another structure." And defendant's wing, which came within the claim, was held not to infringe.—*Id.*

389. A claim was for "the detached case B, so combined and arranged with the hydrant A, as to have an end play or vertical motion of several inches to compensate for the heaving by frost, the upper part of the same passing outside of main stock of hydrant." The court said: "Had this patent been confined to a hydrant jacket closed at the bottom and resting on a flange of the main elbow, perhaps it might have

been sustainable; but it is not so confined. It is only said that the lower end preferably shuts into a flange of the elbow. . . . The claim . . . as it stands covers any and every loose jacket having end play to compensate for the heaving of the frost, and having the upper end passing around the hydrant. It covers the old New York wooden case or housing, which was in public use for many years before Race and Matthews gave their attention to the subject. We are of the opinion, therefore, that this patent cannot be sustained." *Matthews et al. v. Boston Mach. Co. et al.*, 105 U. S. 54.—SUP. CT. 1882.

390. The patent in suit contained two claims—viz.: "[1] A can or other vessel made of sheet metal, in which the top or bottom is joined to the sides by a double-recessed clamping lap-joint, substantially as described. [2] A can or other vessel made of sheet metal, in which the top or bottom is joined to the sides by a clamping lap-joint, which is capable of being soldered by dripping, substantially as described." The court said: "Construing the first claim, as we think it ought to be, in connection with the directions given for the construction of the can in the body of the specifications, we are of the opinion that the second claim is comprehended in the first, and is, therefore, a partial duplication of it. It claims a can with a double-recessed clamping lap-joint, which is capable of being soldered by dripping. The can referred to in the first claim has its capability, because it is directed to be constructed with the joint described, which is to be soldered by dripping. Of course it is capable of being soldered, and hence the second claim embraces only a quality or feature which is covered by the first claim, as an inseparable incident to the can therein claimed as an entirety. We must, therefore, dismiss the claim from further consideration as void." *Combined Patents Can Co. v. Lloyd*, 11 Fed. Rep. 153 —McKENNAN, 1882.

391. In plaintiff's invention in pumps, the combination included a diaphragm which was shown and described as being at one side of the uptake. Defendant placed the diaphragm over the uptake, but attained the advantage which complainant attained, and the court, in view of the prior art, construed the claim broad enough to cover defendant's pump. *Loud v. Stone*, 11 Fed. Rep. 721.—LOWELL, 1882.

392. Complainant's patent being for "an earthenware saucepan, the bottom of which is rounded and has a regular surface of or about an equal thickness throughout," defendant's saucepan, having corrugations upon the bottom,

was held not to be within the claim. *Scott et al. v. Evans*, 11 Fed. Rep. 726.—ACHESON, 1882.

393. For example of refusal to construe into a claim a part generally but not specifically mentioned in the claim, see —. *Doubleday v. Beatty*, 11 Fed. Rep. 729.—ACHESON, 1882.

394. Complainants' patented device being for an oven shelf operated, in connection with the oven door, very much as a carriage step of the prior art operated in connection with a carriage door, it was held that the claim must be restricted to complainants' exact device; and defendants' device, being slightly different in detail, was held not to be an infringement. *Bridge et al. v. Excelsior M'fg Co. et al.*, 105 U. S. 618.—SUP. CT. 1882.

395. For an example of reissued claims limited by construction to the terms of the claims of the original patent, see —. *Consolidated Oil Well Packer Co. v. Eaton, Cole & Burnham Co.*, 12 Fed. Rep. 865.—SHIPMAN, 1882.

396. The first claim of complainant's patent was for a tin sheet having a "bright or polished copper surface," etc. The second claim was for a process including as one step "cleaning the other surface." The court construed the "bright or polished copper surface" of the first claim to be a surface made bright or polished by a wheel or other approved mode of polishing; and construed the words "cleaning or brightening" of the second claim to mean such polishing, and held that where the sheet was cleaned by diluted acid the patent was not infringed. *Cotter v. New Haven Copper Co. et al.*, 13 Fed. Rep. 234.—SHIPMAN, 1882.

397. By the court: "Clough was the first person who applied a valve regulation of any kind to the combination to which he applied it, and the first person who made such combination, and he is entitled, under the decisions heretofore made by this court, to hold as infringements all valve regulations applied to such combinations which perform the same office in substantially the same way and were known equivalents for his form of valve regulations." *Clough v. Gilbert & Barker M'fg Co. et al.*, 106 U. S. 166.—SUP. CT. 1882.

398. In complainant's patented gang plough a brake, acting on the periphery of the wheel, was used to raise the plough. In defendants' gang plough a friction band encircling the extension of the wheel hub was used for the same purpose. If complainant had been the first to utilize the motion of the carrying wheel for raising the plough, the court would have found defendant an infringer; but he was not, and the court said: "I am therefore of the opinion that de-

fendants' friction band does not infringe the friction clutch shown in the complainant's mechanism, and that the complainant, upon the state of the art, had no right to claim broadly any friction clutch whereby the crank axle should be locked to the wheel; but is confined to the friction clutch shown in his specifications and drawings." *Newton v. F. & B. M'fg Co.*, 11 Bissell, 405.—BLODGETT, 1882.

399. Complainant's patent was for: "As a new manufacture, soap in which the described petroleum residuum is one of the ingredients." Defendants used vaseline in their soap. The prior art was such that complainant's claim was necessarily limited to his particular residuum, and defendants, using another residuum, were held not to infringe. *Parsons v. Colgate et al.*, 21 Blatch. 171.—WHEELER, 1882.

400. A claim in a reissue which is in substance the claim of the old patent, with added elements in combination, is valid. *Fay et al. v. Fraser*, 11 Bissell, 422.—BLODGETT, 1882.

401. Complainant's patent being limited to that alcohol which is spirits of wine, the use of methyl alcohol, which is wood alcohol, is not an infringement. *Spill v. Celluloid M'fg Co.*, 10 Fed. Rep. 290.—BLATCHFORD, 1882.

402. The Green driven-well patent held to cover the case where the well was bored until water was struck, and the well then finished by pressing the pipe more deeply into the source of supply. *Andrews et al. v. Eames*, 15 Fed. Rep. 109.—SHIPMAN, 1883.

403. The claim in suit was to "the concave base-block, having extensions and shoulders in combination with the cylinder and its cone, substantially as described." The court said: "I am satisfied that the patent must be limited to the base-block of the particular construction described. . . . His base-block is a circular disk with a depression on the upper surface for containing the bait, the shoulders and extensions in the Harper patent being dispensed with and metallic springs used instead, over which the case and trapping cone are slipped by which they are held in place." *Nat'l M'fg Co. et al. v. Meyers*, 15 Fed. Rep. 237.—MATTHEWS, 1883.

404. Complainants' patent on post-office boxes being for "a series of metallic door frames and doors, with a series of wooden pigeon-holes, whereby a series of post-office boxes with a continuous metallic frontage is formed," defendant, having been adjudged an infringer, then made its metallic boxes so that the top, bottom, and sides of each box were separated from the corresponding parts of adjacent boxes by thin strips of wood, out an eighth of an inch thick,



which were not covered by metal. On a motion for attachment for contempt, defendant was held not to infringe. *Yale Lock M'f'g Co. v. Scoville M'f'g Co.*, 15 Fed. Rep. 342.—SHIPMAN, 1883.

405. Where the claim in a patent for plating with nickel negatived the presence of acid in the solution, and defendant had a small quantity of acid in his solution, the court said: "The infringement of the claim cannot be avoided by introducing such small quantities of any of the injurious substances named by Adams as will produce no practical injurious effect." *United Nickel Co. v. Pendleton*, 21 Blatch. 226.—BLATCHFORD, 1883.

406. The claim in issue was: "The electroplating of metals with a coating of compact, coherent, tenacious, flexible nickel of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact." The claim was sustained and held to cover the product irrespective of the process used.—*Id.*

407. Where complainants' claim was broad enough to cover a fire pot having vertical openings of any length, the court refused to construe the claim as limited only to that length of opening shown in the drawing, and held that a prior structure, having longer openings, was an anticipation. *Hailes et al. v. Albany Stove Co.*, 21 Blatch. 271.—WALLACE, 1883.

408. By the court: "The case is one where, in view of the state of the art, in the field of wash-boards made of sheet metal with the surface broken up into protuberances formed of the body of the metal, so as to make a rasping surface and to strengthen the metal by its form, and to provide channels for the water to run off, Todd was not a pioneer. He merely devised a new form to accomplish these results. . . . The defendant adopts another form. Under such circumstances the Todd patent cannot be extended so as to embrace the defendant's form. The latter is not a mere colorable departure from the form of Todd, but is a substantial departure." *Duff et al. v. Sterling Pump Co.*, 107 U. S. 636.—SUP. CT. 1883.

409. Complainant's tubular bearings abutted directly against each other. Defendants' were separated by washers. These washers served a function additional to that which they served by connecting the tubular bearings. The prior art approached very close to complainant's device. Defendants were held not to infringe. *Dodds v. Stoddard et al.*, 24 O. G. 799.—SAGE, 1883.

410. Where the specification of a patent on running gear for vehicles stated that the bottom

springs should be attached to the rear axle "close to the shoulder," and it was found that the object of the invention was attained if the point of attachment was somewhat removed from the shoulder, it was held that this latter construction was within the patent. *Grier v. Castle*, 24 O. G. 1176.—MCKENNAN, 1883.

411. The claim in issue was: "A drive screw having an angular thread of the character shown and a conical point the base of which is of the same diameter as the lower end of the shank, with which it immediately connects." Defendant's screw had a straight taper instead of a conical point. The court said: "If, as has been claimed, the original patent covered no screws but those having oval points, still, as it covered the enlarged base of the point also, it might be infringed by the use of that thing without the oval point, for the patent gives exclusive enjoyment of the whole patented invention, and taking one feature is an infringement *pro tanto*. It cannot be necessary to take the whole invention to constitute an infringement." *Fetter et al. v. Newhall*, 21 Blatch. 445.—WHEELER, 1883.

412. Complainants' patent was for an improvement in jewelry. Defendants' article was a button. It was held that defendants' article came within the scope of the patent. *Royce et al. v. Fifield et al.*, 18 Fed. Rep. 262.—COLT, 1883.

413. The claim in issue was: "In combination with the separator, I claim the vats arranged substantially as described, and the method herein described of manufacturing starch." Held to be a "double claim for the combination of machinery and also for the process." *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1883.

414. For illustrations of the rule that where the patented device is closely approached by the prior art the claim must be strictly construed, see —. *Fay & Co. v. Cordesman et al.*, 109 U. S. 408.—SUP. CT. 1883.

415. The claim in issue being for "an anti-frictional guide which is adjustable so as to accommodate different thicknesses of saw blades and to compensate for the wear, in combination with the upper portion of a web-saw blade, substantially as set forth," and defendants using "a band-saw . . . passing over wheels and running constantly in one direction, . . . and having a tension over the peripheries of the wheels," defendants were held not to infringe.—*Id.*

416. The claim in issue being "the combination of the anti-frictional saw-support and guide, or the equivalent thereof, with an adjust-

able guard or its equivalent, substantially as and for the purpose set forth," defendants, not having or needing the guard, were held not to infringe.—*Id.*

417. The important element of the patented combination—one closely approached by the prior art—being a laterally adjustable roller for the back of a saw, "so as to bring different points of the periphery of a smooth-faced wheel into use," defendants, using a "two-grooved" roller, were held not to infringe.—*Id.*

418. In a patent for a lumber drier, the patented combination included as one element certain steam pipes, and as another element certain partitions. Defendants made the steam pipes act as partitions, and were held to be infringers. *Burdsall v. Curran et al.*, 27 O. G. 1320.—BLODGETT, 1883.

419. Complainant's patent contained a claim to a combination including as one element the "offset D." Defendant's structure had not this part, and was held not to infringe. *Mattison v. Caine*, 8 Sawyer, 498.—SAWYER, 1883.

420. Where the patentee's point of novelty resided in a certain means of giving a certain circular feed, and defendant's machine differed in that particular, defendant was held not to infringe. *Dryfoos v. Wiese*, 22 Blatch. 19.—WHEELER, 1884.

421. For example of claim limited in view of the state of the art, and defendant thereby found not an infringer, see —. *Bussey et al. v. Excelsior M'f'g Co.*, 110 U. S. 131.—SUP. CT. 1884.

422. By the court: "In view of the fact that an inclined plane or cam was previously used by Bartholomew as a means of providing the same result upon the valve stem as that produced by the screw made upon it by Jenkins, it is clear that the claim of the latter . . . must be limited to the precise form of mechanism designated." *Zane et al. v. Soffe*, 110 U. S. 200.—SUP. CT. 1884.

423. Complainants' patented mode of securing cake-pans to a plate was by a double seam upon the top of the plate. Cake-pans and the like had previously been fastened to plates and the like in other ways, but the use of the double seam was an improvement. Defendant used the double seam on the under side of the plate. Complainants' patent was sustained broadly enough to cover defendants' construction. *Bell et al. v. U. S. Stamping Co.*, 22 Blatch. 27.—WHEELER, 1884.

424. Where the patented thing was "a cigar constructed as described, with a longitudinal opening H in its drawing end and the end of the wrapper A, secured permanently within the

aperture, as and for the purpose set forth," it was held that a cigar, to come within the claim, must be made upon such a machine as was described in complainant's patent. *Schalscha v. Sutro et al.*, 19 Fed. Rep. 319.—WALLACE, 1884.

425. Where defendant's paper box seemingly came within the terms of the claim of complainants' patent, but really did not embody the improvement which distinguished complainants' invention from the prior art, defendant was held not to infringe. *Munson et al. v. Hall*, 19 Fed. Rep. 320.—WALLACE, 1884.

426. The patentable novelty of an alloy consisted in the proportions in which the copper and tin were compounded, and in the addition thereto, in the process of melting, of a prescribed quantity of arsenic. Defendant's metal was composed of copper, tin, zinc, lead, and arsenic, copper within the range of proportions stated in the patent, and the tin and arsenic generally below the minimum proportion stated in the patent. Defendant was held not to infringe. *Kirk et al. v. Elkins M'f'g & Gas Co.*, 19 Fed. Rep. 417.—MCKENNAN, 1884.

427. Complainant's claim—in a patent for improvement in frilling and crimping machine—was limited, by its terms, to a combination in which the blade or crimper acted to space the crimps as well as to form them. Defendants' crimper did not act to space the crimps, and was held not to infringe. *Tuttle v. Claffin et al.*, 19 Fed. Rep. 599.—WALLACE, 1884.

428. The claim in controversy was: "3. The combination, with a harness for a fire-engine or like apparatus, of a device for suspending said harness above the place occupied by the horse when attached to the apparatus, substantially as and for the purpose set forth." Of this the court said: "Sullivan was the first to enter the field of invention. No other patent, American or foreign, is introduced to anticipate or limit the claim referred to. It should therefore be construed broadly to cover any similar apparatus which suspends a harness in substantially the same manner. The details of construction both in the harness and suspending apparatus are non-essential, inferior, and subordinate to the principle embodied in the patent, which is the paramount and superior consideration. The man who first conceived the idea of suspending the harness above the horse, and put it into successful and practical operation, is the one to confer the benefit on, and is entitled to the reward. It would be an exceedingly illiberal and narrow construction to hold that he should be deprived of the fruits of his ingenuity by one who simply changes the form of the harness or

of the device by which it is suspended. No principle is better settled than that a mere abstract idea is not the subject of a patent, but that principle has little application here, for the reason that the inventor has put his idea into tangible shape and given it form and substance." *Worswick M'fg Co. et al. v. City of Buffalo et al.*, 22 Blatch. 157.—COXE, 1884.

429. Complainants' patent was for an improvement in preparing alizarine. Bromine and chlorine were used in the process. Defendant substituted sulphuric acid for the bromine and chlorine. Complainants had unsuccessfully tried to use the sulphuric acid. Defendant was held not to infringe on the ground that the facts made it impossible to say that the sulphuric acid process was a known equivalent process at the time, although "it is easy now, after the event, for scientific men to say, with the knowledge of today, that the thing was obvious." *Cochrane et al. v. Badische Anilin & Soda Fabrik*, 111 U. S. 293.—SUP. CT. 1884.

430. Complainant's patented process was for the application of steam and heat to coffee in its uncured condition. Defendants' process was for the application of heat only to the uncured coffee, and was held not to infringe. *Arnold v. Phelps et al.*, 20 Fed. Rep. 315.—WHEELER, 1884.

431. Two of complainant's claims were: "1. The retaining of the water in the receiving and discharging cylinders until, at required height, it exerts a power sufficient to perform the operations, substantially as described and set forth. . . .

"3. I claim the method of returning the water of condensation to the boiler, substantially as described." Said the court: "Both of these claims must be construed as claims for the apparatus which performs the functions mentioned in the first claim, and which is the means of effecting the method specified in the third claim; otherwise both these claims are void as being for a function or abstract effect instead of the means by which it is produced." *Albany Steam Trap Co. v. Felthousen et al.*, 22 Blatch. 169.—WALLACE, 1884.

432. Where complainant's patented combination consisted substantially in a union of two different mechanisms separately found in prior patents, it was held that defendants' substitution of a common trap for that part of complainant's device which consisted in certain valve mechanism did not constitute defendants infringers.—*Ib.*

433. In complainant's patented device, which was closely approached by the prior art, the fifth claim referred to a receiving vessel counter-

balanced by a weight in such a manner that the vessel rose when the water was withdrawn and sunk when it was filled again. In defendants' device the trap was stationary, and the float was caused to rise by water introduced into the trap; and the float being empty, rose until the water overflowing into it caused it to sink. Defendants were held not to infringe.—*Ib.*

434. In complainant's patent, which was closely approached by the prior art, there were claims relating to an open top float contained within a shell, constructed with a siphon-pipe, so that the water was discharged from the top instead of the bottom of the float. In defendants' trap the water was showered from a perforated diaphragm to the bottom of the containing shell; as the water flowed into the trap it caused the float, which was empty, to rise, until it came in contact with a plate at the top of the trap, where it remained until the circumjacent water flowed over its edge; and when the trap and float were filled, the water sank to the bottom of the former. Defendants were held not to infringe.—*Ib.*

435. If defendant's machine is, in substance, as to means and purpose, the same as complainant's patented machine, but fails to effect that purpose in its entirety, it is still an infringement. *Sewing Mach. Co. v. Frame*, 28 O. G. 96.—BUTLER, 1884.

436. In complainant's patented tag for ticketing cloths, the claim was: "As an article of manufacture, a size or quality mark or ticket, composed of two layers of paper between which is secured the head or bridge of the fastening springs *c*, which extend through the bottom layer and are adapted to fasten the ticket to a fabric." Defendant's staple, secured to the tag by an eyelet, was held not to infringe. *Kimball v. Cunningham*, 22 Blatch. 146.—BENEDICT, 1884.

437. Complainant's patent was for an improvement in glove fastenings. The prior art required the restriction of the claim to the particular style of springs described in the patent. That spring was of a single piece of wire automatic and continuous in its operation. Defendants' device was composed of two stiff arms pivoted at one end, with a spring riveted to one arm and connecting at its free end with a link fastened to the end of the other. Defendants' device was held not to infringe. *Field v. Ireland et al.*, 28 O. G. 284.—COXE, 1884.

438. Complainant's patent for improvement in trunks used the term "spring catches." The court construed this term to mean that part of the fastener which was secured to the body of the trunk, consisting of three pieces—namely,

a case provided with a metallic socket, a hinged latch hung in the socket, and a spring. *Sessions v. Romadka et al.*, 21 Fed. Rep. 124.—DYER, 1884.

439. Complainant's claim was: "The suspender-end made of a flat cord or strip of fibrous material, bent into a loop laid flatwise, united at the inner edges and connected to the attaching pieces, as set forth." "Button straps for suspenders made of woven material were old; flat suspender-ends of various materials, with a buttonhole cut in them, were old; and suspender-ends made of a round cord, with the end turned back and fastened to form a loop, were old." In view of this prior art, the complainant's patent was "construed as one for a suspender-end made of a flat cord or strip bent to form a buttonhole, and the ends turned back and united at their inner edges, and connected to attaching pieces." "The defendants' suspender-ends, . . . made of flat braid, with a buttonhole formed in them in the process of plaiting the braid," were held not to infringe. *Shenfield v. Schirmer et al.*, 21 Fed. Rep. 241.—WALLACE, 1884.

440. Complainant's patent was for a railroad frog, and the combination claim mentioned as one element "two centre-rails B B joined to form the V-shaped point;" and the court said of this: "The two centre-rails B B mentioned in the second claim refer to and mean the two centre-rails which he has particularly described in his specifications." *Wier v. Morden*, 21 Fed. Rep. 243.—BLODGETT, 1884.

441. The claims of complainants' patent were: "1. As a new article of manufacture, a blank key-board covered with a continuous strip or roll of plastic composition, substantially as specified." "2. The within-described process of forming piano or analogous keys, which consists in covering a key-board blank with a strip of plastic material and then cutting out each key from the coated blank, substantially as specified." This patent was limited by construction to plastic composition of the nature and character of celluloid. *Celluloid M'fg Co. et al. v. Pratt et al.*, 22 Blatch. 367.—SHIPMAN, 1884.

442. Complainants' claim being: "As a new article of manufacture, a blank key-board covered with a continuous strip or roll of plastic composition, substantially as specified;" defendants, who covered the upper surfaces and edges of their key-boards, but not the fronts, with one strip of material, were held to infringe, and the court further said: "It is an infringement if a substantial portion of the upper surface of the key-board is covered with a single sheet, but it

is not an infringement to cover single keys with separate strips of celluloid."—*Ib.*

443. Complainant's patent was for an electric lining to an outer covering for a safe, insulated from the safe and so arranged that an attempt to get through the covering effected the electrical conditions and gave an alarm. "The inventors could not have a valid patent for protecting safes by electricity any more than Morse could for sending messages to a distance by that agency; neither could they for every form of device for that purpose, for various devices existed before their invention. They were entitled to protection only for their specific improvements upon what existed before." *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 22 Blatch. 471.—WHEELER, 1884.

444. Complainant's patent was for making concrete pavements in sections, having tar-paper or its equivalent between the sections. Defendants laid the concrete as an integral mass, but marked the lines with a cord one sixteenth of an inch in diameter, causing the concrete, when it cracked, to follow these marks. Defendants were held to infringe. *Kuhl v. Mueller et al.*, 21 Fed. Rep. 510.—SAGE, 1884.

445. Where complainants' lantern had both interior and exterior air-feed, and defendants' structure only had the exterior air-feed, defendants were held not to infringe. *Steam Gauge & Lantern Co. et al. v. Miller et al.*, 21 Fed. Rep. 514.—SHIPMAN, 1884.

446. Complainants' improvement was intended, as described in the specification, for deflecting into an air tube atmospheric currents, in contact therewith, from whatever direction. Defendants contended that their device was not an infringement because such deflection only took place when the air came from a certain particular direction. Defendants were held to infringe.—*Ib.*

447. Complainant's patented egg-beater was the same as prior egg-beaters except in the form of the beater. The form of the beater was otherwise old, and it was held that complainant was necessarily restricted to his specific form of beater in the combination. *Deis v. Doll*, 21 Fed. Rep. 523.—MATTHEWS, 1884.

448. Complainant's patent on skylights had a claim for a sash swinging on pivots, having exterior and overlapping flanges on the sides and bottom of the part of the sash swinging outward, forming an outer flashing for protection against storms. Defendant had such a flange at the bottom of the sash only, and was held to infringe to that extent. *Hayes v. Bickelhaupt, Sr.*, 22 Blatch. 463.—WHEELER, 1884.

449. Complainants' patent was for a combination of the capstan of a vessel with a freight-hoisting engine, through intermediate mechanism. Defendant used an independent engine to operate the capstan, and was held not to infringe. *McMillin et al. v. St. Louis & Vicksburg Anchor Line*, 22 Fed. Rep. 169.—TREAT, 1884.

450. Where the invention claimed, in an original patent, was of a certain cylinder valve operating in a suitable case in connection with a waste-water valve, it was held that the reissued patent must be restricted to the same thing or be declared void for lack of novelty. *Flower et al. v. Detroit et al.*, 22 Fed. Rep. 292.—BROWN, 1884.

451. For an example of a patented combination closely approached by the prior art, necessitating a narrow construction of the patent and permitting defendant to use equivalents without infringing, see —. *Gilbert v. Weir Plough Co.*, 29 O. G. 1129.—BLODGETT, 1884.

452. The actual language of a specification was: "The crushing cone is suspended on an oscillating arbor rigidly connected with a rotating eccentric box," etc. The court construed this passage as if it read: "The crushing cone is rigidly suspended on an oscillating arbor connected with a rotating eccentric box," etc. *Frazer et al. v. Gates & Scoville Iron Works*, 22 Fed. Rep. 439.—BLODGETT, 1884.

453. A patented washboard was of sheet-metal, with a rubbing face longitudinally and transversely corrugated or ribbed, whereby such rubbing surface was made up of projections bounded by a series of horizontal, vertical, and angular shaped grooves. This construction was somewhat closely approached in the prior art. Defendants' washboard was a sheet-metal washboard having transverse continuous ridges and intermediate longitudinal separate ridges, and was held not to infringe. *Duff et al. v. St. Louis Wooden Ware Works et al.*, 22 Fed. Rep. 340.—TREAT, 1884.

454. Complainants had a patent on the manufacture of boxes of paper, pasteboard, thin wood, or other flexible material; they were not pioneers in that art. Their patent stated that the flaps were bent or folded perpendicularly to the plane of the blank. Defendants' tray had sloping sides or ends, and was held not to infringe. *Ketcham et al. v. Jacques et al.*, 22 Fed. Rep. 399.—BLODGETT, 1884.

455. Complainants' patentee was the first discoverer of the process by which the destructive sulpho-acids of alphanaphtol, capable of treatment with nitric acid without the destruction of

their sulpho groups, could be produced. Consequently—it was held—they were entitled, when applying for a patent, to make a broad claim for the product when made by their process, whether, as part of the process, the treatment of sulpho-acids with nitric acid should be according to their method or should be by any other equivalent method which would produce their product. *Pickhardt et al. v. Packard*, 23 Blatch. 23.—WALLACE, 1884.

456. Where one element of a combination claim was a windlass, and defendants substituted therefor a lever; and levers and windlasses were old in the prior art generally, complainant was restricted to his specific windlass, and defendants held not to infringe. *McFarland v. Deere & Mansur M'fg Co. et al.*, 22 Fed. Rep. 781.—BLODGETT, 1884.

457. Complainant's improvement in paint cans employed an annular disk with an upwardly projecting bead, presenting a rotund smooth surface to the brush. Defendant employed an annular disk with a sharp upturned edge. The court held defendant not to infringe in view of the prior art, and said: "One combination is not the same as another if it substantially differs from it in any of its parts." *Norton v. Haight*, 22 Fed. Rep. 787.—GRESHAM, 1884.

458. Complainant's patent was for a truss, and his combination included a certain ratchet-toothed cylinder and spring lever. Defendants used a set screw in lieu thereof, and were held not to infringe. *Becker v. Hastings et al.*, 22 Fed. Rep. 827.—BUTLER, 1884.

459. Where, in a button sewing-machine, there were groups of instrumentalities, and defendant's machine differed from complainants' in the make up of the specific groups, defendant was held not to infringe. *Morley Sewing-Machine Co. et al. v. Lancaster*, 23 Fed. Rep. 344.—COLT, 1885.

460. Complainant's patent was for a horse-collar with detachable pads; but, in view of the art, it was necessary to construe it to be for a collar to which, in the absence of hames, separable pads might be attached by buckles and straps, thereby obviating the use of hames; and, as defendant did not use such a collar, it was held not to infringe. *Osmer v. J. B. Sickles Saddlery Co.*, 23 Fed. Rep. 724.—TREAT, 1885.

461. Complainant's patented improvement in sewing-machine was: "The combination, substantially as herein described, with the stitch-forming mechanism, of a rotary cutter having its cutting edge or edges eccentric." Defendant's machine showed certain structural differences in the form and the size of the cutter, and

the parts were so arranged as to do but a fractional part of the cutting while the fabric was in motion. These changes by defendant were held not important because the defendant had only waived an immaterial part of the benefit derived from the invention. *Sewing-Machine Co. v. Frame*, 24 Fed. Rep. 596.—BUTLER, 1884.

462. The claim in complainant's patent for an improvement in boots was: "A counter protector, as hereinbefore described, extending from a point in front of one eye-seam over the seam to a point in front of the opposite eye-seam, substantially as described." The protector was described as being inside the boot. The prior art closely approached the patented thing. Defendants' outside protector was held not to be an infringement. *Buckingham v. Porter et al.*, 26 Fed. Rep. 759.—SAWYER, 1884.

463. Plaintiff's patent was for an improvement in constructing bridges, and a claim thereof was: "What I claim as my invention and desire to secure by letters-patent is: The ground frame constructed of rods *F* [longitudinal iron rods] and the girders *a* [transverse iron bars], in combination with the rod *c* [vertical iron rods], connected and arranged substantially as herein set forth." Defendant used longitudinal rods and transverse bars without chaining together, and vertical rods were not used. Defendant was held not to infringe. *Pacific Sub. & E. P. W. Co. v. United States*, 19 Nott. & Hunt. C. C. 234.—SCOFIELD, 1884.

464. The patentable novelty of the described alloy consisting in the proportion in which the copper and tin were compounded and in the addition thereto, in the process of melting, of the prescribed quantity of arsenic; and defendant's metal being shown to be composed of copper, tin, zinc, lead, and arsenic—copper within the range of proportion stated in the patent, and the tin and arsenic generally below the minimum proportion stated in the patent, defendant was held not to infringe. *Kirk et al. v. Elkins M'fg & Gas Co.*, 19 Fed. Rep. 417.—MCKENNAN, 1884.

465. Complainants' patent was for cementing a sheet of celluloid to the key-board of a musical instrument, and the slitting of it in accordance with the divisions between the keys. Defendants took a sheet of celluloid, cemented two strips of cloth to the back, slit the sheet for key-faces, and then applied them to the keys. Defendants were held not to infringe. *Celluloid M'fg Co. et al. v. Comstock et al.*, 23 Fed. Rep. 38.—SHIPMAN, 1885.

466. Complainant's patented invention, as claimed, was for "a screen or riddle immersed

in a vessel of water," etc. Defendants used the screen or riddle in open water, and were held not to infringe. *Williams v. Stolzenback et al.*, 23 Fed. Rep. 39.—ACHESON, 1885.

467. The claim of a patent, properly construed, was for a process of saturating leather, etc., with glycerine until it became impervious to gas. Defendants immersed their fabric in a compound of glue, glycerine, soap, borax, and sulphate of iron; the glue rendered the fabric gas-proof, and the glycerine made it flexible; the other ingredients cured the glue and glycerine. Defendants were held not to infringe. *Farmers' Friend M'fg Co. v. Challenge Corn Planter Co. et al.*, 23 Fed. Rep. 42.—BAXTER, 1885.

468. In a flanging machine the lower roll was extended beyond the outer end of the upper roll a distance equal or nearly equal to the thickness of the plate to be flanged. This was a permanent arrangement. Defendants provided their upper roll with a spiral spring which permitted it to recede, in operation, so as to produce the same effect; and were held to infringe. *Phillips et al. v. Carroll et al.*, 23 Fed. Rep. 249.—ACHESON, 1885.

469. Complainants' invention was of a cultivator tooth having a certain kind of brace. In view of the fact that such braces generally were old, the claim was held to be limited to the specific kind of brace, and a tooth with another kind of brace was held not to infringe. *Rowell et al. v. Lindsay et al.*, 113 U. S. 97.—SUP. CT. 1885.

470. A claim in complainant's patent was: "The neck pad, having an inner lining of crimped leather, and provided with straps to allow its being fastened to the collar, as herein shown and described, for the purpose specified." The patent described a stuffed pad, and the court held that the claim was to be construed as for a combination consisting of a stuffed pad having an inner lining of crimped leather and straps to fasten the pad to the collar; and the defendant, who used a single piece of crimped leather, having a piece of sheet metal, so shaped as to fit it, riveted to its upper side in order to stiffen it and preserve its crimped form, and provided with straps to fasten to the collar, was held not to infringe. *Voss v. Fisher*, 113 U. S. 213.—SUP. CT. 1885.

471. For an example of a claim construed, in view of the prior art, so narrowly as not to include the use of mechanical equivalents by defendant, see —. *Grain Drill M'fg Co. v. Rude et al.*, 30 O. G. 1207.—WOODS, 1885.

472. The claim in issue was: "I claim, in a valve for water-closets, a cup-leather for con-

trolling the motion of said valve, in closing gradually, substantially as specified, said cup-leather moving freely in one direction and closing against the containing cylinder in the other direction, and the leakage of water in said cylinder allowing the movement of said cup-leather, as set forth." The court found that the general construction was that of a prior patentee, using a cup-leather centrally instead of the central valve of said prior patent. A central valve was old; a cup-leather was old; a plunger with a central valve and means of regulating the escape of water from above it was old; and, in view of this prior art, complainants were restricted to his specific device. *Thompson et al. v. Boisselier et al.*, 114 U. S. 1.—Sup. Ct. 1885.

473. Complainants' claim was: "I claim the use of a drip-box or leak-chamber arranged above the closet and below and around the supply-cock, substantially as described." The following devices were old: a drip-cup or drip-box; a pipe to convey away drippings in machinery from a drip-box arranged in connection with a cock; a drip-cup applied to the valve of a water-closet, the leakage from the valve falling into a saucer, and thence finding its way through a hole into the inside of the trunk; a valve on the floor at the foot of the trunk; a valve attached to the trunk and below its top; a valve above its top; a valve with a drip-pan conducting the drip into the soil pan pipe at the foot of the trunk; a valve on top of the trunk, and a provision, by means of a hollow arm, to conduct the drip into the trunk. In view of this state of the art, the claim was limited, by its language, to a drip-box "arranged upon the top of or over the trunk;" and as defendants' drip-box was on the side of the trunk, they were held not to infringe.—*Ib.*

474. The patented improvement was of a valve for water cylinders of steam fire-engines and other pump cylinders. The improvement was really an automatic valve in combination with a contrivance consisting of a pinhole and pin, by which the valve might be raised from its seat so as to leave the valve hole permanently open, or by which the valve might be rigidly closed upon its seat, making a closed or float valve. This inventor was not the first to conceive the idea of a device for opening or closing rigidly an automatic valve. The same thing had been done by means of weights and screws in other devices. The claim was, therefore, construed to be confined to the specific device described in the specification and claims—namely, a pinhole and pin. As defendants used for this purpose a screw, sleeve, or cup, they were held not to have one

of the elements of the combination, and therefore not to infringe. *Blake v. San Francisco et al.*, 113 U. S. 679.—Sup. Ct. 1885.

475. Complainant's claim, referring to an invention in hammocks, was for a combination of, first, a rectangular, flexible, open-work fabric; second, a continuous, flexible binding; third, certain strengthening cords; fourth, certain eye-lets; fifth, a continuous clew lining; sixth, suspending rings. There were certain elements of this combination not present in defendant's device. Complainant claimed, however, that there were in defendant's device mechanical equivalents for the omitted elements; but as complainant's device had the same features which were thus claimed to be mechanical equivalents in addition to the said omitted elements, it was found that defendant's structure did not have said mechanical equivalents. *Travers v. Palmer*, 31 O. G. 382.—Coxe, 1885.

476. Complainant's patent was for an improvement in circuits for electric railroad signals. The court found that one essential of the combination claimed in the patent was insulated sections of the railroad track used, when covered by the locomotive or cars, as a circuit closer. Defendant's device dispensed with such insulated section of the track, and employed in place thereof a separate instrument placed near the track and worked by means of a lever connected with the track, so that the wheels of the locomotives and cars, passing on the track, depressed the outer end, the lever being raised again and held up after the train had passed by means of a spring which held it in place. Defendant was held not to infringe. *Electric Signal Co. v. Hall Railway Signal Co.*, 114 U. S. 87.—Sup. Ct. 1885.

477. In complainant's patent for an electric railroad signal, the entire circuit, operated by a single battery and closed intermediate points, for the purpose of displaying and concealing the signals, was described as formed by means of two wires or other conductors attached to the positive and negative poles of the battery, and extended to any required distance parallel or nearly so to the line of railroad; these two conductors were designated as metallic and insulated from the earth, and were embraced under that description in the claims. Defendant's plan did not include a metallic circuit composed of two conductors, such as those described, but used a circuit composed in part of the earth itself. This arrangement was held to be a new combination, giving a new result, and held not to infringe.—*Ib.*

478. Complainant's claim, in its patent for

improvement in fabric for collars and cuffs, was : "A fabric for collars and cuffs or other similar articles, having outer sheets or layers of celluloid and an outer lining of textile or fibrous material, substantially as set forth and for the purposes specified." Defendant cut a single sheet of chrolithion, essentially the same as celluloid, into the desired shape, but larger than the finished article ; it placed a narrow strip of textile or fibrous material around the four edges, which were then folded over and by heat and pressure made to adhere. The buttonholes were strengthened in substantially the same manner. Defendant was held to infringe. *Celluloid M'f'g Co. v. Chrolithion Collar and Cuff M'f'g Co.*, 31 O. G. 519.—COXE, 1885.

479. In a patent for a telegraph printing instrument, there were two printing wheels specified in the claim as arranged to print jointly ; defendants contended that this meant simultaneously ; but the court held that the prior art called for no such construction, that the patent did not describe the two wheels as necessarily acting simultaneously, and that the real improvement did not consist in making the two wheels act simultaneously, and therefore held that in this case jointly did not mean *simultaneously*. *Gold & Stock Tel. Co. v. Commercial Tel. Co. et al.*, 23 Blatch. 199.—SHIPMAN, 1885.

480. Complainant's patented telegraphic printing instrument had two type-wheels capable of independent rotation. In defendants' machine, which had two type-wheels, each one came back to the zero-point after acting, which was a feature not found in complainant's device. Defendants were held to infringe.—*Id.*

481. Where a claim in a process patent was : "The method of insulating telegraph wire by first filling the pores of the covering and subsequently compressing this covering, and thereby polishing its surface, substantially as described," complainant contended that a feature of the patented process was the allowing of the wax or paraffine to cool before compressing it. Thereupon the court said : "Clearly a patentee cannot claim the benefit of an element of his invention thus vaguely and indefinitely hinted at." "That part of the alleged invention is not even referred to in the most distant manner in the claim." *Western Electric M'f'g Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447.—SUP. CT. 1885.

482. Complainant's patent was for an adjustable desk top held in place by a hooked rod. Defendant used a stop-hinge for that purpose. The prior art approached closely to the patented device Defendant's stop-hinge was held not to

be an equivalent for the hooked rod, and the court said : "To be an equivalent it must perform the same function in substantially the same manner." *Peard v. Johnson*, 23 Fed. Rep. 597.—COXE, 1885.

483. In complainant's patented bed frame the adjustable standard at the corner needed to be adjusted by some power extrinsic of the frame. In defendant's frame the adjustment was effected by a screw belonging in the structure. Defendant held to infringe. *Hartford Woven Wire Matt. Co. v. Peerless Wire Matt. Co.*, 23 Blatch. 227.—SHIPMAN, 1885.

484. Complainant's improvement in hoisting apparatus was a combination of a drum, a shaft, a friction-cone, a spur-wheel, a spring, and a side flange. The differences therefrom in defendants' device were that while the friction-surface of complainant's device was wood, that of defendant was leather. Where the complainant had one spring to regulate the pressure, defendants had two. Where, in complainant's machine, the bearing of the friction-surface was between the inner face of the drum-flange and the outer face of the friction-cone, in defendants' device it was between the outer face of the drum-flange and the inner face of the friction-cone. These changes were held to be merely mechanical, or the substitution of well-known equivalents. *Mundy v. Kendall et al.*, 23 Fed. Rep. 591.—NIXON, 1885.

485. Complainant's patent was for an improvement in making carriage-thill shackles, and consisted in disposing the body of the blank out of a straight line so as to give a surplus of metal for the final formation of the back. A prior patentee obtained this surplus by certain downward projections. Another prior patentee obtained it by "sharp lower corners with curved arms." Complainants were restricted, by construction, to his exact shape ; and defendant was held not to infringe. *Clark et al. v. Beecher M'f'g Co.*, 115 U. S. 79.—SUP. CT. 1885.

486. Where, in a patent for a transom lifter, approached by the prior art, the main object of the improvement set out in the patent was to prevent the operating rod from being bent or displaced by the weight of the transom, defendant's device, which might have been construed within complainant's patent, upon a broad construction, did not embody the said improvement, and was held not to infringe. *Wollensak v. Reiher*, 115 U. S. 87.—SUP. CT. 1885.

487. Complainant, in his patented baggage-check, used one piece of metal ; defendant used two ; complainant had a face-plate with three distinct openings ; defendant had but one open-



ing of the same size in both plates ; complainant had a back plate with openings of any kind and a lip to guide the card ; defendant used neither of these features ; complainant attached his strap so that both sides of the holder were exposed ; defendant was particular to obscure one side with the strap ; defendant's holder was reversible ; complainant's was not. The point of similarity between the two was that both adopted flanges to prevent lateral sliding of the plates and to give strength and durability to the check. The claim was for a combination of the features of complainant's check. Defendant used only one element of complainant's check, and was held not to infringe. *Abott v. Hoole M'f'g & Baggage Check Co.*, 31 O. G. 1561.—COXE, 1885.

488. Complainant's claim was : "The revolving cutting block P, in combination with the cutting press, substantially as and for the purpose specified." Defendants used a revolving block and cutting die, but not the cutting press. In view of the prior state of the art, the defendants were held not to infringe. *Richardson v. Bresnahan et al.*, 23 Fed. Rep. 897.—COLT, 1885.

489. In complainants' machine for packing shoe-shanks, the blanks were not cut before use, while they were so cut in defendant's machine. In complainants' machine the blanks fell to the table by gravity, while in defendant's machine there was a device for pushing the shank from the dies. Defendant was held to infringe. *Jenkins et al. v. Gurney*, 23 Fed. Rep. 898.—COLT, 1885.

490. Complainant's improvement, as claimed, was : "In an air cooler or an apparatus for cooling carcasses, etc., the combination of the fan-blowers or fanners F, the system of tubes T t t, etc., and the ice chest or depository in either of said forms, as and for the purposes shown and represented." Defendant did not use an ice chest, but in lieu thereof used an apparatus for chilling composed of compression cylinders. Defendant was held not to infringe. *Bate Refrigerating Co. v. Eastman*, 32 O. G. 517.—SHIPMAN, 1885.

491. Complainant's patented machine was for unhairing and scouring hides or skins. The bed of the table was omitted from the claimed combination. Defendants contended that such bed formed an actual part of the combination, and because not mentioned in the claimed combination, the claim therefore covered a mere aggregation. Defendants' contention was overruled. *McDonald v. Whitney et al.*, 24 Fed. Rep. 600.—COLT, 1885.

492. Defendants' machine had one less roll than complainant's patented machine, but that

one roll filled the important patented function, and defendants were held to infringe.—*Id.*

493. For an example of changes in the structure of a windmill held to be merely mechanical, see —. *Eclipse Windmill Co. v. Woodmanse Windmill Co. et al.*, 24 Fed. Rep. 650.—BLODGETT, 1885.

494. In complainant's patented baby-jumper, the principal feature of novelty was a backwardly curved suspension rod. Defendants used a bifurcated or double rod having substantially the same curve, and were held to infringe. *Spooner v. Dorn et al.*, 24 Fed. Rep. 700.—BLODGETT, 1885.

495. In a patented automatic fire extinguisher, the gist of the improvement consisted in locating the seal on the outer end of the water conduit. This, resulting in practical advantages, was held sufficient exhibition of invention to support a patent. Defendant, in making this seal, used a semispherical cap in place of the patented flat cap, and its flanges passed into the pipe instead of outside thereof ; defendant was held to infringe. *Parmelee et al. v. A. Burritt Hardware Co.*, 24 Fed. Rep. 735.—SHIPMAN, 1885.

496. For an example of a narrow construction of a patent, in view of the state of the art, and a finding thereupon that defendants did not infringe, see —. *Leach v. Chandler et al.*, 24 Fed. Rep. 791.—NIXON, 1885.

497. For an example of an arrangement of leaves in a pocket check book held patentable over former arrangements, and of a variation by defendant held to be an infringement, see —. *Norrington v. Merchants' Nat'l Bank*, 25 Fed. Rep. 199.—COLT, 1885.

498. The claim of complainant's patent was : "The herein described trunk-roller, the frame of which is formed from a square sheet metal blank, cut or incised at the junction of the plate A, and ears B, B, said ears being bent up from two opposite corners so as to leave the points c, c, c, c, substantially as described." It was held that complainant's patent could only be sustained by limiting it to roller frames having diagonal incisions in the plate, and the opposite corners of the blank turned up. Defendants' trunk-roller was produced from blanks in which the incisions were not diagonal nor the opposite corners turned up, but by using a rectangular rather than a square blank, and making the incisions in lines parallel with the longer sides of the rectangle. Held not to infringe. *Sessions v. Gould et al.*, 33 O. G. 1139.—NIXON, 1885.

499. Complainant's patent being for roller frames or castors for trunks, devices which were

not used for trunks were held to be a part of the prior art.—*Id.*

500. A patented hat-pouncing machine showed a frusto-conical pouncing cylinder. The claim mentioned it as a "pouncing cylinder." Defendants used a cylindrical pouncing wheel, and were held to infringe. *Nat'l Hat-Pouncing Machine Co. v. Thom et al.*, 25 Fed. Rep. 496.—COLT, 1885.

501. The claim in a patent for a lubricator was: "The drip-tube P, constructed and arranged to operate substantially as described, whereby the water from the condenser shall be delivered against or close to the side of the glass in order that it may be seen as it enters the oil, or passes through the same." The court said: "The claim must be limited to a drip-tube with one side, at its end, cut off slanting, and located with its slanting end so near the side of the glass cylinder that the drops of condensed water shall be delivered against the side of the glass or so near it as to practically disclose the oil between the end of the tube and the glass." *Jenks et al. v. Swift*, 25 Fed. Rep. 722.—WALLACE, 1885.

502. In complainant's patented hose, of textile fabric, the warp threads went through the whole structure from side to side. Defendant's warp threads went only half through from the inner side and the outer side, and tied the hose together, all passing under and around an intermediate filling thread. Defendant was held to infringe. *Reed v. Street*, 34 O. G. 339.—NIXON, 1885.

503. For an example of a claim strictly construed in view of the state of the art, and defendants' somewhat similar machine held not to infringe, see —. *Buzzell v. Andrews et al.*, 25 Fed. Rep. 822.—BUTLER, 1885.

504. Complainant's improvement in drying-machines consisted of a combination specifying certain "heating pipes D." The specification described these heating pipes as flexible or jointed. Defendant's machine did not have the flexible or jointed pipes, and was held not to infringe. *Sheeder v. Shannon*, 25 Fed. Rep. 824, *per curiam*, 1885.

505. The claim in complainant's patent was: "The combination of the brim of a hat with a drooping-hoop, so that the brim is caused to droop at the front and rear and to rise at the sides, substantially as set forth." In view of the state of the art, this claim was limited to a spring-hoop, bent or twisted in such a manner as to impart a droop to the front and rear and an elevation to the sides thereof, the word "bent" being held to be synonymous with the

word "twisted;" and it was held that the droop must be imparted by twisting, and that if a hoop received its droop by bending there was no infringement, although the wire might be, in fact, twisted to some extent. *Mallory M'f'g Co. v. Hickok et al.*, 25 Fed. Rep. 827.—SHIPMAN, 1885.

506. In complainants' patented quilting-machine, the essential feature was the alternate arrangement of the needles. In defendant's machine the needles were so duplicated that the alternate arrangement was not apparent at first glance, but was found to be present on analysis, and it was held to infringe. *Tate et al. v. Thomas*, 30 O. G. 345.—WALLACE, 1885.

507. In complainant's patent for a wardrobe bedstead, a claim was: "In a wardrobe bedstead the hinged folding sections A, B, C, secured to the uprights D, substantially as and for the purpose described." These sections were three folding doors; defendants used only two, and were held not to infringe. *Tobey Furniture Co. v. Colby et al.*, 26 Fed. Rep. 100.—BLODGETT, 1885.

508. Defendants' improvement in wardrobe bedsteads was the utilization of a vertical spring to aid in lifting the bed. The court held defendants' device to be an equivalent for that of complainant's, but that, in view of the state of the art, complainant could not invoke the doctrine of equivalents, and defendants therefore did not infringe.—*Id.*

509. Complainant's patent was for such lock cases as are used in the jaws of satchels and the like. He conceded that unless the claims of the patent were limited in construction so as to make certain end pieces, provided with notches or recesses, constituents of the claims, the claims were void for want of novelty. Such notches or recesses were not referred to specifically either in the specification or the claims. They were therefore held not to be within the claims. *Roemer v. Neuman et al.*, 26 Fed. Rep. 102.—WALLACE, 1885.

510. The claim in complainants' patent was: "An insulated gas-burner having its insulated section of or from glass or similar vitreous material, substantially as and for the purpose specified." The court held that "this claim cannot be construed as a broad claim for a gas-burner in an electric lighting system having an insulated section of the material mentioned," and said further: "On the other hand, upon correct principles of construction, the claim should not be limited to an insulated burner having all the details of construction which are described in the specification." Defendants

changed the mode of fastening the conductors to the burner, but were held to infringe. *Birdseye et al. v. Heilner et al.*, 26 Fed. Rep. 147.—WALLACE, 1885.

511. Complainant's patented device consisted in the adaptation of a mowing-machine to a boat for the purpose of cutting grass, weeds, and the like under water. This machine used the well-known sickle-bar, with its motion given by a vibrating lever. Defendants substituted a vertical crank-shaft for this lever, and were held to infringe. *Piper v. Shedd et al.*, 26 Fed. Rep. 151.—BLONGETT, 1885.

512. In a patent for a door-check, the claim was: "The grooved screw I, for adjusting the vent, in combination with the packing H, piston G, tube D, and coiled spring E or equivalent, substantially as herein shown and described." In complainant's device the cupped packing performed the double office of a packing and a valve, to admit the air to the piston, moving backward and closing when the piston moved forward. In defendants' device there was a piston with a cupped packing and a valve in the centre of the piston for the purpose of admitting air to the cylinder during the backward stroke and confining it during the forward stroke. Defendants were held to infringe. *Norton Door Check & Spring Co. v. Elliot Pneumatic Door Check Co. et al.*, 26 Fed. Rep. 320.—COLT, 1885.

513. A claim in complainant's patent on a door-check was for "the combination with a door and its jam of a compressed air door-check provided with an arm whereby its piston-rod may be operated, a guide-rod whereby the stroke of its piston will be controlled, and suitable for attachment of the arm, guide-rod, and door-check to the door or its jam, all connected and operating together substantially as and adapted for the purpose set forth." Taken in connection with the specification and drawings, this was held to include as a part of the necessary mechanism the two pistons by which the arm was connected first to the guide-rod and, second, to the piston. As defendants did not use this particular device, they were held not to infringe.—*Id.*

514. The claim in complainant's patent was: "An insulated gas-burner having its insulated section of or from glass or similar vitreous material, substantially as and for the purpose specified." The court held that this could not be construed as a broad claim for a gas-burner in an electric lighting system having an insulated section of the material mentioned, for the patentee was not the first to discover the peculiar

value of such material for that purpose. Nor, on the other hand, was the claim to be limited to an insulated burner having all the details of construction described in the specification. The court further held that the essential novelty consisted in selecting this appropriate insulating material and making from it the upper part of a gas-burner, serving to support and insulate the electrical conductors, and also as a gas-way from the gas-pipe to the place where the spark was communicated to the gas. Defendant's device differed from complainant's as regards the shoulder for fastening the conductor to the burner, but was held to infringe. *Bogart v. Hinds*, 34 O. G. 1510.—WALLACE, 1885.

515. In complainant's patent for lumber drier a certain kind of flexible joint was shown and described. In view of the prior art, the patent was held restricted thereto; and as defendant's device did not have this peculiar kind of joint, defendant was held not to infringe. *Sheeder v. Shannon*, 35 O. G. 138, *per curiam*, 1885.

516. A claim in complainant's patent in suit was: "1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described." A disclaimer had been entered as follows: "Your petitioner hereby disclaims the forming of blocks from plastic material without interposing anything between their joints in the process of formation." Defendant prepared first a pavement bed, and then placed parallel strips of plank diagonally across this bed from the curb to the inner side of the pavement; he then began with the first subdivision formed by these boards, and filled the space between them with a mass of concrete composed of Portland cement or broken stone or the like. Having done that, he did the same with the third subdivision. He then took a cleaver and drove it down a considerable distance, and entirely through or nearly through the concrete mass, so as to mark off these narrow subdivisions into blocks; he then took a different substance, cement and sand in plastic form, and made an additional top coating over the concrete. After that had been smoothed, he, with a trowel, cut through the top surface exactly in line with the cuts below; then what is called a jointer was run over the same lines, after which the pavement had a checkered appearance of separate blocks. He then repeated this process with the second and fourth subdivisions, and so on indefinitely. Defendant was held not to infringe. *Schilling v. Cranford*, 37 O. G. 1349.—HAGNER, 1885.

517. Complainant stated that, in his improvement in bleaching xyloidine, he used "any of

the well-known means, preferring a solution of chlorine or a solution of chloride of lime or soda." Defendant used permanganate of potash, which was a known bleaching agent. *Held* to be an equivalent and an infringement. *Spill v. Celluloid M'fg Co.*, 18 Blatch. 190.—BLATCHFORD, 1880.

518. The claim in complainants' patent specified a lever, to be operated by hand, as one element of the combination. Defendants' machine dispensed with the lever, and moved the parts directly by hand. Defendants were held not to infringe. *Brown et al. v. Davis et al.*, 116 U. S. 237.—SUP. CT. 1886.

519. In complainant's patented spring for gloves, the arms of the springs constantly tended to close the mouth of the glove. In defendants' spring there were stiff arms pulling the parts together only when closed far enough to have the spring on one arm operate in the opposite direction upon the cam-shaped end of the other; and defendants were held not to infringe. *Field v. De Comean et al.*, 116 U. S. 187.—SUP. CT. 1886.

520. Complainant's patented fare register had a tell-tale hand, which, when set with the trip-hand at zero, moved with it, and could not be set back to zero unless the trip-hand were also set there. Defendant's fare register had a trip-hand; and a tell-tale hand in each trip was left to show the place in commencing registration. The difference between the two was only in the means by which the trip-hand was brought there. Defendant's device was held to infringe. *Railway Register M'fg Co. v. Broadway & Seventh Ave. Railroad Co.*, 34 O. G. 921.—WHEELER, 1886.

521. A claim was: "I do claim [as a new article of manufacture] a tube or cylinder cast out of copper and free from blow-holes and other similar defects when produced as herein stated." The court said of this: "It is for a new article of manufacture in the form of a cast copper tube or cylinder free from blow-holes and other similar defects when produced as described;" and held that an infringing article must have been produced in the same way described in the patent. *Adams et al. v. Bridgewater Iron Co. et al.*, 34 O. G. 1045.—COLT, 1886.

522. Where a specification mentioned the invention as "a perfect cast copper cylinder," "free from blow-holes and other similar defects," the language was held to mean not that the articles must be absolutely free from blow-holes, but that it meant "a cast copper cylinder so free from blow-holes as to be considered sound—that is, sufficiently perfect to be used in the

arts for the purpose for which such copper cylinders were used."—*Id.*

523. In complainants' patented mould the mould itself rotated. Defendants rotated a pouring basin over the mould, and, attaining practically the same end, were held to infringe.—*Id.*

524. In complainant's patent for a hand-stamp, type were shown arranged upon or around a shell or cylinder by moving which the desired type were brought to the lower part of the shell, where they were passed into a slot in the plate there located, and kept there by means of catch-spring and lugs. Defendants set their type into a metal box or frame and inserted the box in a slot, and retained it in place by means of a catch-spring and lugs. Defendants were held to infringe. *Wilson v. Cubley et al.*, 26 Fed. Rep. 156.—BLODGETT, 1886.

525. Complainant's claim was: "The combination in a bottle washer of a fixed or stationary water supply-pipe; a sleeve shaft mounted upon and adapted to be revolved about said stationary pipe; a brush or scraper attached to the end of said shaft and about the end of said pipe, and adapted to be compressed to enter the neck of the bottle and to expand to the largest interior diameter of the bottle; and a funnel-shaped mouth-sleeve mounted upon and surrounding said sleeve-operating shaft, and enclosing a brush adapted to be moved endwise on said driving shaft, to uncover the brush and to be revolved with said shaft by frictional contact therewith or to be prevented from revolving by frictional contact with the neck of the bottle, substantially as and for the purposes described." For complainant's stationary water supply-pipe, a sleeve shaft mounted upon it and adapted to be revolved about it, defendants substituted a revolving water supply-pipe, lowering the brush at its forward end and jointed at the rear to the stationary supply-pipe. In complainant's machine the sleeve revolved by frictional contact with the revolving brush; the funnel-shaped mouthpiece was attached to the sleeve and therefore revolved with it, until, by the pressure of the bottle against the mouthpiece, the friction moving it was overcome. In defendants' machine the flaring mouth and sleeve were cut in two parts; the mouth-piece was stationary and the sleeve was revolved positively by the pulley which revolved the brush. In the two machines the friction of the mouthpiece and the sleeve were the same. Defendants were held to infringe. *Hoyt v. Slocum et al.*, 26 Fed. Rep. 329.—COLT, 1886.

526. Aside from certain elements common to

devices of the same general character, the specific mechanism of the defendant's device was substantially different from that in complainant's patent. Complainant's patent was limited to the particular mechanism described; and defendant was held not to infringe. *Shaw Relief Valve Co. v. City of New Bedford*, 26 Fed. Rep. 331.—COLT, 1886.

527. The claim in complainant's patent was for a combination, in a typewriter, of key-levers and type-levers. The type-levers of this claim were not described in it as of any particular form or class. In view of the prior art, this claim was limited to levers of a peculiar form; and defendant was held not to infringe. *Phipps v. Post*, 26 Fed. Rep. 447.—WALLACE, 1886.

523. In complainant's patent for a rivet-setting machine, the claim was: "The receiver N, provided with the springs *r, r*, mounted upon the said plunger B, substantially as described." In defendant's machine the receiver was not attached to the plunger, and it consisted of a long lever pivoted at its rear end to the supporting frame of the machine, a base of two elastic strips of metal flaring at their front ends to hold the rivet, the lever being thrown upward by the spring fixed to the arm of the machines. Defendant was held not to infringe. *Marchand v. Emken*, 23 Blatch. 435.—COXE, 1886.

529. The claim in complainant's patent was: "The process herein described of relieving stranded vessels by causing them to float in a fluid or semi-fluid by means of forcing continuous streams of fluid immediately around its bottom into the sand or mud in which the vessel is embedded or lies, for the purpose of washing away and softening the sand, while at the same time a lateral movement or strain is imparted to the vessel by means of warping lines or equivalent means whereby it may be moved into deeper water, substantially as and for the purpose set forth." Defendants used a stream of water for the purpose of [in a similar manner] removing suspected wreckage from beneath a stranded vessel, their process being substantially that which was old in removing obstructions to the sinking of piles. Defendants were held not to infringe. *Knapp v. Benedict et al.*, 26 Fed. Rep. 627.—SHIPMAN, 1886.

530. A claim in a patent for a screw-machine was construed to include two sleeves, a certain inner sleeve and a certain outer sleeve. In the actual construction shown in the patent there was nothing interposed between these two sleeves, and defendants contended that the patent should be limited to such a construction. The court held the fact immaterial. *Hartford Mach.*

*Screw Co. v. Reynolds et al.*, 26 Fed. Rep. 528.—SHIPMAN, 1886.

531. The claim in complainant's patent was: "The process herein set forth of manufacturing celluloid by the addition to the mass composed of pyroxyline and gum camphor of a solvent of gum camphor in about the proportion set forth, and previous to mastication, heat, and pressure." The court held that, as compared with the prior art, this was "an improved process whereby, instead of mixing a solid and liquid, and straining the mass to remove undissolved particles, and evaporating the liquid in an airtight condenser, the inventors mixed two solids and added a liquid; then, having pressed out the moisture and masticated the compound by rolls, they relied upon heat and pressure to effect or complete the transformation into solid celluloid." The defendants mixed dry gum camphor with pyroxyline liquid abnormally dry; then added the alcohol, and did not subject the mixture to pressure for the purpose of expelling dampness. Defendants were held to infringe. *Celluloid Mfg Co. v. Am. Zylonite Co. et al.*, 23 Blatch. 444.—SHIPMAN, 1886.

532. The claim in complainant's patent for a baling press was: "1. The combination of the lever or sweep H with the lever G, follower F, and box A, of a baling press, when constructed to operate as herein described." The court held that this was a claim "for the combination therein named, involving, as essential thereto, the peculiar construction of the press box." *Dedrick v. Whitman Agricultural Co.*, 26 Fed. Rep. 763.—TREAT, 1886.

533. The claim in complainant's patent for a lock was: "The arrangement of two or more rollers H, H', varying eccentrically when combined with the cam, in the manner and for the purpose specified." Defendant used the combination, except that the rollers were not "varying eccentrically;" and defendant was held not to infringe. *Yale Lock Mfg Co. v. Sargent*, 117 U. S. 373.—SUP. CT. 1886.

534. Complainant's patent had, among other claims, three for combinations, of which one element was a toggle-joint mechanism. Defendants substituted another mechanism in the place of the toggle-joint for the same purpose, and were held to infringe. *Wheeler v. Morris et al.*, 26 Fed. Rep. 918.—WOODS, 1886.

535. The claim in complainant's patent was: "The rotating tumbler I, when separated and isolated in action from the permutation wheels, and so arranged that any inward pressure upon the bolt will be exerted on the bearing of said tumbler and have no action nor effect upon the

said permutation wheels, substantially as and for the purpose herein specified." Defendant's lock had a bolt turning on a pivot, substantially like complainant's bolt. It prevented and permitted the retraction of the bolt-work in the door in the same manner. It had no sliding bolt. The turning bolt was arranged to serve as a stop to two sets of bolt-works instead of one, but in respect to that one set there was the same mode of operation in both locks. Furthermore, in the lock of complainant's patent the fence lever was connected with the turning bolt by a rack on the end of the lever, engaging with the cog teeth on the bolt, while in defendant's lock the end of the lever was pivoted directly to the turning bolt. Defendant was held to infringe. *Yale Lock M'fg Co. v. Sargent*, 117 U. S. 537.—SUP. CT. 1886.

536. For an example of a claim in a patent for a carpet-stretcher held limited to the exact device shown and described in the prior art, see —. *Montross et al. v. Bullard et al.*, 27 Fed. Rep. 64.—BLODGETT, 1886.

537. The claim in complainant's patent was : " [1] The face-guard or safety mask, substantially as described, for the purpose specified, consisting of the open cage and forehead and chin-rests or bearings, all combined and arranged essentially as set forth. [2] The open cage provided with the forehead-rest arranged in it, substantially as represented." The old fencing mask of the prior art showed no head-rest or chin-rest, and therefore complainant was held entitled to broad construction. *Thayer v. Spaulding*, 27 Fed. Rep. 66.—BLODGETT, 1886.

538. One of the constituents of complainants' patented baking powder was alum. Defendants substituted a percentage of acid phosphate. Complainants' experts testified that the two were equivalents. Such a construction of the claim made it void, therefore so broad a construction was held to be forbidden. *Smith et al. v. Murray et al.*, 27 Fed. Rep. 69.—BLODGETT, 1886.

539. For an example of a patent for a skien for wagon axles held limited to the exact thing shown and described, by the prior art, see —. *Brown & Van Arsdale M'fg Co. v. Studebaker Bros. M'fg Co.*, 27 Fed. Rep. 73.—BLODGETT, 1886.

540. A claim in complainant's patent was : "The combination with a series of pathways, of equal lengths, of means for guiding the successive sheets into different pathways and means for retarding the speed of the advance sheet until the following sheet is abreast thereof, substantially as described." The sheets, as they followed each other from a web printing-press,

were caused to travel in different pathways of equal lengths, and stop or retard the advance sheet until the following sheet or sheets were brought abreast of it, and they then moved at a given rate of speed to a point where they came together. Hoe, being the first to combine these elements and produce a given result, was held, therefore, entitled to protection against the use of equivalents by others. *Hoe et al. v. Knapp et al.*, 27 Fed. Rep. 204.—BLODGETT, 1886.

541. In complainants' patent, for folding machine, a claim was : "The combination of brake-arms, rest-locks, and supporting carrying-tapes, substantially as described." Thereof the court said : "I am of opinion that the true construction of this claim requires that the brake-arms, rest-plates, and carrying-tapes are to co-operate with the following plates or rollers. In other words, that the following plates or rollers are to be read into the claim ; and under this construction the defendants do not infringe, as the only place where they stop or retain their sheets is in the double pathway for the purpose of superimposition."—*Id.*

542. The claim in complainants' patent was : "1. The method of forming the body of a coal hod or other similar vessel, which consists, substantially as before set forth, in first forming a cone-shaped body from a suitable blank, then folding in the cone end of said body, in crimps, to form the bottom." This folding in of the crimps made the bottom of the hod stronger and at the same time made the bottom and sides integral. Defendant availed itself of that feature of the patent which consisted in using the same piece of metal to form the sides and bottom, so that the bottom would be of an increased thickness of metal ; and in order to decrease the cost of production or to evade the patent, formed only a part of the bottom from the metal of the sides, and then closed the space between the folded ends with a cap. Defendant was held to infringe. *Hoff et al. v. Iron Clad M'fg Co.*, 23 Blatch. 481. WALLACE, 1886.

543. The claim in complainant's patent was : "A nail made by punching or cutting from hot-rolled, ribbed bars of metal a headed blank, substantially as described, and by elongating, hardening, and compressing the shanks of such blanks by cold rolling from the head to the point, thereby giving to all parts of the nail so produced the superior qualities specified." In view of the state of the art, the court said : "The claim of this patent must be strictly construed, and confined to the making of nails by punching or cutting from hot-rolled, ribbed bars of metal, a headed blank, and the subse-

quent cold rolling as an entire process ; and the claim cannot be extended so as to include the process of the older art of hot rolling the blanks from rods, and finishing by cold rolling." *Globe Nail Co. v. Superior Nail Co. et al.*, 27 Fed. Rep. 450.—BLODGETT, 1886.

544. The claim in complainants' patent for hoisting apparatus was : " The combination and arrangement of levers and connections, substantially as herein described, whereby the brake is automatically applied while the valve is closed and withdrawn when the valve is open to set the apparatus in motion." In view of the prior art, the court held complainants limited to the peculiar arrangements of parts shown. For one element of the combination defendant had substituted a certain heart-shaped cam. Defendant was held not to infringe. *Otis Bros. M'fg Co. et al. v. Crane Bros. M'fg Co.*, 27 Fed. Rep. 550.—BLODGETT, 1886.

545. The claim in complainants' patent for gas and water pipes was : " The combination of a composition of hard-boiled tar and sawdust with wooden pipes, applied in the manner and for the purpose set forth." Defendants used auger borings, and were held to infringe. *Hobbie et al. v. Smith et al.*, 27 Fed. Rep. 656.—COXE, 1886.

546. The claim in complainant's patent for sash fastener was : " The improved sash lock fastening, consisting of the elevated plate C, having shouldered notches *c, c, c*, pivot E, for swinging latch-bar F, *f*, and the hinged pendant H, for attachment to the lower sash, in combination with a stationary spur or cam-hook upon the upper sash, substantially as set forth." Thereof the court said : " The first claim of the plaintiff's patent must be construed in accordance with the extent of his invention, which was a base plate elevated above the lower sash, so that the hinged pendant could engage with notches upon the base plate proper, irrespective of the thickness of the sash, and cannot cover a fastener, although having a plate elevated above the lower sash, which fastener is furnished with a weighted latch which engages with notches on the edge of the flange at the top of the post above the sweep;" and found the defendants not to be infringers. *Morris v. Kempshall M'fg Co. et al.*, 27 Fed. Rep. 748.—SHIPMAN, 1886.

547. The claim in complainants' patent for car-wheel was : " I do not claim a car wheel provided with a detachable cap or oil-cup, nor the employment of a perforated journal-box in connection therewith ; but what I claim is [1] the combination with the hub N, having chamber O, and oil passages *g*, in its front inner bearing

*h*, and the oil-holding cup A, of the box S, having the perforations *n*, all as shown and described, whereby the lubricant has free circulation around said box and access to the journal, as specified." In defendants' car-wheel the oil-cup was made separate and detachable from the body of the wheel, and the journal-box was not removable, but cast solid with the body of the wheels. In view of the prior art, complainants were limited to their precise claim and defendants were held not to infringe. *Osceola M'fg Co. et al. v. Pie et al.*, 28 Fed. Rep. 83.—ACHE-SON, 1886.

548. A claim in complainant's patent for telegraph transmitters was : " [3] The combination, in a telegraph key, of the lever fulcrumed upon the torsional spring, with the adjusting screws H, H, for regulating the amplitude of the movement and the retractile resistance of the torsional spring, substantially as described." Defendant's device was technically a " sounder" rather than a telegraph key, and defendant was held to infringe. *La Rue v. Western Electric Co.*, 28 Fed. Rep. 85.—BROWN, 1886.

549. A claim in a patent for a grinding machine specified " suitable gearing " Thereof the court said " The claim must be understood broadly, as described by its terms, embracing any suitable gearing which may be employed for the clog arrangement described in the claim." *Cohansey Glass M'fg Co. v. Wharton*, 28 Fed. Rep. 189.—BUTLER, 1886.

550. A claim in complainant's patent for clover-hulling machine was : " 2. The combination in one machine of the open upper cylinder with the open lower cylinder, substantially as and for the purposes described." Defendants' machine did not have the open lower cylinder, but one whose circumference between the bars was made up of corrugated iron plates which were removable, and, when removed, access could be had to the screws of the spikes, as in any open cylinder. The prior art contained approximations to complainant's patented machine. Defendants were held not to infringe. *Newark Mach. Co. v. Hargett et al.*, 36 O. G. 692.—BOND and MORRIS, 1886.

551. A claim in complainant's patent for clover-hulling machine was : " In combination with a hulling cylinder, the rubbers *b, b*, having roughened sides and rounded front edges *h*, substantially as and for the purposes described." Rubbers with roughened sides but with notched front edges were old. Defendants' rubbers did not have rounded front edges, but those of a blunt wedge shape. Defendants were held not to infringe.—*Ib.*

552. The claim in complainants' patent was : " 1. The combination of a chronometric or time-lock and a supplemental locking mechanism, consisting of a dog or check, out of action during the normal condition of the time-lock, some part of this supplemental mechanism being arranged in proximity to the lock, substantially as set forth, whereby the supplemental dog or check will be brought into action to prevent the retraction of the door-bolts of the safe or vault on which the time-lock is used, on the occurrence of a shock capable of breaking or displacing the parts of such lock." The inventor seemed to the court " to have taken a step forward of all who had preceded him in this field, and to be entitled to a liberal construction of the first claim of his patent, so as to cover any supplemental locking mechanism which, when used in combination with a time-lock, shall prevent the retraction of the door-bolts in case of such shock or violence as will disable the time-lock, because he seems to have been the first to have discovered the need of such mechanism and to have supplied the want." *Newbury et al. v. Fowler et al.*, 36 O. G. 817 — BLODGETT, 1886.

553. A claim in complainant's patent was " The combination in a horse-nail machine of a feed wheel, a roll-die, and a nail-roll, together with their respective connections with the main shaft, substantially as hereinbefore described, so that the nail may be brought into position in front of the die before the die is advanced, and the die be advanced before the roll begins its work." In defendants' machine a part of the devices took their direct movement from a counter shaft. Defendants were held to infringe. *Northwestern Horse Nail Co. v. New Haven Horse Nail Co. et al.*, 28 Fed. Rep. 234.—SHIPMAN, 1886.

554. The claim in complainant's patent was : " 1. The mode herein described for attaching buttons to garments by a single pointed malleable tack, consisting in passing the shank of the tack through the garment, and then turning or clinching its end through and around the eye of the button by pressing the point against the clinching portion of the device, which holds the button while the clinching is being performed, substantially as described." In the patented machine the button was so situated that the tack went forward to the clinching die on a line parallel with the flat side of the eye of the button ; in defendant's machine the button was so situated that the tack in going forward was presented to the hole of the eye at right angles to the flat side of the eye, and therefore passed through the

eye before reaching the clinching die ; the difference was held immaterial, and defendant was held to infringe. *Belle Patent Button Fastener Co. v. Lucas*, 28 Fed. Rep. 371.—COLT, 1886.

555. The claim of the patent in suit, for glass-annealing furnace, was : " The combination of the bars *d d*, arranged side by side and alternately between each other, the set *d* supporting the sets of glass, while the bars *d* are pushed toward the leer or flattening wheel *a*, and the sets *d* supporting the sheets of glass and moving them onward and through the tunnel, substantially as set forth." The distinguishing feature of the patented invention was that the sheets of glass travelled through the leer, elevated above the floor, away from the disturbing influences of the conditions there existing, and so as to be subjected to the heated currents of air whereby they were uniformly annealed. The specification of the patent did not specifically claim the elevated parts, but the specification so described them. The claim was construed so as to include them. In defendants' tunnel or leer the grooved wheels which supported the reciprocating bars were sustained from above instead of from below, and the rest bars were fastened rigidly to the immovable cross bars, and consequently had no movement. Defendants were held to infringe. *Tondeur v. Stewart et al.*, 28 Fed. Rep. 561.—ACHESON, 1886.

556. The claim in complainant's patent for lantern was : " The tubular frame D, D, and the globe G, in combination with the plates C, *p*, the connecting rods F, and the guides H, whereby said globe is raised by a suitable lever and guided or steadied laterally in its movements, for the purpose set forth." Defendant's lantern had a tubular frame and a globe, in combination with a concave annular top plate, a perforated bottom plate, a connecting rod, and guides. In the place of the " suitable lever" defendant had a thumb piece. Defendant was held to infringe. *Steam Gauge & Lantern Co. v. Ham Mfg Co.*, 28 Fed. Rep. 618.—COXE, 1886.

557. The patent in suit was for a sole-edge burnishing machine. The principal question was whether, by the terms of the patent, the top sole was to be pressed against the upper surface of the finger-rest. The specification said : " My machine is extremely simple, and consists of a head or standard carrying a tool-holder holding a tool for setting or burnishing the edges of the soles of boots and shoes, and a finger-rest to aid the workman in holding the edge up to the tool, and the face of the sole against the rest, which is just below the burnishing part of the tool."



The claim was : " What I claim as my invention is, [1] in combination with the burnishing tool and the rest for the face of the sole, the finger rest D, substantially as described." The court held the affirmative of the above question. *Union Edge-Setter Co. v. Keith*, 28 Fed. Rep. 715.—COLT, 1886.

558. Complainants' patent in suit was for improvement in mode of mounting time-locks, the object being to isolate the lock from the main outer door of the safe, and the patent described three ways of doing this : *first*, attaching it to the face of the inner door ; *second*, mounting it on a hinged bar behind the main door ; and *third*, supporting it on a fixed standard rising from the floor of the safe. In the prior art time-locks had been mounted on a strip of metal attached at one or both ends to the bolt-frame of the safe door. They had also been mounted on a plate which was bolted to one of the bars of the bolt-frame. They had been attached to plates supported from the door by standards or thimbles ; they had been fastened to wooden blocks placed in one corner of the safe ; rubber washers had been interposed between the time-locks and the door to which they were secured ; safes had been divided into two compartments by a vertical partition, with the lock mounted on the partition only. The claims were very broad in their scope, but, in view of the prior art, were limited strictly. *Newbury et al. v. Squaires et al.*, 28 Fed. Rep. 752.—COLT, 1886.

559. There were two patents in suit. The claim of one was : " A safety valve with a circular or annular flange or lip *cc* constructed in the manner, or substantially in the manner shown, so as to operate as and for the purpose herein described." The claim of the other was : " The combination of the surface beyond the seat of the safety valve, with the means herein described for regulating or adjusting the area of the passage for the escape of steam, substantially as and for the purpose described." Defendant's valves had no huddling chamber and no strictured orifice leading from the huddling chamber to the open air. Defendant was held not to infringe. *Consolidated Safety Valve Co. v. Kunkle*, 7 Sup. Ct. Rep. 50.—SUP. CT. 1886.

560. Complainants' patent in suit was for an improvement in paper-bag machines, and a claim thereof was : "[8] As an improvement in the art of forming satchel-bottomed paper bags by machinery, the method hereinbefore set forth of opening the end of a tubular blank and forming the first fold thereof by means of the conjoint action of the two adjacent delivering moving surfaces, substantially the same as described, be-

tween which the blank is continually fed, and to which surfaces the continuous sides of the blank are caused temporarily to conform as they move over said surfaces by means substantially such as described, whereby the fold is formed, while the blank is in motion simply by the strain upon the paper itself." In defendants' machine there was one roller which drew away one side of the blank and partially formed a diamond fold on that side. At the same time a spear-pointed separator, acting conjointly with this roller, helped to bring the other side of the blank into shape so that when the blank passed through the second pair of rollers the diamond fold was only on that side. At the same time a spear-pointed separator, acting conjointly with this roller, helped to bring the other end of the blank into shape, so that when the blank passed through the second pair of rollers, the diamond fold was completed by the compression of the paper on itself ; and in defendants' machine there was no second divergent moving roller, and the fold was not formed by the conjoint of the two diverging moving surfaces. Defendants were held not to infringe. *Union Paper-Bag Mach. Co. et al. v. Standard Paper-Bag Co. et al.*, 29 Fed. Rep. 96.—COLT, 1886.

561. Complainant's patent in suit was for grain separators, and the claims thereof were : " 1. A recleaning attachment for grain separators, consisting essentially of a hopper, a screen for receiving the grain from the hopper, an elevator having a chamber at its lower end and its upper end arranged to deliver the grain to the hopper, and an inclined conductor having one end connected with the chamber of the elevator and its upper end formed into a mouth arranged under the discharge mouth of the screen to convey the tailings to the chamber of the elevator, substantially as set forth. 2. The combination with a separator of a recleaning device, consisting essentially of a screen, an elevator for elevating the tailings to the screen, and a spout arranged directly between the screen and the elevator for receiving the tailings from the screens and discharging them into the elevator frame or casing." In the light of the prior art these claims were construed strictly. Defendants' machine did not have " a spout arranged directly between the screen and the elevator," nor " an inclined conductor having one end connected directly with the chamber of the elevator," and defendants were held not to infringe. *Newark Mach. Co. v. Garr et al.*, 37 O. G. 1250.—WOODS, 1886.

562. The patent in suit was for a suspender buckle. The buckle frame was made by cutting the blank from a sheet of metal and then

striking up two wings on opposite ends of the blank until their edges were brought close together; and an elongated narrow space, in which the suspender cloth was enclosed, was left between the wings and the front part of the frame. These arms were elastic, and produced a spring-clamp which would yield from inside pressure, but which would exert a binding force and pressure against the web. The claims were: "[1] A suspender buckle having a frame or bow formed with a spring-clamp, divided at its centre, and integral therewith, and adapted to embrace and bind the web or suspender cloth, substantially as shown and described." "[2] In a suspender buckle the combination with a frame or bow having a spring-clamp to embrace the web or suspender cloth, and slotted to receive a tongue, adapted for the attachment of the suspender-straps, and having a flanged edge or lip to impinge upon the web or cloth, and hold it against the clamp, substantially as described." "[3] The buckle frame or bow, consisting of the metallic plate A, struck up or bent into shape, and having the inwardly turned leaves or wings *a, a*, forming a clamp-spring or springs, and having the elongated space *b*, substantially as described." "[4] The combination of the buckle frame, consisting of the plate A, provided with inwardly bent elastic clamp-arms *a, a*, and having the slot *e*, and the movable tongue H, fitting and working in said slot, and formed with flange or lip *h*, substantially as described." One kind of defendant's buckles had a long arm bent over it, but under a short bent arm on the other side. These two arms formed an elongated space in which the web was enclosed; not being fastened to each other, they made a spring-clamp not divided in the centre; as to this kind of buckle, it was held that the first claim was not infringed. Another kind of defendant's buckle had two short wings turned back and locked to each other by a strip of metal extending across the width of the front part of the frame and forming the back of the elongated space. It was held not to infringe. *Bruff v. Waterbury Buckle Co.*, 29 Fed. Rep. 214.—SHIPMAN, 1886.

563. The patent in suit was for a hydraulic jack, and the claims were: "[1] The combination and arrangement of the pump-plunger, constructed with the longitudinal passages, the pump-barrel, and the reverse passages, substantially as set forth." "[2] The combination and arrangement of the pump-plunger, the pump-barrel, with its reverse passage, the egress-valve, and the guard thereof, substantially as set forth." Defendants cut away more of the pump-plunger

and less of the pump-barrel than the complainant. The methods of forcing liquid around the ingress-valve when the ram was lowered were identical, except that, instead of the longitudinal passages in the plunger, the metal was cut away around its entire circumference, making a much wider channel. In the pump-barrel, on the contrary, instead of cutting the surface away around its inner periphery, as in the patent, the defendants at the same point substituted reverse passages bored through the wall of the barrel. Defendants were held to infringe. *Dudgeon v. Watson et al.*, 29 Fed. Rep. 248.—COXE, 1886.

564. The claims of the patent in suit were: "1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described." "2. The arrangement of tar paper or its equivalent between the adjoining blocks of concrete, substantially as and for the purpose set forth." Subsequently there was a disclaimer to "the forming of blocks from plastic material without interposing anything between their joints while in the process of formation." Defendant laid his pavement in a mass, and then marked it crosswise with a blunt marker, producing a division in the blocks. Defendant was held not to infringe. *Cal. Artificial Stone Paving Co. v. Schalickie*, 119 U. S. 401.—SUP. CT. 1886.

565. The claims of the patent in suit were: "[1] In a lantern having a globe-supporting frame, the vertically adjustable plate C, carrying a spring E, adapted to hold or release the globe, as desired, in combination with the globe, the perforated plate on which it rests, the connecting rods F, F, serving to unite the top and bottom plates, and suitable guides, adapted to give lateral support to the lower part of the globe, substantially as set forth." "[2] The tubular frame D, D, and the globe G, in combination with the plates C, *p*, the connecting rods F, and the guides H, whereby said globe is raised and lowered by a suitable lever, and guided or steadied laterally in its movement, for the purpose set forth." Respondents' lantern differed from the complainants' only in the following particulars: in the former the side wires were hooked into the lower perforated plate instead of being wound around or under it; and in place of guides they were supported laterally by being bent partly around the side tubes. The spring connecting the upper part of the globe was somewhat different from that shown in the drawings of the patent. Defendants were held to infringe. *Steam Gauge & Lantern Co. et al. v. Rogers et al.*, 29 Fed. Rep. 453.—NELSON, 1886.

566. The claim of the patent in suit was: "In

an apparatus for lighting gas by electricity, in combination with a circuit breaker located at the gas-burner, a lever adapted and arranged to open and close the stop-cock or valve of the burner, and carrying the circuit breaker, substantially as herein described." In respondent's apparatus the two armatures operated to open and close the gas valve, but there was found in it no separate lever to open and close the valve and carry the circuit breaker, found in the patent. Respondent was held not to infringe. *Electric Gas Lighting Co. v. Boston Electric Co.*, 29 Fed. Rep. 455—COLT, 1886

567. The patent in suit was for an improvement in pipe couplings, and a claim thereof was "The rods or tubes A, A, having tapering ends and tapering threads upon the same, in combination with a sleeve having tapering sockets and threads corresponding to those of the rods, as set forth." In defendants' coupling the thread was cut with a vanishing thread and the sleeve had a vanishing thread, but the coupling did not have a rod with a tapering end or screw or a tapering socket. In defendants' device the threads of the screw surrounded a cone-shaped stem, but the exterior lines of the threads formed a cylinder and not a cone-shaped or tapering end or screw, and the exterior lines of the sleeves formed a cylindrical chamber, and not a cone-shaped or tapering chamber. Defendants were held not to infringe. *Allison v. Trustees of N. Y. & Brooklyn Bridge* 29 Fed. Rep. 517.—WALLACE 1886

568. The patent in suit was for an improvement in hydrocarbon stoves, and a claim thereof was "1. The water vessel A, with its perforated top plate A and hot-air cylinder C, hinged at c to plate A and to top perforated plate L, all arranged and constructed together substantially as and for the purpose set forth." The specification said "Concentrically arranged around this central opening is a series of perforations a, through which atmospheric air passes down into the top part of the vessel A, and thence up through the hot air cylinder and its chimneys." In defendants' stove the air cylinder rested on three equidistant strips, extending from the base of the cylinder to the wall of the water chamber. Defendants were held not to infringe. *Sharp v. Riessner et al.*, 119 U. S. 631.—SUP. CT. 1887.

569. The claims of the patent in suit, the same being for a curtain fixture, were: "1. The arm or detent k, arranged upon the roller in such a manner that it is moved toward and away from the centre or axis of the roller by the action of gravity and centrifugal force, substantially

as described." "2. The combination and arrangement at the same end of a shade roller of a spring e, rod d, and arm or detent k, or their mechanical equivalents, substantially as described." The court held that "the claims must be confined, by reference to the specification, to the use of the devices named, in a shade roller where the pawl or detent is upon the roller moving with it, and the ratchet or engaging part is separated by being placed upon a journal box or bracket, or other fixed part of the mechanism, and that it must also be limited to the particular form of the arm or detent described." In respondents' roller the pawl and the ratchet were both upon one end of the roller, the pawl being fixed upon the revolving part and the ratchet upon the fixed part of the roller, and the pawl and the ratchet were of a different form from those of the patent. Respondents were held not to infringe. *Hartshorn v. Saginaw Barrel Co. et al.*, 119 U. S. 664.—SUP. CT. 1887.

570. The patent in suit was for an improvement in automatic pressure relief apparatus for beer vessels, and a claim thereof was: "In an automatic pressure relief apparatus, a mechanical fit valve, in combination with a surrounding chamber K, for containing water to prevent the valve fouling, for the purpose set forth." Respondent's device contained only one water chamber into which the gas escaped as it passed the lips of the valve, while the patent described a device with a water chamber below and above the valve. Respondent was held to infringe. *Consolidated Bunting Apparatus Co. v. Woerle*, 29 Fed. Rep. 449—BLODGETT, 1887.

571. The patent in suit was for making satchel-bottomed paper bags, and a claim thereof was: "The finger N, or equivalent device, whether fixed or movable, to operate upon the inner side of the tube, and hold or punch back a portion of the open end of the tube while the diamond fold is being formed." In defendants' machine the diamond fold was formed, or partially formed, by means of nippers mounted on a movable roller which took hold of the upper ply of the tube and threw it a proper distance over the roller while the under ply of the tube was held down by a spear-pointed separator. Defendants were held not to be infringers. *Eastern Paper-Bag Co. et al. v. Standard Paper-Bag Co. et al.*, 29 Fed. Rep. 787.—COLT, 1887.

572. For an example of a claim narrowly construed, and thereupon defendants' mechanism found not to infringe, see —. *Ib.*

573. The patent in suit was for a fruit drier, and the claim in issue was: "4. In combination with a fruit drier, the outer part of which is

made up of the frames of several trays, as explained, a suspending device, operating substantially as described, and supporting said drier from a point in or on the lowermost tray thereof, for the object named." Thereof the Supreme Court said: "Movable trays, the outer walls of which constituted the drying chambers, being old, and apparatus having existed before to raise a tray or rack and a column of racks above it, and insert a fresh one at the bottom, and the two having been used in connection, the fourth claim of plaintiff's patent must be limited to the mechanism described and shown." Plaintiff's patented device had a crane with suspended ropes, and his lowermost tray, while being raised, necessarily carried on it the weight of all the trays and fruit above it. In the respondent's apparatus each tray could be lifted independently of the other, and each tray was supported independently, so that the weight of the series of trays, and of the fruit on them, did not rest directly on the lowermost tray. Respondent was held not to infringe. *Grier v. Wilt*, 120 U. S. 412.—SUP. CT. 1887.

574. The claim of complainant's patent in suit was "A barb for double strand cable-wire fences, composed of two pointed pieces of wire, each of which passes over a strand of the cable, thence between its strands, and reciprocally binds the other wire to the strand of the cable, wherefrom the points of the wires project as from a centre, substantially as set forth." Each of the prongs of defendants' barb, which passed between the strands, was wound tightly around one of the strands, but did not pass around the other prong. Defendants were held to infringe. *Iowa Barb Steel-Wire Co. v. Southern Barbed Wire Co. et al.*, 29 Fed. Rep. 863.—TREAT, 1887.

575. The patent in issue was the Schillinger patent for making pavement. The court thus described the operations of the defendant: "He first lays a lower course of concrete from two and one half to four inches in thickness; then removes the scantling forming the frame for the block against the edges of the concrete, places paper, or sand, or wood to separate it from the adjoining block in the same manner as the first was formed, and eventually covers the lower course of concrete with an upper course of finer concrete from one half to three fourths of an inch thick, and cuts through the upper course with a trowel, so as to make the joints of the upper course coincide with the joints of the lower course, which are filled with the material above stated—that is to say, with paper, sand, or wood." Defendant was found to infringe.

*Shannon v. Brunner*, 41 O. G. 697.—THAYER, 1887.

576. The claim in suit was as follows: "The method herein set forth of waxing paper, consisting in spreading wax upon its surface, heating the paper from the opposite side to spread and fuse the wax into the fabric of the paper, removing the surplus wax and remelting and polishing the wax upon the paper, substantially as set forth." The court described defendant's process as follows: "The paper is passed from a supply reel over and in contact with a heated cylinder which revolves, partly submerged in a vat containing melted paraffine, thus receiving the wax, to and over a heated roller which diffuses the wax equally; then to and over a scraper which removes the surplus wax, and finally over a polishing roller. A scraper is also attached to the roller cylinder that takes up the melted paraffine and applies it to the paper. This scraper is applied between the wax-trough and the place of contact with the paper, for the purpose of removing the surplus wax and distributing the remaining wax uniformly over the cylinder." Defendant was held not to infringe. *Hammerschlag M'fg Co. v. Bancroft*, 40 O. G. 1339.—GRESHAM, 1887.

577. For an example of a patent construed in view of the prior art, and thereupon defendants found not to infringe, see —. *Au Sable Horse Nail Co. v. Essex Horse Nail Co. et al.*, 41 O. G. 355.—BLATCHFORD, 1887.

578. The patent in suit was for a spark arrester for locomotives, and the claim in issue was: "What we claim," etc., "is [1] the grating D, with vertical bars placed at the foot of the spark or petticoat-pipe E, in the manner and for the purpose substantially as described." In the patented arrester the vertical bars were of wrought iron having stiffening pieces or bars. Defendant had a casting substantially the same, and was held to infringe. *Kearney et al. v. Lehigh Valley R. R. Co.*, 32 Fed. Rep. 320.—BRADLEY, 1887.

579. Bell was the discoverer of the new art of transmitting speech by electricity, and his claim should receive the broadest interpretation to secure to the inventor not the abstract right of sending sounds by telegraph, but with regard to means and processes described which are essential to the application of his principle. *Am. Bell Tel. Co. v. Globe Tel. Co. et al.*, 31 Fed. Rep. 729.—WALLACE, 1887.

580. The patent in suit was for a steam bell-ringer, and the claim in issue was: "The combination of the cylinder A, piston G, piston-rod D, slotted rod C, and crank B, when constructed

and operated substantially as described." Thereof the court said: "The language of the specification limits the first claim to a combination in which the piston and piston-rod are detached from each other." As the piston and piston-rod of defendant's device were not detached from each other, the defendant was held not to infringe. *Snow et al. v. Lake Shore & Mich. Southern R. R. Co.*, 121 U. S. 617.—SUP. CT. 1887.

581. The patent in suit was the Green driven-well patent, and the claim in issue was: "The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water without removing the earth upward, as it is in boring, substantially as herein described." Defendants bored their well until they came to the water-bearing stratum, then drove it lower, after Green's method; and were held to infringe. *Eames v. Andrews et al.*, 122 U. S. 40.—SUP. CT. 1887.

582. The patent in suit was for a lubricator, and the claims thereof were: "[1] The arrangement of the cock M, passages S, S', and tubes O and P, with the oil reservoir F, and gauge J, R, as hereinbefore shown and described, for the purposes specified. [2] The improved lubricator, consisting of the parts herein described, constructed and arranged substantially as specified." The second claim only was in issue, and the question was whether the elements of the first claim were included in the second. The court held that they were. *Seibert Cylinder Oil-Cup Co. v. Nightingale et al.*, 32 Fed. Rep. 171.—COLT, 1887.

583. The patent in suit was for a dress-form, and the claim in issue was: "In combination with the standard *a* and ribs *c*, the double braces *e* and sliding blocks *f*<sup>1</sup> and *f*<sup>2</sup>, and rests *h*<sup>1</sup> and *h*<sup>2</sup>, substantially as and for the purpose set forth." The double braces referred to in the claim extended in different directions. In the dress-form complained of the braces were of unequal lengths and extended in the same direction, whereby a substantial advantage was secured. Defendants were held not to infringe. *Morss v. Manchester et al.*, 32 Fed. Rep. 282.—BENEDICT, 1887.

584. For an example of a patent on knob latches strictly construed in view of the prior art, and thereupon defendant's device, much the same as that of complainant's, held not to infringe, see —. *Nashua Lock Co. v. Norwich Lock M'fg Co.*, 32 Fed. Rep. 87.—SHIPMAN, 1887.

585. The patent in suit was for an improvement in sofa bedsteads, and the claim in issue

was: "In combination with the sections A and B, the folding-rods F, F, and the head-boards D and E, supporting the latter when extended to sustain the bolster, substantially as set forth." Defendant's lounge was constructed and operated precisely like that of complainant's, except that, instead of resting upon the head boards, the folding-rods rested upon the end pieces of the lounge frame. Complainant's improvement was not broadly new, and the defendant was held not to infringe. *Ott v. Barth*, 32 Fed. Rep. 89.—BLODGETT, 1887.

586. For an example of a patent for vulcanizing apparatus strictly construed in view of the prior art, and thereupon defendants' apparatus held not to infringe, see —. *Stevens v. Magowan et al.*, 31 Fed. Rep. 824.—BRADLEY, 1887.

587. Complainant's patent being for a process for producing slabs of celluloid, one step of which was to hold the celluloid firmly down upon a plate while drying, by grooves in the plate, and another step of which was applying dry heat first from below and afterward from above, defendants used in place of the first step an iron plate perforated by holes, with plugs of zylonite screwed into these holes, and applied the heat first from above and afterward from below; they were held to infringe. *Celluloid M'fg Co. v. Am. Zylonite Co. et al.*, 31 Fed. Rep. 904.—GRAY, 1887.

588. Where a patentee has clearly limited his patent to the use of a round rock-shaft, and the defendants use a square or polygonal one, defendants cannot be held to infringe. *Toepfher v. Goetz et al.*, 31 Fed. Rep. 913.—BLODGETT, 1887.

589. For an example of patents on machines for making horseshoe nails construed strictly, and thereupon defendants' machine held not to infringe, see —. *Au Sable Horse Nail Co. v. New Haven Horse Nail Co. et al.*, 32 Fed. Rep. 92.—BLATCHFORD, 1887.

590. For an example of patent on a coffee roaster narrowly construed, and thereupon defendants held not to infringe, see —. *Vernon v. Heberling et al.*, 31 Fed. Rep. 347.—SHIRAS, 1887.

591. The patent in suit was for a dentist's chair. The seven elements of the combination were old. The court said: "In such cases the doctrine of mechanical equivalents should be given a restricted operation, so as to confine the patentee, within reasonable limits, to the peculiar combination covered by his patent, and not to interfere with the rights of others. Acting on this principle, the court finds that the bell-crank, and axis of the same, used by the defendants in the construction of barbers' chairs, is not the

equivalent of the 'rock-shaft' described in complainant's specifications; that the spring-bolt employed by the defendants is not the equivalent of the 'toggle-arms' shown in complainant's patent. The result of the finding is that the defendants have not infringed complainant's patent." *Archer v. Arnd et al.*, 31 Fed. Rep. 475.—THAYER, 1887.

592. For an example of a patent on lifting jacks upheld, and defendants found to infringe, see —. *Mosher v. Joyce et al.*, 31 Fed. Rep. 557.—JACKSON, 1887.

593. The patent in suit was for an improvement in concrete pavements, and the claim in issue was: "What I claim as new, and desire to secure by letters-patent, is [1] a concrete pavement, laid in detached blocks or sections, substantially in the manner shown and described; [2] the arrangement of tar paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose set forth." After the issue of the patent there was formally disclaimed "the formation of blocks from plastic material, without interposing anything between their joints while in the process of formation." Thereof the court said: "There can be no infringement of this patent, in the construction of a concrete pavement, unless it is made of detached blocks, formed on the ground, as laid down, with a water-tight joint between them, produced by the permanent interposition of tar paper or other suitable material between the blocks; and no marking or cutting a pavement laid down as a whole or in large sections, although the same may be thereby separated into blocks with equally as satisfactory results, is the equivalent of such tar paper so applied." *Schillinger v. Middleton et al.*, 31 Fed. Rep. 736.—DEADY, 1887.

594. The patents in suit were three in number, all pertaining to automatic fire extinguishers, and the claims in issue of the first patent were: "[1] A nozzle for automatic fire extinguishers, constructed substantially as before set forth—namely, of a rose-head enclosing a valve controlling the water passage thereto, the stem of the valve projecting through a neck of said rose-head and being screwed to a cap secured to said neck by fusible metal. [2] The combination, substantially as before set forth, of the water pipes, the automatic valve, and the fire-extinguishing liquid-containing reservoir connected with the water pipes as described, so that its contents will be discharged with and by the flow of the water." The claim in issue of the second patent was: "A valve-releasing device, for automatic fire extinguishers, consisting of

wires C, lever H, and fusibly jointed slides I, combined to operate substantially as set forth."

The claims of the third patent in issue were:

"In an automatic fire extinguisher, the combination, substantially as set forth, of a perforated distributor, a valve located within said distributor and having a stem which projects through the shell of the distributor, and a lever, as K<sup>3</sup>, to hold the valve to its seat within the distributor until its fusible joint, K, is released by heat. [5]

In an automatic fire extinguisher, the combination, substantially as specified, of a perforated distributor provided with a valve, the stem of which projects through the distributor shell, with a jointed lever, K<sup>1</sup>, and latch, K<sup>2</sup>, secured thereto by fusible solder to hold the valve to its seat. [6]

In an automatic fire extinguisher, the combination of a perforated distributor and a valve to control the supply of water to said distributor, said valve provided with a two-part stem, and an elastic cushion between the parts to hold the valve to its seat, with an elastic pressure by fusible solder, substantially as specified."

Complainant's improvement was a system of pipes for the various rooms of a building, coming in through the ceilings, and fitted with a number of downward projecting nozzles, in the lower story and just above the supply valve of a pipe leading from the street main up to the reservoir filled with some non-freezing and fire-extinguishing liquid, which discharged upon the fire by force of the water from the main. Defendant's was a wet-pipe system. He had a reservoir charged with a fire-extinguishing liquid, generating a gas producing a pressure, keeping the distributing pipes at all times filled with fluid; he had also a connection with the street main, with the pressure of this reservoir which was cut off when the check valve was closed. Defendant was held not to infringe the first and second claims of the patent, but to infringe the third claim of the third patent. *Barnes v. Ruthenburg*, 32 Fed. Rep. 159.—SAGE, 1887.

595. The patent in suit was for a rubber-bucket pump, and the claim in issue was: "The combination of the grooved screw-bolt or link A, the convex rubber D, and interior expanding washer C, substantially as set forth." Defendant was under injunction, and had made a rubber bucket with a solid screw-bolt. As the court was of the opinion that the claim might possibly be limited to a grooved screw-bolt, defendant was held not guilty of contempt. *Temple Pump Co. v. Goss Rubber Bucket Mfg Co.*, 31 Fed. Rep. 292.—BLODGETT, 1887.

596. The patent in suit was for cutting files, and the claim in issue was: "In the arrange-

ment of a guide set parallel to the carver, as hereinbefore described, and referred to in Figures 1 and 2, drawing 2." In the machine of the patent the parallelism was brought about by proper grinding before the cutting tool was set into its holder. In defendant's machine the parallelism was brought about by adjusting the presser foot. Defendant held not to infringe. *New Am. File Co. v. Nicholson File Co.*, 31 Fed. Rep. 289.—COLT, 1887.

597. The patent in suit was for a sewing-machine, and the claim in issue was: "The combination of the reciprocating bar G, with the side inclines 10 and 11, and upper inclines *w*, with feed-bar N, stop *v*, and adjustable stop *t*, arranged and operating as herein described, for the purpose set forth." The invention was not one of breadth. In defendants' machine two cams were arranged, one above the other, on a vertical rotating shaft, so arranged that one moved a shaft back and forth and the other from side to side; at the end of this bar was a feed-bar which closely embraced the rod between two fixed jaws; the bar had an adjustable fulcrum about midway between the driving end of the machine and the feed-bar. Defendants were held to infringe. *Gray v. Bangs et al.*, 31 Fed. Rep. 342.—COLT, 1887.

598. The patent in suit was for collar buttons all in one piece; defendants' buttons were not made in one piece, and defendants were held not to infringe. *Cottle v. Kremenz et al.*, 31 Fed. Rep. 42.—WHEELER, 1887.

599. The patent in suit was for a machine for rolling saw logs, and the claim in issue was: "The toothed bar C, pivoted at its lower end and between the blocks E, which are adapted to slide in vertical grooves formed in posts D, whereby the said bar C is rendered vertically movable and capable of adjustment to suit logs of different sizes, substantially as herein set forth and shown." The court held the invention to be a pioneer invention, and entitled to a liberal application of the doctrine of equivalents. Defendant's machine used radius bars in place of cross-heads and guide posts, and was held to infringe. *Tarrant v. Duluth Lumber Co.*, 30 Fed. Rep. 830.—NELSON, 1887.

600. The improvement in suit was for a cash and parcel railway for stores, and the claim in issue was: "In combination with the return track, a series of graduated stops, arranged in connection with the sales counters, substantially as described, so as to automatically arrest the cars or conveyors at the stations where they respectively belong." The apparatus had two single tracks operated by gravity; the forward-

ing track conveyed the cars from the counters to the cashier's desk, where the cars were sent back to the counters by means of a return track, on which there was a series of graduated stops consisting of quadrangular pieces of metal projecting from the lower side of the rail. In defendants' apparatus there were two tracks one above the other; each of these tracks had supported, below it, a continuously running cable, impelling the cash boxes, which were attached to the cable by spring-gripping jaws; on the return track the boxes were thrown into the receptacles at their proper stations by a system of switching. Defendants were held not to infringe. *Lamson Cash R. R. Co. v. Martin et al.*, 30 Fed. Rep. 824.—COLT, 1887.

601. The patent in suit was for an instrument for transmitting telegraph signals, and the claim in issue was: "The combination in a telegraph key of the lever, fulcrumed upon the torsional spring, with the adjusting screws H H, for regulating the amplitude of the lever movement and the retractile resistance of the torsional spring, substantially as described." Defendant contended that it did not infringe because "that the combination of the third claim is confined to a telegraph key, and by implication to a 'circuit-breaking lever;' and as they use the combination in a telegraph sounder, and not a key, they do not infringe." The court said: "In view of the clearly expressed intention of the patentee to include other telegraph instruments, it must be held to include the lever of a sounder. Fairly construed, the claim should read, 'The combination in a telegraph key or sounder,' etc. To restrict it to a key alone, as that word is known in telegraphy, would be most illiberal, and would unduly circumscribe the invention." Defendant was held to infringe. *La Rue v. Western Electric Co.*, 31 Fed. Rep. 80.—COXE, 1887.

602. The patent in suit was for an improvement in hollow tile floors, and the claim in issue was: "[2] The removable clay filling strips D, in combination with the hollow arched tiles A, and the double-flanged girders B, as herein set forth, for the purpose specified." In using the improvement covered by the claim in controversy, the defendant first placed the filling strip temporarily in position and then filled the whole joint between it, the girders, and the adjoining tiles with cement; after being thus cemented, the filling strip is no longer removable. Held to infringe. *Fryer v. Mutual Life Ins. Co.*, 30 Fed. Rep. 787.—WALLACE, 1887.

603. The claim in issue was a combination claim, including as one element a certain "knife." The court construed this to mean a "tape wire

knife" not used by the defendant, and held defendant not to infringe. *Duesh v. A. J. Medlar Co.*, 30 Fed. Rep. 619.—BUTLER, 1887.

604. The patent in suit was for corrugated metal shutters, and the claim in issue was: "[1] The application to corrugated metal revolving shutters of one or more strips or lengths of soft and pliant material, disposed in such manner as to act as a cushion between the coils of the shutter, substantially as and for the purpose described." It was held that the claim was to be liberally construed, in view of the fact that the complainant was the first to enter this particular field of invention. Defendant used a rivet with a large head or shield designed to strengthen or protect the edge of the shutter. The stem of the rivet ran through the shutter and through a thick piece of leather made to fit the hollow part of the corrugation, the other edge being riveted against a metal washer on the top of the washer. These pieces of leather were placed upon the shutter in longitudinal lines, as in complainant's structure. Defendant was held to infringe. *Clark v. Wilson*, 30 Fed. Rep. 372.—COXE, 1887.

605. The patent in suit was for a pump bucket, and the claim in issue was: "[1] The combination of the grooved screw-bolt or link A, the concavo-convex rubber B, and the interior expanding washer C, substantially as set forth." Defendant urged that under the patent in suit there must not only be a concavo-convex rubber, but it must have a drip hole near the periphery, and there must be a hole or holes through the washer to allow the escape of the drip water; but the court did not accede to this construction. In some of defendant's buckets the bell-shaped rubber was so constructed that the washer might be screwed downward upon the link instead of upward, for the purpose of expanding the periphery of the bucket; and this was held to be a mere colorable change. Defendant also contended that its pump bucket did not infringe because its rubber was fastened to the neck of the link by projections entering the slot in the rubber, holding it from turning; and because the interior of the washer was bevelled so that it could not turn by catching in the reel forks. The court held defendant to be an infringer. *Temple Pump Co. v. Goss Pump & Rubber Bucket M'fg Co.*, 30 Fed. Rep. 440.—BLONGETT, 1887.

606. The patent in suit was for an improved fabric for collars and cuffs, and the claim in issue was: "A fabric for collars and cuffs, or other similar articles, having outer layers or sheets of celluloid, and an interlining of textile or fibrous material, substantially as and for the purpose

specified." The defendants took a fabric consisting of two sheets of cloth or muslin with a paper interlining, and placed a thin sheet of zylonite upon one side of this fabric; and after the cloth edge of this sheet had been shaven off, the zylonite face was turned back upon itself so that there was a surface of zylonite at all edges of the collar except at the neck band. Defendants were held to infringe. *Celluloid M'fg Co. v. Am. Zylonite Co. et al.*, 30 Fed. Rep. 437.—SHIPMAN, 1887.

607. The patent in suit was for a fare register, and the combination included the dovetailed end indicating any failure to reset the trip-hand of the register at zero at the commencement of the trip; the tell-tale hand of the patent was moved with the trip-hand in resetting, and if reset at zero moved with it in registering fares until again reset; if then not reset at zero, the tell-tale hand remained at the place at which reset, when the trip-hand moved forward in registering fares, indicating that the registration was begun at a wrong place. In defendant's device the trip-hand was reset by moving it forward, and it had a stop by which it could not move the trip-hand beyond zero. If it was stopped short of zero, it could be moved back to zero when the trip-hand had proceeded to that point in registration or beyond, and if it were stopped at zero it could be moved back from that point at any time and forward to it again without interfering with the trip-hand in registration. Defendant was held not to infringe. *Railway Register M'fg Co. v. Broadway & Seventh Ave. R. R. Co.*, 30 Fed. Rep. 238.—WHEELER, 1887.

608. The patent in suit was for an improvement in wagon gear, and the claim in issue was: "In a wagon gear, the combination, with the wagon-box A, transverse spring K, and side spring M, of the rocking rod or equalizer N, provided with the forked end *n*, and bolts *h*, substantially as herein shown and described, whereby the wagon gear is made more elastic, as set forth." In the wagon gear of complainant's patent the ears to which the ends of the side springs were fastened swung below the axis of the equalizer, whereas in defendant's wagon gear the equalizer was not brought as close to the wagon body, and the ears swung above the axis of the equalizer. Defendant was held to infringe. *Shaver v. Skinner M'fg Co.*, 30 Fed. Rep. 68.—SHIRAS, 1887.

609. The patent in suit was for a bustle. Defendant's bustle was for all practical purposes the same as that of complainant's patent, except that it was of braided rattan instead of



braided wire. But complainant's patent was limited in terms to a bustle of wire. The court held that the doctrine of equivalents could not be invoked, and that there was no infringement. *Western & Wells M'fg Co. v. Rosenstock*, 30 Fed. Rep. 67.—WALLACE, 1887.

610. Complainant's patent in suit was for producing a bronze-like surface on iron; it consisted in coating the iron with a thin film of oil and oxidizing it by high heat. The claim was to "the process of ornamenting iron in imitation of bronze by the application of oil and heat, substantially as described." Respondent first oxidized the surface of the iron and then baked on a coat of copal varnish. Respondent was held not to infringe. *Plummer v. Sargent*, 120 U. S. 442.—SUP. CT. 1887.

611. For an example of a patent on shoe-buckles construed upon a motion for a provisional injunction, and thereupon defendants held not to infringe, see —. *Thompson et al. v. Smith & Griggs M'fg Co. et al.*, 32 Fed. Rep. 791.—SHIPMAN, 1887.

612. For an example of patents on paper-bag machines construed, and thereupon respondents found not to infringe, see —. *Eastern Paper-Bag Co. et al. v. Union Paper-Bag Co. et al.*, 29 Fed. Rep. 787.—COLT, 1887.

613. The patent in suit was for an improvement in chain-links and chains; the special utility of the link consisted in its adaption to sprocket-chains. The distinguishing feature of the improvement was an open link, permitting the under bar of another link to enter the throat when the links were placed face to face, and with such arrangement of parts, that when the links were turned into working position, the end-bar could not back out from its engagement. The claim was: "(1) A chain-link, having its end-bars eccentric to the side-bars reversely to each other, one of said end-bars being provided with a hook, substantially as and for the purpose specified." This inventor was not the first to make a removable link for a drive-chain. Defendants' chain had a bulge upon the side and end-bars, keeping the end-bar from backing out, and defendants were held to infringe. *Ewart M'fg Co. v. Moline Malleable Iron Co. et al.*, 30 Fed. Rep. 873.—BLODGETT, 1887.

## CONTEMPT OF COURT.

### CASES.

1. For a statement of the mode of procedure in contempt-of-court proceedings, see —. *Park-*

*hurst v. Kinsman et al.*, 2 Blatch. 76.—BETTS, 1848.

2. If an injunction is too broad in its terms, defendants should, when served with it, immediately take measures to have it set aside for that reason, for such a reason will not avail in an attachment proceeding. *Sickles v. Borden et al.*, 4 Blatchford 14.—HALL, 1857.

3. An injunction may properly be served on the engineer of a steamboat using the patented cut-off which is the subject of the patent; and the engineer may be held to be in contempt of court if the use of the cut-off is continued.—*Ib.*

4. The service of a copy of the order of the court granting an injunction is not the service of the injunction, and will not hold as such in contempt proceedings. *Whipple v. Hutchinson*, 4 Blatch. 190.—NELSON, 1858.

5. Where a party has been enjoined from infringing a patent and then proceeds to repeat the offensive act, claiming to act as agent for another, he commits a contempt of court. For a second offence defendant was fined four hundred dollars and costs, and ordered to stand committed until fines and costs were paid. *Potter et al. v. Muller*, 1 Bond, 601.—LEAVITT, 1865.

6. "A defendant is not permitted to avoid a decree against him by making some slight changes in the article, and then boldly asserting that the new article is materially different from the one already passed upon and is no infringement." *Liddle v. Cory et al.*, 7 Blatch. 1.—BENEDICT, 1865.

7. Where, in contempt proceedings, the defendants' device raises a really new question of infringement, attachment will not issue, for such question must be decided in a new suit.—*Ib.*

8. A person had been adjudged guilty of contempt of court, and thereunder had suffered imprisonment for fifty days. He was without means and had a family dependent upon him. Thereupon the court released him upon his own recognizance in the sum of two thousand dollars. *Goodyear et al. v. Mullee et al.*, 5 Blatch. 463.—BLATCHFORD, 1867.

9. The defendant, having been previously enjoined, afterward engaged as a workman for wages; and, under legal advice that he might, fitted up machinery and kept it in running order in a factory where he knew the patent was being infringed. He was held to be an infringer. *Goodyear et al. v. Mullee et al.*, 5 Blatch. 429.—BLATCHFORD, 1867.

10. Advice of counsel to the effect that certain changes take defendants' device outside of the patent will not prevent attachment for contempt

of court. *Hamilton v. Simonds et al.*, 5 Bissell, 77.—DRUMMOND, 1869.

11. Where complainants have been put to great expense in securing a conviction against defendants for contempt of court, the court may and will fine the defendants heavily, and award the same to complainants. *Doubleday et al. v. Sherman et al.*, 8 Blatch. 45.—BLATCHFORD, 1870.

12. A person was enjoined from infringement of a patent. He took the improved patented part out of his old machine and put it into a new one and sold it. He was held to be in contempt of court. *Craig et al. v. Fisher*, 2 Sawyer, 345.—SAWYER, 1873.

13. "Not only has a party, in whose favor judicial process has been awarded, a right to demand the full measure of protection it was intended to afford him, but, in a more general sense, it is essential to the due administration of justice that obedience to it should be enforced. If its requirements are wilfully unheeded, a summary method of correction is imperative; on the other hand, if the delinquency, either as to its character or the fact of its commission, is doubtful upon the proofs, such mode of interposition ought not to be applied. This is the import of all the authorities. It is not enough, therefore, to arrest a summary exercise of the power of the court, that the proofs of the violation of its decree are conflicting, or that the thing used by the respondent is, in some of its features, different from the thing whose use is interdicted. The evidence must be carefully weighed, and, as it establishes clearly or falls short of establishing a substantial transgression, it is the duty of the court to act, or forbear to act, accordingly." *Wetherill et al. v. New Jersey Zinc Co.*, 1 Banning & Arden, 105.—MCKENNAN, 1874.

14. A defendant corporation violated an injunction against infringing a patent. A bailable attachment was awarded against the president of the defendant company.—*Id.*

15. A patent suit was before a master in chancery on an accounting in damages and profits. Complainant moved for an attachment against the defendants for violation of the injunction. The question at issue was whether an article made by the defendants was within the interlocutory decree of the court. The court refused the attachment, and ordered the master to make up a special account as to the disputed article. *Welling v. Rubber-Coated Harness Trimming Co. et al.*, 2 Banning & Arden, 1.—NIXON, 1875.

16. Where a defendant under an injunction has infringed again, acting under competent advice, and with no intention of violating the injunc-

tion, a fine will not be imposed, but he may be ordered to pay the cost of the application for the attachment and of the affidavits. *Carsteadt v. United States Corset Co.*, 13 Blatch. 371.—SHIPMAN, 1876.

17. Where, on a motion for attachment for contempt of court, the defendants are working under the sanction of letters-patent, their device must be presumed to be patentably different from that covered by complainant's patent; and a strong and obvious case of infringement, beyond all question of mere colorable difference, would be necessary to make it proper for the court to consider defendants' instruments as covered by a decree in another suit. *Buerk v. Imhaeuser et al.*, 2 Banning & Arden, 465.—JOHNSON, 1876.

18. Defendants being under an injunction not to infringe, sent six of the patented articles to another party before examination of the decree, but afterward had the sale rescinded and took the articles back. This was held to be a mere technical violation of the injunction, and defendants were punished by a fine of fifty dollars, to cover the cost and expenses of complainant in contempt proceedings.—*Id.*

19. Complainant's patent in suit was for a time-detector. Previous to injunction decree, defendants had sold some time-detectors, and afterward furnished paper dials therefor. These time-detectors were included in the accounting. The subsequent furnishing of the paper dials was held not to be a new infringement.—*Id.*

20. In a motion for an attachment for contempt of court, it was understood by both parties that the object was not to mulct defendant in damages, but to obtain a decision in regard to the scope of the patent. Under these circumstances, the motion being granted, there was imposed a nominal fine of fifty dollars in addition to a sum equal to the fees of the master, as partial indemnity for expenses. *Schallinger v. Gunther*, 14 Blatch. 152.—SHIPMAN, 1877.

21. It is a rule governing courts of equity—"that they will never attach a defendant for contempt where the violation of the injunction is not plain, and proved to the satisfaction of the court." *Birdsall v. Hagerstown Agricultural Implement Mfg Co.*, 1 Hughes, 59.—BOND & GILES, 1877.

22. On motion for attachment for contempt of court, in violating a provisional injunction, respondent is not entitled to claim in defence that the patent was invalid or the injunction improvidently granted. *Phillips et al. v. City of Detroit*, 2 Flippin, 92.—BROWN, 1877.

23. Where the violation of an injunction

against infringing a patent by a board of public works, though intentional, was not wilful, in any odious acceptance of the term, where the complainants would derive no benefit from the immediate payment of their royalty, and the city was responsible, and where, if the defendant made the payment, it might not be reimbursed by the city, defendant was not required to pay complainants' royalty, but instead was required to pay a fine of fifty dollars, together with the costs of the motion and counsel fee of fifty dollars, and to stand committed till the terms of the order were complied with.—*Ib.*

24. "Ordinarily, parties against whom proceedings for contempt in violating an injunction are pending, will not be heard upon other proceedings to affect the injunction until they have cleared themselves from, or purged themselves of, the contempt." *Ready Roofing Company et al. v. Taylor et al.*, 15 Blatch. 94.—WHEELER, 1878.

25. Where the violation of an injunction of a court does not appear to be wilful disregard of the order of the court, the punishment may be the payment of the damages and the cost of the proceedings.—*Ib.*

26. The scope of an injunction is according to the construction given to the patent by the court, and no testimony is proper or of any effect to vary that construction in contempt proceedings. *Burdett v. Estey et al.*, 16 Blatch. 105.—WHEELER, 1879.

27. A decision upon a question of infringement, made in contempt proceedings, is not reviewable as far as those proceedings are concerned.—*Ib.*

28. Complainant's patent for a lemon-squeezer covered a combination of old elements, one of which was a perforated bed for the lemons to rest on, the juice escaping through the perforations. He obtained a temporary injunction against defendant. Defendant then made a lemon-squeezer which had a corrugated bed for the lemons to rest on, and subsequently procured a patent for such construction. *Held*, on motion for attachment for contempt, that the question whether the latter construction was a mere colorable evasion could not be settled therein. *Onderdonk v. Fanning*, 2 Fed. Rep. 568.—BENEDICT, 1880.

29. Meddling with property attached by the marshal—under order of a United States court—by notice only, unaccompanied by possession, is not contempt of court. *Steam Stone Cutter Co. v. Windsor Mfg. Co. et al.*, 18 Blatch. 291.—WHEELER, 1880.

30. Complainant had a patent for a process

of producing bronze color on iron, and for the product, the process being to clean the casting from sand and scale, then coat it with oil or oil varnish, and subject to high heat. In a prior suit, on the merits, complainant had not claimed that his patent covered the case where the iron and oil were not both oxidized. Defendants made articles by first oxidizing the iron, then varnishing and heating to a less degree than would oxidize the varnish. A provisional injunction had been granted in the present suit. Motion for attachment for contempt of court in violating the injunction denied. *Tucker v. Burdett et al.*, 5 Fed. Rep. 808.—LOWELL, 1880. *Tucker v. Corbin et al.*, 5 Fed. Rep. 810.—SHIPMAN, 1880.

31. For a recital of protracted contempt proceedings, and the judgment of the court thereon, see —. *Fischer v. Hayes*, 19 Blatch. 13.—BLATCHFORD, 1881.

32. "Contempt of court is a specific criminal offence, and . . . the imposition of a fine for a contempt is a judgment in a criminal case." "The order imposing the fine for the contempt" is "a final order or judgment as to the matter of the contempt."—*Ib.*

33. Courts have the power to order a person fined for contempt of court to be committed till the fine is paid.—*Ib.*

34. Defendants having violated an injunction, believing, in good faith, that they had not done so, the rule for attachment was not granted, but they were made to pay the costs of the rule and proceedings. *Strobridge v. Lindsay et al.*, 6 Fed. Rep. 510.—ACHESON, 1881.

35. The defendant having been ordered to pay a fine for contempt of court (for infringement of patent in defiance of injunction) and ordered to stand committed till the fine was paid, he was allowed to file a bond for security for payment of the fine (with a view to an appeal to the Supreme Court from the final decree), and the execution of the warrant for commitment was suspended until the further order of the court. *Fischer v. Hayes*, 19 Blatch. 184.—BLATCHFORD, 1881.

36. A corporation having violated an injunction by the act of its president, through erroneous advice, the company was fined, but the president was not personally punished. *Macaulay v. White Sewing Machine Co. et al.*, 9 Fed. Rep. 698.—BLATCHFORD, 1881.

37. It seems that merely advertising for sale patented machines after injunction served, without actual sales, is not contempt of court. *Allis v. Storrell*, 19 O. G. 727.—DYER, 1881.

38. "In proceedings for an alleged wilful con-

tempt, which are proceedings of a *quasi* criminal character, a clear case must be made in order to warrant the court in exercising its power in the way of summary punishment. The case should be one that admits of no substantial doubt in the mind of the court that the party has intentionally disobeyed the injunction."—*Ib.*

39. After injunction served, some of the patented machines which respondent had previously sold were returned, and he disposed of them again, supposing he had that right, for the reason that the previous sale would be included in the accounting. The court held this to be a technical violation of the injunction and awarded costs to the complainant.—*Ib.*

40. After an injunction was served, the defendants sent certain of the patented machines to the care of their agent in a different State, but it did not appear that the machines had gone out of the custody of such agent. Defendants were held not to be in contempt of court. *McKay et al. v. Scott Sole Machine Co. et al.*, 20 O. G. 372.—BLATCHFORD, 1881.

41. The patented material was nitro-glycerine mechanically mixed with an absorbent which rendered it safer to transport, etc. Defendants used nitrated sugar (apparently used for that purpose before) to accomplish the same purpose. Defendants held to infringe in violation of an injunction; and the fact that they were advised that they were not infringing did not save them from contempt. "Any question of *animus* can bear only on the extent of the punishment." *Atlantic Giant Powder Co. v. Dittmer Powder M'fg Co. et al.*, 9 Fed. Rep. 316.—BLATCHFORD, 1881.

42. Where, in a motion for attachment for contempt of court, there is much doubt on the question of infringement, the court will require the new apparatus to be embraced in a new suit and deny the motion. *Bate Refrig. Co. v. Eastman*, 11 Fed. Rep. 902.—BLATCHFORD, 1881.

43. By the court: "The act does not appear to have been at all wilful or defiant, but merely the exercise of a supposed right under advice taken and given in good faith, and is not considered to deserve punishment as such." *Mattheus v. Spaugenberg*, 15 Fed. Rep. 813.—WHEELER, 1883.

44. Motions for attachment for contempt of court, by reason of the violation of an injunction, are not granted unless the violation of the injunction is plain and free from doubt. *Smith v. Halkyard et al.*, 26 O. G. 1020.—COLT, 1884.

45. "The process of contempt has two distinct functions—one criminal, to punish dis-

obedience, the other civil and remedial, to enforce a decree of the court and indemnify private persons. In patent causes it has been usual to combine the two, and to order punishment if it is thought proper, or indemnity to the plaintiff if that is all that justice requires, or both." *Hendryx et al. v. Fitzpatrick*, 19 Fed. Rep. 810.—LOWELL, 1884.

46. "The courts have power to punish for contempt (Section 175), but all forms and modes of proceeding which are usual in equity may be followed in cases in equity."—*Ib.*

47. "If the proceedings should be criminal in form it would make no difference. A criminal sentence for the benefit of a private person is to be treated as civil, to all intents and purposes."—*Ib.*

48. Although a court has not a general discretion to annul orders passed for the benefit of a party to the suit, still, where inability is shown to comply with the order, as for instance, if the decree requires an act to be done, or poverty, if the decree is for payment of money, it is according to the course of courts to discharge the imprisonment of which the end is proved to be unattainable.—*Ib.*

49. After defendants have been found to be infringers, they may continue the use of the infringing machines provided they so change them that they are not covered by the complainant's patent as construed by the court. *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 22 Blatch. 182.—SHIPMAN, 1884.

50. Where, after injunction granted, defendant makes a change which raises a real question as to whether the change is a violation of the injunction and an infringement of the patent, the bringing of a new suit is the proper course. "Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct." *Cal. Art. Stone Paving Co. v. Molitor*, 31 O. G. 1044.—SUP. CT. 1885.

51. Where affidavits offered by defendants raise doubt as to the violation of an injunction, a motion for commitment for contempt of court will be refused, as the contempt "ought to be shown by clear proof." *Celluloid M'fg Co. et al. v. Chrolithion Collar & Cuff Co. et al.*, 24 Fed. Rep. 275.—WHEELER, 1885.

52. Application was made to a court for attachment for contempt against Vernon H. Brown, individually, and as a member of a firm represented as general agents in the United States for the Cunard Steamship Co. It did not appear that Vernon H. Brown had control over the cargoes of the steamers of said company, and the

motion was refused. *Bate Refrigerating Co. v. Gillett et al.*, 32 O. G. 1466.—NIXON, 1885.

53. "The sole power of the federal courts to punish for contempts of authority both at law and in equity is derived from Section 725 of the Revised Statutes." "Congress having legislated upon the subject of contempts, and the federal courts having derived the same power to punish for contempts from the act of Congress (Rev. St. Sec. 725), it follows irresistibly that the state court practice in such cases cannot be followed." "A contempt proceeding in the federal court is in its nature criminal, and must be governed by the rules of construction applied in criminal cases." "That court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it, or to entertain proceedings to that end." Where contempt proceedings are pending in a state court at the time of the removal of the case to a federal court, the latter court cannot proceed with the contempt proceedings. *Kirk et al. v. Milwaukee Dust-Collector M'fg Co.*, 26 Fed. Rep. 501.—DYER, 1885.

54. Where there is doubt whether the acts complained of have actually been committed—on motion for attachment for contempt—the doubt will be resolved in favor of the defendant. *Celluloid M'fg Co. et al. v. Chrolithion Collar & Cuff Co.*, 24 Fed. Rep. 585.—WALLACE, 1885.

55. Where a provisional injunction has been issued, conditioned that complainant is to file a bond, respondent cannot avoid the consequences of violating injunction because he was not notified that the bond had been filed, for it was his duty to ascertain that fact from the court. Nor in such a case can respondent defend on the ground that what he was enjoined against was not an infringement; in such a case respondent was ordered to pay a fine of five hundred dollars, and the costs of the motion, including fifty dollars to complainant's solicitor, and to be arrested and committed to jail unless the fine and costs were paid within ten days. *Burr v. Kimbark*, 29 Fed. Rep. 428.—BLODGETT, 1887.

56. The procurement of new defence, new evidence, or the advice of counsel, will not justify the violation of an injunction by defendants. "They are bound to obey the injunction until it has been dissolved or modified; and they cannot be allowed to assume the provence of the court in determining whether it is right or wrong." *Bate Refrigerating Co. v. Gillett et al.*, 30 Fed. Rep. 683.—WALES, 1887.

57. Defendants, being under an injunction against the infringement of a patent, contributed to a common fund with others to further defend

against the same patent in other cases. This was held to be a contempt of court, but as defendants disclaimed any intention of violating the injunction, the court imposed a nominal fee (ten dollars) on each of the defendants.—*Ib.*

58. "On hearing a motion for contempt, the first inquiry always is, Do the acts complained of constitute a violation of the injunction? The motives which impelled the acts, honest misconceptions of right to do them, or the erroneous advice of counsel, and all other excuses, may be properly considered only in awarding the punishment, where the violation is clear and without doubt. It is needless to remark on the importance of exacting implicit obedience to the order of the court having jurisdiction of the subject-matter in dispute. Any relaxation of, or deviation from, the established practice of enforcing a compliance with such order, in its spirit and letter, would not only produce confusion and endless litigation, but would impair the authority and dignity of the court; and it is for these reasons, as well as to maintain the rights of the prevailing suitor, that enjoined parties are liable to punishment even when they have innocently or mistakenly violated an injunction."—*Ib.*

59. "An attachment for contempt is a summary proceeding, and the writ is granted only in cases which are free from any reasonable doubt on the law or the facts." *Bate Refrigerating Co. v. Gillett et al.*, 30 Fed. Rep. 685.—WALES, 1887.

60. Where, in contempt proceedings, it appears that defendant acted in good faith, under the belief that he had a right to do the acts complained of, and stopped the infringing manufacture as soon as the proceedings were begun, he is not guilty of wilful contempt of court and may be discharged upon payment of costs. *Iowa Barbed Steel Wire Co. v. Southern Barbed Wire Co.*, 30 Fed. Rep. 615.—THAYER, 1887.

61. Defendant had been enjoined against the infringement of a patent. He then made a different article and procured a patent for it. In contempt proceedings it was held that he was entitled to have the question determined on a motion for an injunction. *Wirt v. Brown*, 30 Fed. Rep. 187.—BENEDICT, 1887.

62. In a suit for an infringement of a patent a corporation and its managing officers were made parties defendant to the bill, and they so answered. Injunction was granted. The managing officers continued the manufacture and were held to be infringers. *Iowa Barbed Steel Wire Co. v. Southern Barbed Wire Co. et al.*, 30 Fed. Rep. 123.—THAYER, 1887.

## CONTRACT NATURE OF PATENT.

*Constitution of U. S.*

Sec. 8. The Congress shall have power \* \* to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

## CASES.

1. "The grant of an exclusive privilege to an invention for a limited time" does not imply "a binding and irrevocable contract with the people, that at the expiration of the period the invention shall become public property." *Evans v. Eaton*, 1 Peters' C. C. 322.—WASH. 1816.

2. "The law confers an exclusive patent right on the inventor . . . as an encouragement and reward for his ingenuity, and for the expense and labor attending his invention." *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

3. The patent law holds out a reward to inventors, in order to promote the progress of science and the useful arts. *Pennock et al. v. Dialogue*, 2 Peters, 1.—SUP. CT. 1829.

4. It is not the object of the law to reward those least prompt to communicate their discoveries.—*Ib.*

5. If through a subsequent inventor the invention comes into common use, there would be no *quid pro quo*, no price for the monopoly.—*Ib.*

6. "A patent is a bargain with the public, in which the same rules of good faith prevail as in other contracts, and if the disclosure communicates the invention to the public, the statute is satisfied." *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

7. The patent "is the reward stipulated for the advantages derived by the public for the exertion of the individual." The contract ought to be fairly executed on the part of the United States. *Grant et al. v. Raymond et al.*, 6 Peters, 218.—SUP. CT. 1832.

8. For a valuable invention the public gives, for a limited period, the profits arising from the sale of the thing invented. *Shaw v. Cooper*, 7 Peters, 292.—SUP. CT. 1833.

9. The exclusive right does not rest on the discovery alone, but also on the legal sanctions and forms of law.—*Ib.*

10. Patents are treated as a just reward to ingenious men; as holding out encouragements to genius, talents, and enterprise; as highly beneficial to the public; as ultimately securing great advantages to the whole community, and are to

be liberally construed. *Blanchard v. Sprague*, 2 Story, 164.—STORY, 1839.

11. "The bargain by government is to give the inventor the exclusive use for fourteen years, if he will place on record, and distinguish clearly and truly what his novelty or improvement is, so that the public can easily understand it, and benefit by it after the fourteen years if not before." *Hovey v. Stevens*, 3 Woodbury & Minot, 17.—WOODBURY, 1846.

12. "The inventor is not to be protected unless he describes plainly and fully what he has done, so that the public may copy or imitate and use it after his term expires. That is the consideration for the exclusive use during the period of the patent."—*Ib.*

13. "The contract of the public is not with him who has discovered, but with him who also makes his discovery usefully known."—*Ib.*

14. "The patent law goes indisputably upon the ground that when a man, by his knowledge and skill, has made and perfected a machine, the public are then put in possession of the invention, and have the benefit, in some form, of that knowledge and skill; and that the man who comes afterward cannot deprive the public of that benefit, though he may be an original inventor of the machine. He has not given the consideration for an exclusive privilege, because the public had it before; and although he may have the merit of invention, he cannot have the right to take from the community that which they possess by the invention of another." *Hove et al. v. Underwood et al.*, 1 Fish. P. C. 160.—SPRAGUE, 1854.

15. "The undertaking on one part is in consideration of a valuable invention to be given up for the benefit of the public by the inventor after a reasonable term of the exclusive use of the fruits of the invention to be secured to him. His faith is pledged that it is a thing not known before; that there has been no unnecessary delay in the application for a patent; that it has not been unnecessarily exposed to public view; that the manufacture, machine or invention has not been made, or sold, or offered for sale to others, or permitted or suffered without opposition, if known." *Hunt v. Howe*, 1 MacArthur's P. C. 366.—MORSELL, 1855.

16. "Patents are granted to inventors, not for their benefit simply, but for the purpose of benefiting the public by encouraging inventors to make inventions which may be useful to the public when placed at their disposal, and to place upon the records of the Patent Office a description of those inventions, so that after the expiration of the term limited by their patent,

the public may have the full advantage of their genius and discoveries." *Ransom et al. v. New York*, 1 Fish. P. C. 252.—HALL, 1856.

17. "When the patent is granted, it becomes, to a certain extent, a contract upon the part of the Government with the party named in the patent, that it will, through the courts, and in the ordinary courses of the administration of justice, protect him in the exercise of the exclusive privilege which his patent gives to him; and there could be no justice in granting to a party an exclusive privilege to use what he did not invent, or to use, exclusively, for fourteen years, what had been already invented by another, because he has paid no consideration for the grant, no consideration for the promise of the Government to secure him in the exercise of these privileges, if he has not, by his invention, and by placing a description of it upon the records of the Patent Office, added to the stock of useful knowledge which may be applied for the benefit of the citizen."—*Id.*

18. "As the patent law of the United States grants the patentee a monopoly, and not only awards damages, but inflicts a penalty for a violation of the exclusive privilege, it requires that the invention shall be so described in the specifications that one acquainted with the art of manufacture to which it relates may not only understand the invention, but be able by following the specifications with the aid of the drawings, to construct the machine or make the combination which is the subject of the patent. And this rule of law is founded on the equitable principle that a monopoly or exclusive privilege should not be given to an individual without a just equivalent to the public. While the statute holds out encouragements to stimulate inventions and improvements in the arts and manufactures by securing to the inventor a remuneration for his outlay, and a reward for his ingenuity, nevertheless, the consideration for which the patent issues to him is the benefit he confers on the community by his discovery eventually becoming public property. The patentee may be regarded as a purchaser from the public, being bound to so communicate his secret by specifications, drawings, and models, that it shall be successfully available to the whole community at the expiration of the patent." *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILSON, 1856.

19. A patent "is dealt with by the courts as a grant by the Legislature in exchange for the equivalent to be received by the public in the free enjoyment of the patented discovery after the inventor's exclusive privilege expires." *Carr v. Rice*, 1 Fish. P. C. 198.—BETTS, 1856.

20. "The patent grant is bestowed in consideration of something new and valuable contributed by the patentees to the public benefit. If the subject of the grant was already open to common use" the patentees render "no equivalent for the privileges they obtain, and fail to fulfil the vital condition upon which they were authorized to enjoy them."—*Id.*

21. "The patent may be considered in the light of a deed from the Government, the consideration of which is the invention specified; and the patentee is bound to communicate it by so full, clear, and exact a description with the drawings and models, that it shall be within the comprehension of the public at the expiration of the patent, for at that period his invention becomes public property. The exclusive privilege is not conferred merely as a reward of genius, and for the encouragement of useful inventions and improvements in arts and manufactures, but also embraces the public benefit." *Page v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

22. "The consideration given for the monopoly is that the public shall have the full and free benefit and knowledge of the invention at the expiration of fourteen years from the date of the invention." *Savary et al. v. Lauth*, 1 MacArthur's P. C. 691.—MORSELL, 1859.

23. "The public, who through the law secures to the inventor the exclusive property in his invention for a limited period, receives in return either new or more valuable or cheaper productions during the lifetime of the patent, and from its expiration the free enjoyment of any benefits which may flow from it forever thereafter." *Magic Ruffle Co. v. Douglas et al.*, 2 Fish. P. C. 330.—SHIPMAN, 1863.

24. A reissued patent is a new contract made with the Government. *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Clifford, 351.—CLIFFORD, 1864.

25. "In consideration that an inventor will disclose the secret of his invention, and put it in immediate practice, and afford to the public the opportunity to practice it when it becomes public property at the expiration of the term of the patent, the Government grants to the author of a new and useful invention the exclusive right in that invention for a term of years. This grant is not the exercise of any prerogative to confer upon one or more of the subjects of a government the exclusive property in that which would otherwise belong to the common right. It more clearly resembles a contract which, under the authority conferred by the Constitution, Congress authorizes to be entered between the Government and the inventor, securing to him,

for a limited time, the exclusive enjoyment of the practice of his invention in consideration of the disclosure of his secret to the public, and his relinquishment of his invention to the public at the end of the term." *Attorney-General v. Rumford Chemical Works et al.*, 2 Banning & Arden, 298.—SHEPLEY, 1876.

26. "On one side is a special grant made by the Government to the inventor, that he shall have the exclusive use of his invention for a certain time; and there is, on the other hand, a consideration given for it by the inventor; that is to say, the disclosure of his invention, so that the public may afterward have the benefit of it." *Royer et al. v. Coupe*, 29 Fed. Rep. 358.—CARPENTER, 1886.

## CORPORATION.

### CASES.

1. Action for infringement will lie against a corporation. *Kneass v. Schuytkill Bank*, 4 Wash. 9.—WASH. 1820.

2. A railroad, upon which a patent was infringed, was held by a corporation chartered by the State of Pennsylvania, but the road was operated by a Maryland corporation. The Pennsylvania road was held liable for infringement. *York & Maryland Line Railroad Co. v. Winans*, 17 Howard, 30.—SUP. CT. 1854.

3. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. The only mode to give notice, or to communicate knowledge to such artificial being, invisible and intangible, is to give such notice, and to communicate such knowledge to some agent authorized to receive it. Corporations know nothing except through agents. They act by agents. They receive notice through agents. The neglect of agents is their neglect. The directors are no more the corporation than the treasurer is. They are merely the agents of the corporation when assembled for the transaction of business." *New England Car-Spring Co. v. Union India Rubber Co. et al.*, 4 Blatch. 1.—INGERSOLL, 1857.

4. "Corporations as well as individuals can be estopped from denying that they have done certain acts when they had the corporate power to do such acts. They have the power to waive rights and conditions in their favor, to transfer rights and privileges, and to assent to such transfer by others, and, therefore, they can be estopped from saying that they have not so done."—*Ib.*

5. A Massachusetts corporation brought suit

on its patent in the Southern District of New York. Respondents contended that the Massachusetts corporation was confined to the limits of that state; the court held otherwise. *Grover & Baker Sewing Machine Co. v. Sloat et al.*, 2 Fish. P. C. 112.—NELSON, 1860.

6. Where a joint-stock corporation has complied in form with the requirements of the statute, and the authorities of the state have not called the validity of the organization in question, "it cannot be admitted that a mere wrong-doer can set up such a defect, if it be one, as a justification of his wrongful acts." *Dental Vulcanite Co. v. Wetherbee*, 2 Clifford, 555.—CLIFFORD, 1866.

7. The defence that a complainant is not really the joint-stock corporation that it claims to be, must be pleaded in abatement, for it cannot be pleaded in bar, nor given in evidence under the general issue.—*Ib.*

8. "Corporations may have the same remedies at law or in equity as natural persons, and the rule established by the Supreme Court is, that if the defendant pleaded the general issue in a suit brought by a corporation, it is an admission of the corporate existence of the plaintiff, and dispenses with the necessity of any proof on its part to sustain that allegation."—*Ib.*

9. Where the owner of a patent, and the injured licensee, a corporation, join as complainants, the bill may be verified by the oath of the president of the corporation. *Goodyear et al. v. Allyn et al.*, 6 Blatch. 33.—BLATCHFORD, 1868.

10. Where a municipal authority orders a certain patented improvement to be employed in a public work, that authority must be assumed to have acted with knowledge of the patent. *Greaton v. Griffin*, 4 Abbott's Practice, N. S. 310.—GILBERT, 1868.

11. A suit in equity was brought against one Osgood and others, in the Southern District of New York. Osgood was simply president and director of a New Jersey corporation which actually committed the alleged infringing acts. The court held that in order to make Osgood properly a defendant, complainant should have sworn either that he could control the operations of the company, or, at least, have joined with him a majority of the directors. *Jones v. Osgood et al.*, 6 Blatch. 435.—BLATCHFORD, 1869.

12. The contract of license of a corporation may be valid without any authorized resolution or order in writing by the trustees or directors, and although the seal used on it was the private seal of one of its officers instead of the corporate



seal. *Eureka Co. v. Bailey Co.*, 11 Wallace, 488.—SUP. CT. 1870.

13. It does not follow because a corporation never authorized or sanctioned a contract, that it is not responsible for a fraud in connection therewith. *Butler v. Watkins*, 13 Wall. 456.—SUP. CT. 1871.

14. "A corporation, if it can properly be said to reside at all, resides in all the districts of the State creating it." *Locomotive Engine Safety Truck Co. v. Erie R. R. Co.*, 10 Blatch. 292.—BLATCHFORD, 1872.

15. As to mode of proving the legal existence of a corporation, see —. *Dorsey Harvester Revolving Rake Co. v. Marsh et al.*, 6 Fish. P. C. 387.—MCKENNAN, 1873.

16. As to rights of corporations to hold patents, see —.—*Ib.*

17. A corporation does not waive an objection to the jurisdiction of a court over it by appearing and pleading, by an attorney, to the jurisdiction of the court. *Decker v. N. Y. Belting & Packing Co.*, 6 Fish. P. C. 374.—BLATCHFORD, 1873.

18. Jurisdiction over a corporation of one state cannot be acquired in another district by service of process upon one of its officers in such district.—*Ib.*

19. A Rhode Island corporation brought suit for infringement in the Southern District of New York. In the suit defendants sought to have complainant enjoined in similar proceedings elsewhere. The court held that it had not jurisdiction for that purpose. *Rumford Chemical Works v. Hecker et al.*, 11 Blatch. 552.—BLATCHFORD, 1874.

20. A defendant corporation violated an injunction against infringing a patent. A bailable attachment was awarded against the president of the defendant company. *Wetherill et al. v. New Jersey Zinc Co.*, 1 Banning & Arden, 105.—MCKENNAN, 1874.

21. A private corporation must be held to reside where its principal office is located. Its residence depends, not on the habitation of its stockholders, but on the official exhibition of its legal and local existence. *Lyman Ventilating & Refrigerator Co. v. Southard*, 1 Banning & Arden, 627.—WALLACE, 1875.

22. Certain parties joined in conveying to a joint-stock corporation, yet to be formed, certain patents and other property. The defendants contended that such an agreement to convey property to a corporation yet to be formed was invalid. The court held that the principal if not the only office of the agreement was to indicate the intention of the parties in the forma-

tion of the new company, and to show that the owner of the patents, and those holding under him, were estopped from claiming certain property which said defendants had agreed for a valuable consideration to convey to the new company. *Consolidated Fruit-Jar Co. v. Whitney et al.*, 2 Banning & Arden, 375.—NIXON, 1876.

23. "A corporation is an artificial person. It thinks and speaks and acts only in the thoughts, words and actions of the individuals who organize it and direct its proceedings. The sum of its knowledge or intelligence is found in the aggregate knowledge and intelligence of those who give it being and life."—*Ib.*

24. Where a party is under the injunction of a court, and gets up a fictitious sort of a corporation for the purpose of evading the injunction, the corporation will be held liable in the same manner as the party under the injunction.—*Ib.*

25. A corporation is an ideal, non-sentient being, that has no knowledge, and can only answer under its seal. *Vaughan v. Central Pacific Railroad Co.*, 4 Sawyer, 280.—SAWYER, 1877.

26. A bill for a discovery will not lie against a corporation, although in order to compel a discovery on oath, the officers of the corporation may be made parties; otherwise the answer is put in under the common seal. *Vaughan v. East Tennessee, Virginia & Georgia R. R. Co.*, 1 Flippin, 621.—BROWN, 1877.

27. "An injunction against a corporation is binding upon all persons acting for or in behalf of the corporation who have notice of the writ or its contents, whether they be actually served with it or not." *Phillips et al. v. City of Detroit*, 2 Flippin, 92.—BROWN, 1877.

28. A state law enacted "that in all personal suits or actions hereafter brought in any court in this State against any foreign corporation not holding its charter under the laws of this State, process may be served on any officer, director, agent, clerk or engineer of such corporation, either personally or by leaving a copy at his dwelling house or usual place of abode, or by leaving a copy at the office, depot, or usual place of business of such corporation." . . . An Act of Congress provided that "no civil suit shall be brought before either of said courts (circuit or district) against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, etc." The defendant corporation was not an inhabitant of the state of New Jersey at the time of filing the bill; service of the subpoena in the suit was in the District of New Jersey. Jurisdiction

was sustained. *Williams et al. v. Empire Transportation Co. et al.*, 3 Banning & Arden, 533.—NIXON, 1878.

29. Once having control, the "court should look to the legislation of the State, and exercise jurisdiction over a foreign corporation when provision has been made for the service of process."—*Ib.*

30. By the legislation of a state, foreign corporations doing business in the state may be estopped from setting up in bar in a suit in a federal court that they are not amenable to the jurisdiction.—*Ib.*

31. Service of process upon a person as president of a corporation is both service on the corporation and on such person as its agent. *Colgate v. Gold & Stock Telegraph Co.*, 4 Banning & Arden, 559.—BLATCHFORD, 1879.

32. "The acts of 1789 and 1875 declare that no suit shall be brought against any person in any other district than that in which he is an inhabitant, or where he is found." The present suit was brought in the Southern District of Illinois. The laws of Illinois provided "That foreign corporations, and their agents, doing business in this State, shall be subject to all liabilities, restrictions, and duties which are or may be imposed upon corporations of like character in this State, and that they shall have no other or greater power is expressly stated in the statute." The allegation in the bill of complainant was that the St. Louis Beef Canning Co., a corporation under the laws of Missouri, owns and possesses a slaughter-house and stock-yard in East St. Louis, Ill., where beef to be canned by the company was slaughtered and pressed preparatory for and in the name of such company. Jurisdiction of the court was sustained, the court saying that "It is necessary that the foreign corporation should do business in the State in order to be found there, and in order to warrant service on the president when within the limits of the State." *Wilson Packing Co. v. Hunter*, 8 Bissell, 429.—DRUMMOND, 1879.

33. A corporation having no conscience to probe is incapable of taking an oath. It can give information only through its officers, and these may all be summoned and may testify as ordinary witnesses. *Sayles v. Richmond, Fredericksburg & Potomac Railroad Co.*, 3 Hughes, 172.—HUGHES, 1879.

34. A corporation having violated an injunction by the act of its president, through erroneous advice, the corporation was fined, but the president was not personally punished. *Macaulay v. White Sewing Machine Co. et al.*, 9 Fed. Rep. 698.—BLATCHFORD, 1881.

35. The absence of the seal of a corporation from an assignment does not render it invalid or void, for the law does not require a seal to such an instrument. *Gottfried v. Miller*, 104 U. S. 521.—SUP. CT. 1882.

36. A license by a corporation referring generally to its patents will not include a patent belonging to an officer of such corporation. *Shaw v. Colwell Lead Co.*, 20 Blatch. 417.—WHEELER, 1882.

37. For a discussion of the question of service of process upon a non-resident corporation, see —. *Gray et al. v. Taper Sleeve Pulley Works*, 24 O. G. 602.—ACHESON, 1883.

38. Where a corporation is the real defendant, and an account of profits and injunction against the further use of the patented inventions is wanted, the suit must run against the corporation in its corporate capacity, and not against a part only of its stockholders and directors individually. *Ambler v. Choteau et al.*, 107 U. S. 586.—SUP. CT. 1883.

39. When a party named as a defendant in the bill is the owner of the whole stock in a corporation also named as defendant in the bill, the pretext that he is "doing business in the name of the corporation is too flimsy to shield him from accounting." *Smith v. Standard Laundry Machine Co.*, 25 O. G. 393.—WHEELER, 1883.

40. In an action for infringement of patent in the form of a suit against a company and two of its officers, if the officers have participated in the infringement, they are liable as infringers, though acting simply as officers of the company in doing it. *Nat'l Car B. Shoe Co. v. Terre Haute Car & M'fg Co. et al.*, 19 Fed. Rep. 514.—WOODS, 1884.

41. The defendant, William Deering & Co., was a corporation with a business agency at Allegheny City, Pa. A written contract between such corporation and White & Wallace, the resident defendants, expressly created the latter the agents of the former. Under the statutes of Pennsylvania such corporation was one transacting business within the state, and service of process upon its said agents was a good service upon the corporation. *Hussy M'fg Co. v. Wm. Deering & Co. et al.*, 28 O. G. 193.—ACHESON, 1884.

42. Where two directors of the complainant corporation had knowledge of the equitable title of defendant, under the patent in suit, but it was against the interest of said directors to communicate the knowledge to the complainant corporation, it was held that the complainant corporation was not to be charged with knowledge

of defendant's equitable title. *Davis Imp. Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 22 Blatch. 221.—WALLACE, 1884.

43. Where it is sought to recover a penalty for improperly stamping an article as patented, it must be proved that the marks were affixed for the purpose of deceiving the public. The acts and beliefs of the officers of a corporation are the acts and beliefs of the corporation. *Tompkins v. Butterfield et al.*, 33 O. G. 758.—NELSON, 1885.

44. "Undoubtedly a corporation cannot be compelled to answer under oath to a bill in equity. It answers only under the seal of a corporation. It is for this reason the practice has obtained of making the officers of the corporation parties to the bill, and requiring them to answer the interrogatories. This, however, does not excuse a corporation from answering, and the complainant is entitled to an answer from a corporation as well as from an individual, although the value of the answer may not be worth the expense of the experiment. Although no officer or agent is made a party to the bill, it is still the duty of the corporation to cause diligent examination to be made, and give in the answer all the information derived from such examination; and if it alleges ignorance without excuse, a disposition on its part to defeat and obstruct the course of justice, may be inferred, which may justify the court in charging it with the costs of the suit." *Colgate v. Compagnie Française du Telegraph, etc.*, 23 Fed. Rep. 82.—WALLACE, 1885.

45. Where a corporation has infringed a patent, and then made an assignment in insolvency to an assignee, a bill for infringement by the corporation can be maintained against the assignee, although the patent owner might, if he chose, present his claim to the assignee and prosecute it under the laws of the state. *Gordon et al. v. St. Paul Harvester Works et al.*, 23 Fed. Rep. 147.—NELSON, 1885.

46. A corporation of one state doing business in another state is suable in the courts of the United States established in the latter state, if the laws of that latter state so provide, and in the manner provided by those laws, but not otherwise. *Boston Electric Co. v. Electric Gas Lighting Co.*, 23 Fed. Rep. 838.—COLT, 1885.

47. "Except where the laws of the state in which it carries on business and is sued impose, expressly or by implication, a liability to suit there as a condition of its doing business in the State, a foreign corporation cannot be found, for the purpose of a suit *in personam*, outside of the

jurisdiction or sovereignty creating it." *United States v. American Bell Telephone Co. et al.*, 29 Fed. Rep. 17.—JACKSON, 1886.

48. "In the absence of a voluntary appearance, three conditions must concur or coexist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held, viz.: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and, (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the State. Where the local law, expressly or by comity, permits foreign corporations to do business in the State, when it also provides for suit against them in a reasonable and proper manner, and within the just limits of the State's power and authority, and when a foreign corporation thereafter enters the State and transacts its corporate business by means of resident agents coming within the terms of the local statute, it may be found, and is liable to suit there, in either the State or federal courts, by service of process on such agent."—*Id.*

49. "The judiciary acts (Rev. St. Sec. 739 and act of March 3d, 1875, providing that no civil suit or action shall be brought against any person outside of the district in which he resides or may be found at the time of the service of process, do not affect the general jurisdiction of "a circuit "court, but merely confer a personal privilege or exemption upon the defendant, which can be waived, and is waived by a foreign corporation, not only by a voluntary appearance to the suit, but by doing business in a State imposing the condition of liability to suit there by service of process on its agent. It cannot be held sufficient to give "a circuit "court jurisdiction *in personam* over a foreign corporation that it has property rights, however extensive within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on business in its own right, on its own responsibility, and for its own account, and through or by means of its own agents, officers, or representatives, in order to bring it within the operation of the laws of a State other than that in which it is incorporated, making it amenable to suit there as a condition of its doing business in such State."—*Id.*

50. The American Bell Telephone Company had its home and location in Boston, Mass. It was held that "furnishing the means necessary to enable the licensee companies to transact the business of telephoning in Ohio, either upon a fixed rental and royalty upon the telephone instruments used, or a percentage of the gross receipts of the business, does not constitute the carrying on of that business by the American Bell Telephone Company, or make the licensee companies its managing agents, so as to render it amenable to suit here."—*Id.*

51. "In exercising" the "common-law right of licensing others to use its patents," a "corporation owner is no more *nationalized* than a private owner would be under the same circumstances. The fact that a patent-holding corporation licenses others to use its patent in a particular State has no more effect or operation in *domesticating* it within such State than the same act on the part of a private owner would render him a citizen and resident of every State in which his patent might be used. The franchise right of the patent-holding corporation in no way serves to establish the fact that such corporation is carrying on its business, and is to be found wherever its patent is used."—*Id.*

52. The home and location of the American Bell Telephone Company was in Boston, Mass. It was connected businesswise with certain local telephone companies in Ohio. It was sought to get service upon the parent company by service upon the local Ohio corporations. The court held "that the various matters relied on to show that the American Bell Telephone Company is to be found in Ohio, and subject to the jurisdiction of this court, such as ownership of the telephone instruments used by the licensee corporations; the ownership of stock in one or more of the local companies; the right and power reserved to it of resuming possession of its telephone instruments, and taking control of the telephone business, in event of default on the part of the licensee corporations in complying with the provisions of the license contracts; the sharing in the gross receipts of certain portions of the business done; the reservation of rents and royalties; the right to make changes, and the restrictions and limitations imposed upon the licensee companies, neither singly nor in the aggregate establish the *two essential facts* necessary to bring the American Bell Telephone Company within the power and jurisdiction of this court, viz., that said corporation is now, or was at the commencement of this suit, carrying on its business in the State of Ohio, and that it had a 'managing agent' or agents representing it here.

The truth of the plea being assumed, the only relation existing between the American Bell Telephone Company and the local corporations is really and technically that of lessor and lessee, licensor and licensee; the Bell Telephone Company being merely the lessor of the telephone instruments, and the licensor of the right to use the patent embodied therein, on certain terms, as to rents and royalties and otherwise, agreed upon between the parties, the contracts being entered into, not in Ohio, but at Boston, Mass."—*Id.*

53. "If a corporation is engaged without license in the manufacture of an article protected by letters-patent, its acts in that behalf are unlawful, and its managing officers cannot shield themselves from individual liability to an injunction upon the plea that what they did was done as officers or agents of the corporation, but not in their own behalf as principals." *Iowa Barbed Steel Wire Co. v. Southern Barbed Wire Co.*, 30 Fed. Rep. 123.—THAYER, 1887.

54. "A corporation is an artificial body, and there is no identity between it and the persons who compose it." *Bate Refrigerating Co. v. Gillett et al.*, 30 Fed. Rep. 685.—WALES, 1887.

55. Although a corporation cannot be compelled to answer a bill in equity under oath, it can be required to answer, and must answer fully. *Gamevell Fire Alarm Tel. Co. v. New York*, 31 Fed. Rep. 312.—WALLACE, 1887.

56. Where the statute restricts suits to the district in which the acts are committed, a consistent and reasonable interpretation of the statute requires it to be held that a corporation, for the purposes of such suits, has a "managing agent," and is sufficiently "found" within the district in the person of an individual who has the direction, management, and control of its business therein, out of which the acts complained of have arisen, and who so far represents the corporation as to make his acts incurring penalties in that business the acts of the corporation. *Hat Sweat M'fg Co. v. Davis Sewing Mach. Co.*, 31 Fed. Rep. 294.—BROWN, 1887.

## COSTS.

### "Costs" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 5. (Provides for repeal of patent wrongfully obtained, and gives costs to the patentee if the attempt at repeal does not succeed.) [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 6. (Provides defences to an action for infringement, and gives defendant costs if successful.)

SEC. 10. (Provides for repeal of patents wrongfully obtained, and gives the patentee costs if the attempt at repeal does not succeed.) [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 14. (Gives costs to a successful plaintiff in an action for infringement.)

SEC. 15. (Gives costs to a successful defendant in an action for infringement.) [Repealed July 8th, 1870.]

Act approved March 3d, 1837.

SEC. 9. (Deprives plaintiff or complainant of costs in a suit for infringement where disclaimer is filed after suit brought.) [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 39. (Provides for penalty "with costs" for wrongfully stamping articles as patented.)

SEC. 52. (Provides for prosecution of an application for patent by bill in equity. "And in all cases where there is no opposing party, a copy of the bill shall be served on the Commissioner, and all the expenses of the proceeding shall be paid by the applicant whether the final decision is in his favor or not.")

SEC. 59. (Provides for recovery of damages "with the costs," "by action on the case," for infringement of patent.)

SEC. 60. (Deprives plaintiff or complainant of the costs if disclaimer is filed after suit brought for infringement.)

SEC. 61. (Gives costs to a successful defendant in an action for infringement of patent.) [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4915. (Provides for the prosecution of an application for patent by bill in equity and: "In all cases where there is no opposing party, a copy of the bill shall be served on the Commissioner, and all the expenses of the proceedings shall be paid by the applicant whether the final decision is in his favor or not.")

SEC. 4919. (Gives costs to a successful plaintiff in an action on the case for infringement of patent.)

SEC. 4922. (Deprives a plaintiff or applicant of costs where a disclaimer is filed after suit brought for infringement of patent.)

#### CASES.

1. Under Section 20 of the Judiciary Act of 1789 where, in a patent case, the plaintiff recovers less than five hundred dollars, he is not to

be allowed costs. *Kneass v. Schuylkill Bank*, 4 Wash. 106.—WASHINGTON, 1821.

2. Witness fees may be taxed for witnesses living more than one hundred miles from the place, and travelling to attend personally. The Judiciary Act of 1789, Chapter 20, is simply a provision as to taking depositions of such witnesses. *Prouty v. Ruggles*, 2 Story, 199.—STORY, 1842.

3. By the court: "In my circuit court, the plaintiff in patent cases has never been required to give any security for costs." *Woodworth v. Sherman*, 3 Story, 171.—STORY, 1844.

4. A complainant may be required to give security for costs. *Orr Adm'x v. Littlefield et al.*, 1 Woodbury & Minot, 13.—WOODBURY, 1845.

5. "It is, doubtless, a sound principle in chancery to exercise some wider discretion over the allowance of costs than is done in a court of law. But still the general rule is there, as at law, to give costs to the prevailing party. What prevails by law—what is legal—is presumed to be moral and conscientious and equitable, till the contrary is shown. This rule is applied likewise to bills for injunctions as well as other proceedings. But if peculiar circumstances of an equitable character exist in favor of defendant receiving no costs in the case, or none for particular items, it is deemed justifiable to withhold them. But the burden to show the peculiar circumstances is on the complainant," where the defendant prevails. *Hovey v. Stevens*, 3 Woodbury & Minot, 17.—WOODBURY, 1846.

6. "There is no act of Congress expressly enacting that costs generally shall be given to either party, but several merely specify some particulars as first remarked, which may be taxed for particular officers and persons." "It is understood to have been the practical usage by the courts of the United States to conform to the state laws as to costs when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject." *Hathaway v. Roach*, 2 W. & M. 63.—WOODBURY, 1846.

7. "The true course is not to attempt to make the party prevailing *whole*, as it is termed, for all his various items of expense and trouble, for that would be vain without much further legislation in most cases of parties involved in litigation."—*Id.*

8. "The presumption of law and fact must be that . . . witnesses should continue their attendance, and be paid for it till they were discharged by the parties of the court."—*Id.*

9. The cost of a copy of patentee's models in the Patent Office, procured by the party defendant, is to be taxed at what it was actually worth to make them, not necessarily what it cost the defendant.—*Ib.*

10. The cost of copies of the assignments by the plaintiff, procured by the party defendant, is to be taxed.—*Ib.*

11. The cost of a copy of plaintiff's patent, procured by defendant, is not to be taxed, because it is plaintiff's duty to produce the copy.—*Ib.*

12. Where a demurrer to a bill is overruled, the party making it can, on paying costs, have a trial on the merits or principal matter in dispute. *Woodworth et al. v. Edwards et al.*, 3 W. & M. 120.—WOODBURY, 1847.

13. Complainants filed interrogatories unauthorized by law and bad in substance. Defendants demurred and prevailed thereon. Costs were awarded against complainants, but their payment was stayed until the matters in issue were disposed of.—*Ib.*

14. "In these cases of new trial for newly discovered evidence, the terms are usually that the costs of the former trial be first paid." *Aiken v. Bemis*, 3 W. & M. 348.—WOODBURY, 1848.

15. The defences which the statute permits to be made under the general issue, with special notice, cannot be set up in special pleas. They will be stricken out with costs. *Wilder v. Gayler et al.*, 1 Blatch. 597.—NELSON, 1850.

16. If a disclaimer is entered at the Patent Office before a suit is instituted, plaintiff recovers costs, but not if made during the progress of the suit. *Hall v. Wiles*, 2 Blatch. 197.—NELSON, 1851.

17. The Circuit Court may properly tax costs if the case has been to the Supreme Court and returned. *Sizer et al. v. Many*, 16 Howard, 98.—SUP. CT. 1853.

18. "It is the costs on final hearing alone which are by the statute chargeable by one party against the other." *Stimpson et al. v. Brooks*, 3 Blatch. 456.—BETTS, 1856.

19. In an action at law the expense of a model of defendants' infringing machine, made by order of court, cannot be taxed in the costs, although it might be otherwise in a suit in equity. *Parker v. Bigler et al.*, 1 Fish. P. C. 285.—GRIER, 1857.

20. "As the fee bill gives no fee for services or mileage in case of notice under rules of court, the 48th rule of court permits notice of all such rules to be given by mail. The service by the marshal was therefore not official or necessary."—*Ib.*

21. "When the same witness has been brought to court in suits where the parties are different, one cannot complain that another has paid him, if he has obeyed the process of each, and given his testimony when called. But where a witness has been produced by the same plaintiff to give his testimony in more cases than one against different defendants, his right to demand from the plaintiff any fee for more than his actual attendance and mileage seems more doubtful. The witness should have but one remuneration for but one service. . . . When the parties are not the same, the witness has a right to fee in each suit, and cases where the plaintiff alone is a party in each suit, are left in the same category with those where all the parties are different."—*Ib.*

22. In Section 6 of the act of March 2d, 1793, the marshal's fees for serving subpoenas cannot cover more than one hundred miles of the distance, although the routes of travel may be such as to compel him to travel a greater distance in order to reach a witness who is only one hundred miles away.—*Ib.*

23. The right of the plaintiffs to costs comes from the verdict in their favor for any amount of damages, without reference to any increase thereof by the court. *Merchant et al. v. Lewis*, 1 Bond, 172.—LEAVITT, 1857.

24. "Costs belong to the attorney." *Ransom et al. v. New York*, 4 Blatch. 157.—INGERSOLL, 1858.

25. If, during a trial, it appear that a claim is void for lack of novelty, and no disclaimer has been filed, plaintiffs are thereby deprived of costs. *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

26. "The mileage of witnesses who have attended without being summoned by legal process" cannot be taxed as costs in cases at law. *Woodruff et al. v. Barney et al.*, 1 Bond, 528.—LEAVITT, 1862.

27. "The subject of costs in cases at law, in the courts of the United States, is wholly governed by statute, and is not dependent on the discretion of the judge of those courts."—*Ib.*

28. Where a party in good faith, in a case at law, procures models of the device of the patents in suit, the expense thereof will be taxed in the costs.—*Ib.*

29. In a case at law, copies of patents not procured by order of the court cannot be taxed in the costs.—*Ib.*

30. In an equity case argument having begun, complainants produced a naturalization certificate, and it being admitted by defendant upon terms to be settled by the court as to costs, the

court found as costs the fees of all the witnesses whose testimony was taken to prove alienage and one hundred dollars as the estimated expense of the defendant in procuring that testimony. *Stainthorp et al. v. Humiston*, 4 Fish. P. C. 107.—HALL, 1864.

31. In a bill of costs, the following items were disallowed: (1) The expense of complainant in attending court at Albany when the hearing of the case was transferred to New York. (2) Models which were certified copies of models in the Patent Office, and old machines and parts of machines, and the expense of their production. (3) The cost of printing pleadings and testimony and of making drawings; also cost of printing abstract of pleadings; also cost of printing brief and supplemental brief. (4) The cost of copying papers to be used in the suit. (5) Expense of counsel to Cooperstown and back on motion to modify the decree. (6) The expense of reporting argument on final hearing in court. Money paid for telegraphic despatches was allowed. *Hussey v. Bradley et al.*, 5 Blatch. 210.—HALL, 1864.

32. Complainant brought suit on five patents. The court found for defendants on four of them, and the judges disagreed as to the fifth. Bill dismissed without costs. *American Wood Paper Co. v. Heft et al.*, 3 Fish. P. C. 316.—GRIER, 1867.

33. Where complainants are victorious as to one claim in suit, and respondent is victorious as to the other, no costs are to be allowed. *Yale & Greenleaf M'fg Co. et al. v. North*, 5 Blatch. 455.—SHIPMAN, 1867.

34. Where a verdict is set aside and a new trial granted, the costs will abide the result. *Densmore et al. v. Schofield et al.*, 4 Fish. P. C. 148.—SWAYNE, 1868.

35. Disclaimer during suit takes away the right to costs. *Tuck v. Bramhill*, 6 Blatch. 95.—BLATCHFORD, 1868.

36. Under the act of February 26th, 1853, but one docket fee is to be allowed in docket cases. *Troy Iron & Nail Factory v. Corning et al.*, 7 Blatch. 16.—NELSON, 1869.

37. Section 1 of the act of February 26th, 1853, "provides: 'For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.' This relates to testimony taken out of court, under authority which will entitle it to be read as evidence in court, and has no relation to oral testimony taken in court or before a master. It applies, in cases at common law, where depositions are given in evidence on the trial, and in suits in equity, where the depositions are read at the hearing."—*Ib.*

38. The act of February 26th, 1853, does not authorize the taxation of printers' fees for printing testimony taken before a master on an accounting.—*Ib.*

39. "No *per diem* allowance should be taxed for the attendance before the master of witnesses on the part of the plaintiffs whose testimony was afterward abandoned or given up, or was stricken out or rejected by the master, where the striking out or rejection has been sustained by the court. It would be unreasonable and against the established rule of taxation to tax costs in favor of a party for acts or services which were useless or illegal, and which only lead to increased expense, and to a waste of the time of the court and of all persons concerned."—*Ib.*

40. "Trial and final hearing have well-known definite meaning in the law, and they are used in the statute" (of February 26th, 1853), "in that well-known sense. 'Trial' is used to describe the process of determining the issues in an action at law, and 'final hearing' the submission of the case for a determination thereof upon the pleadings, or pleadings and proofs, or otherwise, so that the case may finally be disposed of." *Doughty v. West, Bradley & Cory M'fg Co.*, 8 Blatch. 107.—WOODRUFF, 1870.

41. Docket fees are not to be allowed on reference to a master.—*Ib.*

42. "The Supreme Court, by Rule 88 of the rules of equity, has assumed to authorize the Circuit Court, or perhaps to declare the general power of the Circuit Court in equity, to appoint standing masters in Chancery in their respective districts, and has provided that 'the compensation to be allowed to every master for his services in any particular case shall be fixed by the Circuit Court in its discretion, having no regard to all the circumstances thereof.'" "The clerk has no power, under this rule, to fix the compensation to be allowed, and his taxation is therefore inoperative."—*Ib.*

43. The fees of masters were prescribed in the act of February 26th, 1853. By that statute the fees of commissioners for attending to a reference in a litigated matter are made three dollars a day, and it is not obvious why a master in a like matter should have larger fees.—*Ib.*

44. In the absence of a statute prescribing fees of masters, the court may fix the same. In a case where unusual labor and difficulty were thrown upon the master, his *per diem* fees were fixed at ten dollars per day where testimony was taken, and five dollars per day where only adjournment was had.—*Ib.*

45. The patent in question was for detachable teeth for saws. Complainant worked the pat-

ent solely and by himself. Complainant had had recovery against certain makers and sellers of the infringing saws. His bill against the user of the same saws was dismissed without costs to either party. *Spaulding v. Page et al.*, 1 Sawyer, 702.—SAWYER, 1871.

46. "The act of Congress relating to costs makes no allowance for printing testimony. It is, no doubt, very inconvenient not to have it printed, but, however inconvenient, it is not properly chargeable against the losing party as an item of costs." *Spaulding v. Tucker et al.*, 4 Fish. P. C. 633.—SAWYER, 1871.

47. "The travelling fees of those witnesses who came from other states, at the request of the complainant, to attend the hearing, and even those who came voluntarily, and not in obedience to a subpoena, from a distance within the state, ought not to be taxed as costs against the defendants."—*Id.*

48. In a case pending on the Pacific coast, a large number of witnesses were examined in New York City, by agreement of the parties. The court in its discretion allowed the fees of those witnesses on the same basis as prescribed by the statute.—*Id.*

49. The costs in a court of law are determined by statute. In a court of equity the court has discretion with reference thereto.—*Id.*

50. "The mere fact that the plaintiffs obtained a verdict is not conclusive that they are also entitled to costs; for they may have obtained the verdict under, and in pursuance of, Section 9 of the act of 1837, which warrants a recovery for an infringement of what is, in fact, new, and claimed as the plaintiffs' invention, notwithstanding the patentee has also, through mistake, without fraud or intent to deceive, claimed something which is not new." *Peek et al. v. Frame et al.*, 5 Fish. P. C. 211.—WOODRUFF, 1871.

51. "If . . . verdict was rendered for an infringement of valid claims, and it appeared that other claims were rejected in pursuance of that section, then, although plaintiffs obtained a verdict, they are not entitled to costs. But if the verdict was, in fact, upon all the claims, in affirmance of the validity of each, and of the novelty of the inventions claimed in each, then the plaintiffs are entitled to costs."—*Id.*

52. "The mere fact that the plaintiffs have, since the trial and verdict, disclaimed one or more of the claims made in the patent, is not alone conclusive that the plaintiffs are not entitled to costs. If the verdict was rendered . . . upon all the claims, affirming their validity and the novelty of the invention claimed in each, then what the plaintiffs may have said or done,

by disclaimer or otherwise, does not deprive them of the effect of the verdict; and so long as it remains in force, not set aside, it is conclusive between the parties. The fact of disclaimer is high evidence, in such case, that the verdict was wrong, and that the plaintiffs should only have recovered on the parts of the invention of patent therefor which are not disclaimed, and such evidence might warrant a new trial. But while such a verdict stands, it is conclusive."—*Id.*

53. For example of facts warranting the dismissal of bill of complainants without costs, see —. *Sisson et al. v. Gilbert et al.*, 9 Blatch. 185.—WOODRUFF, 1871.

54. In an accounting before a master, costs had accumulated to a very large amount. The court, holding this to be through the unreasonable line of proof followed by the complainant, held that no costs should be charged against either party, but that each party should pay its own costs. *Troy Iron & Nail Factory v. Corning et al.*, 10 Blatch. 223.—NELSON, 1872.

55. Where complainant's conduct has led defendants into infringement, costs will not be awarded against defendants. *Sarven v. Hall et al.*, 11 Blatch. 295.—WOODRUFF, 1873.

56. Notwithstanding an appeal has been taken to the Supreme Court from the decree of a circuit court, it yet remains for the circuit court to enforce its decree for the payment of the master. Nor would the case be varied if the defendants had given a bond to the master to stay proceedings to enforce payment of his compensation. *Myers et al. v. Dunbar et al.*, 12 Blatch. 380.—BLATCHFORD, 1874.

57. Where the damage shown is but fifteen cents, a decree for an injunction will be granted without costs. *Geier v. Goetinger*, 1 Banning & Arden, 553.—SWING, 1874.

58. Where, pending a patent suit, defendant becomes bankrupt, and its assignee becomes a party to the proceedings, the costs accruing after such intervention are to be taken in full out of the bankrupt estate. *Webster et al. v. New Brunswick Carpet Co.*, 2 Banning & Arden, 67.—NIXON, 1875.

59. In the United States Circuit Court for the Northern District of New York, the provisions of title 2, Chapter 10, Part 3, of the revised statutes of the state of New York, relative to security for costs, were adopted by the rules of the court. Under such rules a corporation complainant residing in the city of New York, not a resident of that district and not within the jurisdiction of that court, was held to give security for costs. *Lyman Ventilating & Refrig-*



*erator Co. v. Southard*, 1 Banning & Arden, 627.—WALLACE, 1875.

60. Where, of different claims in suit, a part are void and no disclaimer has been filed, costs cannot be recovered. *Bussey et al. v. Wager et al.*, 2 Banning & Arden, 229.—WALLACE, 1876.

61. Where it is stipulated that one case of a number is to stand as a test case for all, it is proper to tax a docket fee in each case. *Good-year Dental Vulcanite Co. v. Osgood*, 2 Banning & Arden, 529.—SHEPLEY, 1877.

62. "Wherever a final decree is entered by the court, in an equity case, after replication filed, for the purpose of taxation of the docket fee, this is to be considered as the 'final hearing' referred to in revised statutes, Section 824."—*Ib.*

63. "This docket fee is not to be taxed for an attorney, unless the name of the attorney taxing the fee has been entered on the docket before the filing of the replication, and such attorney has been admitted to the bar of the Circuit Court of the United States in this or some other circuit, or to the bar of the Supreme Court of the United States."—*Ib.*

64. "In the taxation of costs, 'final hearing' is to be considered as the submission of a cause in equity for the determination of the court, so that the case may be finally disposed of upon bill and answer, or bill, answer, and replication, or upon pleadings and proofs, or otherwise after the case is at issue."—*Ib.*

65. Complainant's patent was for an improvement in the cushions of billiard tables, and a suit was brought against a certain number of tables. Part of the tables were held to infringe and part not. Complainant was allowed to recover one half of his costs. *Collander v. Bailey*, 3 Banning & Arden, 217.—SHEPLEY, 1878.

66. The clerk, by consent of parties, taxed costs for the plaintiffs, and deducted from the gross taxation so much of the expenses as he found had been caused by taking the evidence on a claim afterward declared by the court to be void. The court sustained the clerk. *Holbrook et al. v. Small*, 3 Banning & Arden, 625.—LOWELL, 1878.

67. Where, after a hearing in damages and profits, the court gave plaintiff nominal damages only, the court gave the plaintiff costs as to the hearing on the merits, and the defendants costs as to the hearing in damages and profits. *Ingersoll v. Musgrove et al.*, 14 Blatch. 541.—BLATCHFORD, 1878.

68. Where complainant gets but nominal damages and no profits, the costs of the reference to the master go to the defendants. *Garretson v.*

*Clark et al.*, 4 Banning & Arden, 536.—BLATCHFORD, 1879.

69. Where, on accounting, complainants recover only nominal damages, the defendant will recover the costs of the reference. *Fisk et al. v. West, Bradley & Cary M'fg Co.*, 19 O. G. 545.—BLATCHFORD, 1880.

70. By the court: "As the complainants succeed as to one patent and are defeated as to the other, I suppose it will be fair that neither party shall recover costs." *Elfelt et al. v. Steinhart et al.*, 6 Sawyer, 480.—SAWYER, 1880.

71. "The provision is not that no costs shall be recovered until after disclaimer, but it is as extensive as the whole existence of the case, and prohibits the recovery of any costs at all in the case." *Burdett v. Estey et al.*, 19 Blatch. 1.—WHEELER, 1880.

72. Where a cross bill is dismissed on the ground that the court had full power in the premises without the cross bill, no costs are to be allowed. *Lockwood v. Clearland*, 6 Fed. Rep. 721.—NIXON, 1881.

73. "The statute does not mean that claims not in issue should be contested for the mere purpose of settling the costs." *Am. Bell Telephone Co. et al. v. Spencer et al.*, 8 Fed. Rep. 509.—LOWELL, 1881.

74. "Costs generally, in proceedings in equity, do not follow as matter of right, as in proceedings at law, but are subject to the discretion of the court, and are to be awarded as a part of the decree or they cannot be recovered, although they may be, and generally are, taxed after the decree. The determination as to the costs must ordinarily be made upon the hearing in chief. . . . The costs cannot be taxed fully, and no execution can properly issue until the final decree. . . . They are awarded as issued, unless there are special circumstances to govern them." *Coburn et al. v. Schroder et al.*, 19 Blatch. 493.—WHEELER, 1881.

75. The fees of the master are to be borne in the first instance by complainant. *Macdonald v. Shepard*, 10 Fed. Rep. 919.—LOWELL, 1882.

76. A case will not be reviewed on appeal merely to settle costs of suit. *Union Paper Bag Mach. Co. et al. v. Nixon et al.*, 105 U. S. 766.—SÚP. CT. 1882.

77. By the court: "The conclusion is justified by the record that the defendants were willing at the outset, and through their attorney offered, to pay the complainant the amount of the net profits realized by them; but the complainant was desirous of mulcting them in damages, under circumstances not calling for such a course. Costs have been unnecessarily accumu-

lated, and I think it just that the parties be required to pay their own costs, and each party must pay one half of the master's fee." *Ford v. Kurtz et al.*, 11 Bissell, 324.—HARLAN, 1883.

78. Where, in an action at law, a disclaimer which ought to be made is not made before the suit is brought, plaintiff cannot have costs. *Proctor v. Brill et al.*, 16 Fed. Rep 791.—McKENNAN and BUTLER, 1883.

79. "Costs in equity cases are generally subjected to the discretion of the court, to be exercised, however, according to general legal principles, and not arbitrarily. Ordinarily the recovering party recovers costs in suits in equity as well as at law." *McKay v. Jackman*, 17 Fed. Rep 641.—WHEELER, 1883.

80. Where the complainant has a substantial recovery on the merits for the wrongful invasion of his rights by the defendants, and the defendants have not prevailed upon any issue, upon any distinct item made in the case, no part of the costs will be allowed to the defendants. *Urner v. Kayton et al.*, 17 Fed. Rep. 845.—WHEELER, 1883.

81. Where complainants sue upon two patents and both are litigated, and the defendants prevail as to one, no costs will be awarded to either party. *Adams et al. v. Howard et al.*, 22 Blatch. 47.—WALLACE, 1884.

82. Where the sum in dispute is small, the court will take the question of costs into special consideration. *Green v. Barney*, 19 Fed. Rep. 420.—LOWELL, 1884.

83. Where a complainant abandons a claim in his reissue patent in suit because of its invalidity through undue expansion, and there is no hearing upon that claim, a disclaimer is not necessary before a decree, nor are costs to be denied. *Munday v. Lidgewood M'fg Co.*, 20 Fed. Rep. 191.—WHEELER, 1884.

84. "Courts of equity, . . . having a large discretion in matters of costs, frequently give costs in intermediate stages of a cause, without waiting for the final decree. . . . This discretion can be properly exercised in giving to the prevailing party the incidental costs which have arisen during the progress of a cause about a matter completely disposed of by the court, and not necessary to be considered on further directions." *Avery et al. v. Wilson*, 20 Fed. Rep. 856.—DICK, 1884.

85. Where the defendant made a general offer to pay royalty which complainant refused to accept, but there was no actual tender of any specific sum of money, and defendant was sued for infringement, costs were awarded to com-

plainant. *Allen v. Deacon*, 21 Fed. Rep. 122.—SAWYER, 1884.

86. In an interference proceeding in the United States Circuit Court under Section 4915 of the revised statutes at large, costs will be awarded to successful complainants. *Butler et al. v. Shaw*, 21 Fed. Rep. 321.—GRAY, 1884.

87. Where different claims in a patent are in issue, and complainant prevails as to some, while defendant prevails as to others, costs will be awarded to neither party. *Hayes v. Bickelhaupt, Sr.*, 21 Fed. Rep. 567.—WHEELER, 1884.

88. A party to a suit is not entitled to counsel fees for witnesses when before the master, and it is doubted whether he is entitled to fees for witnesses when before a special examiner. *Strauss v. Meyer*, 22 Fed. Rep. 467.—TREAT, 1884.

89. Although a patentee who procures a patent fraudulently may be mulcted in costs, his innocent assignee may not be. *United States v. Gunning et al.*, 23 Blatch. 31.—WHEELER, 1884.

90. Where, in a contest involving priority of invention, complainant prevails as to one branch of the case and defendants prevail as to another, no costs will be awarded. *Wooster v. Hill et al.*, 22 Fed. Rep. 830.—WHEELER, 1885.

91. "To constitute 'a final hearing in equity or admiralty' within the meaning of Section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel as the ground for the permanent relief which his pleading seeks, on such proof as the parties place before the court, be the case one of *pro confesso* or bill or libel and answer, or pleadings alone, or pleadings and proofs. Nor does it detract from the force of this conclusion that what is called an interlocutory decree, as distinguished from a final decree, is often entered as the result of a decision on a final hearing. . . .

"The docket fee is given by Section 824 as a fee to the solicitor or proctor 'on' the final hearing. If there is such a final hearing as above defined, the fee is taxable, as between party and party, in behalf of the party to whom the costs of the cause are awarded. Nor is there anything in the statutes which forbids the allowance of a docket fee on or for each trial before a jury, where there is a verdict on or for each hearing in equity or admiralty, if there are two or more final hearings, such as are above defined, in the same cause. A new trial granted after verdict

is as complete a trial, if there is a verdict in it, as was the first trial." *Wooster v. Handy*, 23 Blatch. 113.—BLATCHFORD, 1885.

92. For a *résumé* of decisions as to docket fees, see —. *Ib.*

93. For a *résumé* of decisions on solicitors' deposition fees, see —. *Ib.*

94. Where depositions taken in one cause are simply *read* in another cause by stipulation, solicitors' fees thereon will not be taxed in such other cause.—*Ib.*

95. For a list of travelling expenses of messengers and attorneys and expenses of box, for which costs were disallowed, see —. *Ib.*

96. For a list of machine exhibits for which costs were disallowed, see —. *Ib.*

97. For examples of photo-lithographing exhibits for which costs were disallowed, see —. *Ib.*

98. "If a party does not pay a witness either before or after he has testified, the presumption is that the debt is forgiven, unless the failure to pay is explained in such wise that the fee can be considered as if 'paid,' because both parties intend it shall be paid." And costs will not be taxed therefor.—*Ib.*

99. Where, in a group of cases of the same kind, the depositions taken in one case are stipulated into the others, the solicitors' fees on such depositions will be taxed in the other cases.—*Ib.*

100. "Where several cases are heard at the same time on one agreement, a docket fee is always taxed in such cases."—*Ib.*

101. Where a witness actually testifying but once is paid for his attendance in different cases to which the testimony applies, his costs will be taxed in the different cases.—*Ib.*

102. For a list of certified copies for which costs were taxed, see —. *Ib.*

103. It is too late to object that testimony is incompetent or immaterial after final hearing, and when the question of costs is under consideration.—*Ib.*

104. Where a complainant prevailed on account of a disclaimer filed after his suit was brought, and where he failed as to a large part of his case, costs were denied to him.—*Ib.*

105. Where testimony is taken once, equally for use in two cases, it should be taxed not wholly in one case or the other, but equally in each. *Thayer v. Hart, Jr., et al.*, 30 O. G. 776.—WHEELER, 1884.

106. Where complainants recover only nominal damages, the costs of the accounting will go against the complainants. *Dobson et al. v. Hartford Carpet Co.*, 114 U. S. 439.—SUP. CT. 1885.

107. The expense of obtaining a model of de-

fendant's infringing machine is not taxable in the costs awarded to the victorious complainant. *Cornely v. Marckwald*, 23 Blatch. 248.—WALLACE, 1885.

108. Although a defendant may prevail, yet if his previous course of action has tended to mislead complainants, costs may be withheld from defendant. *Bunker et al. v. Stevens*, 26 Fed. Rep. 245.—NIXON, 1885.

109. Where there are two patents in litigation and each party prevails on one, and the costs upon each are substantially alike, no costs will be allowed to either. *Railway Register M'fg Co. v. Broadway & Seventh Ave. Railway Co.*, 34 O. G. 921.—WHEELER, 1886.

110. It turned out in the trial of a cause that a disclaimer should have been filed to one claim of the patent in issue. Before the case was tried in the Supreme Court, the patent expired. The Supreme Court held "that the decree below must be reversed as to the award of costs and affirmed in all other respects, with interest until paid, at the same rate per annum that decrees bear in the courts of the state of New York, and the case be remanded to the Circuit Court, with direction to modify the decree accordingly. Each party will bear his own costs in this court, and one half of the expenses of printing the record." *Yale Lock M'fg Co. v. Sargent*, 117 U. S. 537.—SUP. CT. 1886.

111. Where only nominal damages are found, final decree will be without costs. *Moffitt v. Cavanagh*, 27 Fed. Rep. 511.—SHIPMAN, 1886.

112. Where a rehearing in damages and profits is had for complainants' benefit and because complainants did not produce satisfactory evidence at the first hearing, the costs of such reference go against complainants. *Fay et al. v. Allen*, 30 Fed. Rep. 446.—COXE, 1887.

113. The mileage of the officers of a defendant corporation, while testifying before the master on an accounting, are not to be allowed as costs. *Am. Diamond Drill Co. v. Sullivan Mach. Co.*, 32 Fed. Rep. 552.—SHIPMAN, 1887.

114. Where a party has paid the master's fees the clerk has taxed, the clerk will not include them in the bill of costs without an order of the court.—*Ib.*

115. A defendant, under order of the court, paid the master's fees. Subsequently the case was reversed and given to defendant. These costs were taxed in favor of defendant.—*Ib.*

116. Where, upon a certain branch of a case, the defendant makes no contest, costs will not go against him as to this branch. *Chicopee Folding Box Co. v. Rogers*, 32 Fed. Rep. 695.—WALLACE, 1887.

117. After a case was at issue it was dismissed, on complainant's motion, "without prejudice to the complainant of his assignee's rights, and with the usual costs to the defendants." The taxation of the docket fee in favor of defendants was disallowed. *Ryan v. Gould et al.*, 41 O. G. 1392.—LACOMBE, 1887.

118. In this case the cost of certified copy of file wrapper and contents of the patent in suit, and of certified copies of other patents procured by defendants to enable them to properly present their defence, was disallowed as costs.—*Id.*

### DAMAGES AND PROFITS.

#### "DAMAGES AND PROFITS" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 4. *And be it further enacted*, That if any person or persons shall devise, make, construct, use, employ, or vend, within these United States, any art, manufacture, engine, machine, or device, or any invention or improvement upon, or in any art, manufacture, engine, machine, or device, the sole and exclusive right of which shall be so as aforesaid granted by patent to any person or persons, by virtue and in pursuance of this act, without the consent of the patentee or patentees, their executors, administrators, or assigns, first had and obtained in writing, every person so offending shall forfeit and pay to the said patentee or patentees, his, her, or their executors, administrators, or assigns, such damages as shall be assessed by a jury, and, moreover, shall forfeit to the person aggrieved the thing or things so devised, made, constructed, used, employed, or vended, contrary to the true intent of this act, which may be recovered in an action on the case founded on this act. [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 5. *And be it further enacted*, That if any person shall make, devise, and use, or sell the thing so invented, the exclusive right of which shall, as aforesaid, have been secured to any person by patent, without the consent of the patentee, his executors, administrators, or assigns, first obtained in writing, every person so offending shall pay to the patentee a sum that shall be at least equal to three times the price for which the patentee has usually sold or licensed, to other persons, the use of the said invention, which may be recovered in an action on the case founded on this act, in the Circuit Court of the United States, or any other court having competent jurisdiction. [Repealed July 4th, 1836.]

Act approved April 17th, 1800.

SEC. 3. *And be it further enacted*, That where any patent shall be or shall have been granted pursuant to this or the above-mentioned act, if any person without the consent of the patentee, his or her executors, administrators, or assigns, first obtained in writing, shall make, devise, use, or sell the thing whereof the exclusive right is secured to the said patentee by such patent, such person so offending shall forfeit and pay to the said patentee, his executors, administrators, or assigns, a sum equal to three times the actual damage sustained by such patentee, his executors, administrators, or assigns, from or by reason of such offence, which sum shall and may be recovered by action on the case founded on this and the above-mentioned act, in the Circuit Court of the United States, having jurisdiction thereon. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 14. *And be it further enacted*, That whenever, in any action for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, or by any patent which may hereafter be granted, a verdict shall be rendered for the plaintiff in such action, it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damage sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs; and such damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States. [Repealed July 8th, 1870.]

Act approved March 2d, 1861.

SEC. 13. *And be it further enacted*, That in all cases where an article is made or vended by any person under the protection of letters-patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word "patented," together with the day and year the patent was granted; or when, from the character of the article patented, that it may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label on which the notice, with the date, is printed; on failure of which, in any suit for the infringement of letters-patent by the party failing so to mark the article the right to which is infringed upon, no damage shall be recovered by the plaintiff, ex-

cept on proof that the defendant was duly notified of the infringement, and continued after such notice to make or vend the article patented. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 38. Provides that where a patentee, his assignee, or his legal representatives, in vending patented articles, fails to mark them with the date of the patent, then in "any suit for infringement by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article patented."

SEC. 55. *And be it further enacted*, That all actions, suits, controversies, and cases arising under the patent laws of the United States shall be originally cognizable as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court, or by the Supreme Court of the District of Columbia, or of any territory; and the court shall have power, upon bill in equity filed by any party aggrieved, to grant injunction according to the course and principles of courts of equity to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the claimant [complainant] shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case.

SEC. 59. *And be it further enacted*, That damages for the infringement of any patent may be recovered by action on the case in any circuit court of the United States, or district court exercising the jurisdiction of a circuit court, or in the Supreme Court of the District of Columbia, or of any territory, in the name of the party interested, either as patentee, assignee, or grantee. And whenever, in any such action, a verdict shall be rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4900. It shall be the duty of all patentees and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word "patented," together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is enclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, and vend the article so patented.

SEC. 4919. Damages for the infringement of any patent may be recovered by action on the case in the name of the party interested, either as patentee, assignee, or grantee. And whenever, in any such action, a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damage sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.

SEC. 4921. The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be determined accounted for by defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case.

#### CASES.

1. Damages for infringement of a patent granted by a private act can only be recovered from the time that defendant is notified of his infringement. *Evans v. Weiss*, 2 Wash. 342.—WASH. 1809.

2. Where the patented thing has been made only, the rule is to give nominal damages. *Whittemore v. Cutter*, 1 Gall. 429.—STORY, 1813.

3. Counsel fees and expenses of witnesses, be-

yond taxable costs, are not recoverable as damages.—*Ib.*

4. Mere *making* of a patented thing warrants nominal damages only. In case of *use*, the damages are the value of such use. *Whittemore et al. v. Cutter*, 1 Gall. 478.—STORY, 1813.

5. The rule of damages for a jury is the actual damage sustained by the plaintiffs. The court can treble them. (Sec. 5, act February 21st, 1793.) *Gray et al. v. James et al.*, 1 Peters' C. C. 394.—WASH. 1817.

6. It seems that damages may be recovered for the use of an invention which only becomes of value through the subsequent additional invention of another. (Doubted in *Whiting v. Emmett*, 1 Bald. 303.)—*Ib.*

7. Where the defendant is the maker and owner of the patented device, the rule of (single) damages is the amount of profits actually received by the defendant. *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

8. "Let the damages be estimated as high as they can be conveniently."—*Ib.*

9. In case of *user* the rule of single damages is the actual damage plaintiff has sustained by reason of the defendant's use. *Evans v. Het-tick*, 3 Wash. 408.—WASH. 1818.

10. "The plaintiff is entitled to be compensated for the damage he has sustained." It seems that when no evidence is laid before the jury, the damages will be nominal. *Kneass v. Schuytkill Bank*, 4 Wash. 9.—WASH. 1820.

11. "The jury are at liberty, if they see fit, to allow the plaintiff as a part of his actual damage, any expenditure for counsel fees or other charges, which were necessarily incurred to vindicate the rights derived under his patent, and are not taxable in the bill of costs." *Boston M'fg Co. v. Fiske et al.*, 2 Mason, 119.—STORY, 1820.

12. "Where counsel on both sides are content with a measure prescribed by themselves, it is not usual or necessary for the court to interfere at all." *Earle v. Sawyer*, 4 Mason, 1.—STORY, 1825.

13. "The price of the machine, the nature, actual state and extent of use of the plaintiff's invention, and the particular losses to which he may have been subjected by the piracy, are all proper ingredients to be weighed by the jury."—*Ib.*

14. If plaintiff has not proved his damages, the jury are not to supply the defect. *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

15. Latitude is given to the jury in estimating actual damages. They may infer the damage of

the plaintiffs from the profit of the defendants. Reduction of prices and injury to reputation from poor goods may be taken into account when the evidence proves such facts, but damages must be *actual*.—*Ib.*

16. (Referring to *Gray v. James*, 1 Peters C. C. 394.) Doubted that the patentee of a machine which proves worthless can sustain any damage through the use thereof by another who makes the machine of value by his subsequent improvements.—*Ib.*

17. A verdict giving large damages, when the amount is supported by some evidence but contradicted by other evidence, cannot be set aside as opposed to the evidence. *Stanley v. Whipple*, 2 McLean, 35.—MCLEAN, 1839.

18. Where the patent in suit is a reissue, damages are not recoverable prior in date to the reissue. *Knight v. Balt. & O. R. R. Co.*, Taney's Dec. 106.—TANEY, 1840.

19. Where there are no features of aggravation, the damages are the reasonable profits of the defendants. *Smith v. Pearce et al.*, 2 McLean, 176.—MCLEAN, 1840.

20. On the first occasion of suit for infringement the jury are not to give vindictive damages, but such as will "establish the right of the plaintiffs, and indemnify them against all the expenses of litigating their rights." For a repeated offence vindictive damages may be given. *Alden et al. v. Dewey et al.*, 1 Story, 336.—STORY, 1840.

21. That the damages are large, where no gross mistake is made, is not ground for setting aside the verdict of the jury.—*Ib.*

22. On principle it seems to be reasonable, if not absolutely justified by authority, to hold that if a transaction occurs while a person is a member of a corporation, and he would if he remained a member be liable for the ultimate debt adjudged, it may well be treated as an inchoate debt consummated by the judgment. *Carver v. Braintree M'fg Co.*, 2 Story, 432.—STORY, 1843.

23. Whenever a patented right is contested for the first time, it is only for the sake of determining whether the patent be valid or not. Still, the plaintiffs, if successful, are entitled to reasonable damages, not vindictive, but such as are not covered by any of the costs they will recover, to indemnify them for the necessary and unavoidable expenses of establishing their right. The jury are not always bound to give such damages, as for instance, in the case where a patentee fraudulently induces a party to infringe, and then brings the action from malice or revenge. But no valid patent should go out of

court without indemnification to the owner for reasonable and necessary charges in establishing his true right. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

24. The successful plaintiff "is entitled to such reasonable damages as shall vindicate his right and reimburse him for all such expenditures as have been necessarily incurred by him beyond what the taxable costs will repay, in order to establish that right. . . . The jury are at liberty in the exercise of a sound discretion, if they see fit . . . to give the plaintiff such damages, not in their nature vindictive, as shall compensate the plaintiff fully for all his actual losses and injuries occasioned by the defendants." *Piereson v. Eagle Screw Co.*, 3 Story, 402.—STORY, 1844.

25. When the illegal use of a patented machine is in connection with the sale of the products of the machine, "the individual is responsible in damages, and the amount of his sales will, in a considerable degree, regulate the extent of his liability." *Boyd v. McAlpin*, 3 McLean, 427.—MCLEAN, 1844.

26. "A patentee may never be able to prove the extent of his actual damages, but the defendant can almost invariably, if he is disposed to do so, show the character of his own acts, and prevent any excessive valuation of damages against him. If, however, the defendant prefers to leave the matter to general inference, and the estimate of a jury, when he might make it reasonably certain on his part, . . . the judgment and valuation of the jury should not "be weighed overscrupulously or . . . the court . . . interfere with their finding, except in a case of palpable extravagance." *Stephens v. Felt et al.*, 2 Blatch. 37.—BETTS, 1846.

27. The jury may "allow to the plaintiff in damages his actual costs, as well as any taxable cost he had paid in consequence of any violation of his patent which the defendants had committed." "The 'actual damages' sustained, include all necessary and proper expenses in protecting one's violated rights. And though they should not include 'smart money,' or what is proper merely for example, they may well embrace everything really suffered by the wrong." *Allen v. Blunt et al.*, 2 W. & M. 121.—WOODBURY, 1846.

28. Although a jury may give larger damages than the court would upon the same case, yet "it must be a very aggravated and oppressive case where the court will feel justified in setting up its own opinion, even if decidedly different from that of the jury as to the true amount of damages in practical life, and as to business not susceptible of exact proof in its details, but pe-

culiarly lying in the range of the experience and observation of a jury."—*Ib.*

29. Section 14 of the act of July 4th, 1836, empowered the court to treble the damage. A disclaimer was filed after suit was brought. This was held not to interfere with the power of the court to increase damages. *Guyon v. Serrel et al.*, 1 Blatch. 245.—NELSON, 1847.

30. Under a statute allowing the court to increase the damages, they are not to be so increased except under aggravating circumstances.—*Ib.*

31. "The term 'actual damages' cannot be construed to mean exemplary, vindictive, or punitive damages, inflicted by way of smart money, or punishment of the defendant, or malicious or outrageous wrongs." *Stimpson v. The Railroads*, 1 Wallace, 164. SUP. CT. 1847.

32. The court will not instruct the jury "that they are at liberty, if they see fit, to allow the plaintiff as part of his actual damages, any expenditures for counsel fees incurred to vindicate his rights, and not taxable in the bill of costs."—*Ib.*

33. "Since the act of July 4th, 1836, the court are not compelled to treble actual damages assessed by the jury, but may increase them or not at their discretion within legal limit. In the exercise of that discretion the court will judge for themselves, and will not increase the damages if, in their opinion, the jury have already exercised the proper measure."—*Ib.*

34. As to verdicts for damages in patent cases "the sum given in this class of cases must be plainly exorbitant, or what is sometimes called 'outrageous,' to require the interference of the court." *Aiken v. Bemis*, 3 W. & M. 348.—WOODBURY, 1848.

35. "When the act complained of had been done without the knowledge of the plaintiff's right, and under such circumstances as to authorize the jury to infer that the defendant was not aware that he was violating the rights of any one, the damages should be so graduated as to give nothing more than to compensate the injury done to the plaintiff. But where the circumstances were of a somewhat aggravated character, what are merely called in the law vindictive damages might be given, which would include counsel fees and something more, by way of example, to deter others from doing the same thing." *Parker v. Corbin*, 4 McLean, 462.—MCLEAN, 1848.

36. If the defendants have been misled by the plaintiffs, that makes a case for lesser damages. *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

37. A verdict should be for the damages the plaintiff has actually sustained, not for vindictive damages, which are out of place in verdicts in patent cases. The damages to be assessed should be compensatory. Plaintiff's loss and defendant's profit may both be considered. Sometimes the price of a license is a fair guide, but not always, and the conduct and motives of the defendant may be taken into consideration. *Parker v. Hulme*, 7 West. L. J. 417.—KANE, 1849.

38. The recovery should be such as will indemnify the plaintiff for the injury sustained from the infringement. The number of patented articles which defendant has made, and his profit, may be taken into consideration, but they are not conclusive either way. Defendants' profit might be less than complainant's and thus form no measure of damages. Where plaintiff grants license, this may be taken into account. *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

39. In a case at law, the evidence being that the defendant had manufactured and sold one hundred of the patentable articles, and that complainants' profit on smaller articles was from two dollars to two dollars and a half, the jury found a verdict of two hundred dollars. Verdict sustained. *Buck et al. v. Hermance*, 1 Blatch. 398.—NELSON, 1849.

40. A jury should award a plaintiff such damages, as, in their opinion, found upon the evidence, will fully indemnify him for the actual damages he has suffered by reason of the infringement. *Footte v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

41. As regards damages, those defendants do not stand in a favorable light who have entered upon the infringement after being warned thereagainst.—*Id.*

42. "The rule on the question of damages is, that the plaintiff is entitled to all the actual profits which the defendant has made by the use of the principle of the plaintiff's combination. In other words, the plaintiff is entitled to all the damages which he has sustained by reason of the use which the defendant has made of the plaintiff's property. This is, in effect, the same thing, because the law presumes that if the defendant had not put his machines into the market, the demand would have been for the plaintiff's, and that he would have received the profits on the machines which have been made and sold by the defendant. Vindictive or exemplary damages are not allowed. The jury are confined to the actual damages, and the law has provided that the court may increase those damages in proper

cases." *Wilbur v. Beecher*, 2 Blatch. 132.—NELSON, 1850.

43. "It is the making and selling to be used, and not the selling or buying, or making alone, for which full damages are given." *Hogg et al. v. Emerson*, 11 Howard, 587.—SUP. CT. 1850.

44. "The intent not to injure . . . never exonerates . . . from all damages for the actual injury or encroachment, though it may mitigate them."—*Id.*

45. "The general rule is, that the plaintiff, when he has established the right to recover, is entitled to all the actual damages which he has sustained in consequence of the infringement of his patent, as contradistinguished from exemplary, vindictive, and punitive damages. These are not to be taken into consideration in patent cases." *Pitts v. Hall*, 2 Blatch. 230.—NELSON, 1851.

46. One mode of arriving at the actual damages "is to ascertain the profits which the plaintiff derives from the machines which he manufactures and sells, and which have been made and sold by the defendant. This mode is founded on the presumption of law that, if the defendant had not been wrongfully concerned in the manufacture of the machines, those persons who procured them from him would have applied to the patentee or assignee for them."—*Id.*

47. Another mode of arriving at the actual damages "is to ascertain the profits which the party infringing has derived from the use of the invention or the construction of the machines; because, whatever profits he has derived have arisen from the wrongful use of the invention, and belong to the real owner of the machine. This measure of damages, however, is not controlling, and ought not to be, because a party concerned in infringing a patent stands in a different position from the patentee, not having been previously subjected to the expense and labor to which the latter is frequently exposed in the process of invention and experiment."—*Id.*

48. "If, . . . on looking into the profits made by the defendant, the jury shall be of opinion that they did not correspond with the fair profits, which the plaintiff, if left alone, would have realized, they are not bound by the measure of the profits of the defendant, but have a right to look to the profits which the plaintiff or the patentee would have made under the circumstances if not interfered with."—*Id.*

49. To an award of damages may be added interest from the commencement of the suit.—*Id.*

50. The rule of law as to damages, when the infringement is made out, is to give to the plain-



tiff the actual loss which he has sustained and nothing more. Exemplary or vindictive damages cannot be given. If the damages are insufficient, there is a provision of law authorizing the court to treble them. The plaintiff is entitled, if his case is made out, to the profits on all the machines sold by the defendant.—*Ib.*

51. "If a party has already violated the patent of another, he shall not pay less than he would if he had contracted to use the machine during the time he had been using it. The idea cannot be tolerated in a civilized community that a man, by trespass, shall use a machine for a less sum than he would have to pay for its license." *Colt v. Mass. Arms Co.*, 1 Fish. P. C. 108.—WOODBURY, 1851.

52. "The general rule is, that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement; and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendants had not interfered with his rights. That view proceeds upon the principle that, if the defendants had not interfered with the patentee, all persons who bought the defendants' machine would necessarily have been obliged to go to the patentee and purchase his machine. And the profits that the patentee might have made out of the machines thus unlawfully constructed, present, therefore, a ground that may properly aid the jury in arriving at the damages which the patentee has sustained." *McCormick v. Seymour et al.*, 2 Blatch. 240.—NELSON, 1851.

53. "The rule which is to govern is the same whether the patent covers an entire machine or an improvement on a machine. Those who choose to use an old machine in this case, have a right to use it without incurring any responsibility. But if they ingraft on it an improvement secured by a patent, and use the machine with that improvement, they have deprived the patentee of the fruits of his invention, the same as if he had invented the entire machine, because it is his improvement that gives value to the machine, on account of the public demand for it."—*Ib.*

54. In determining defendants' profits on patented machines which they sell there is to be considered the cost of the material, the labor, the interest on the capital used, the expense of putting the machines into market, such as agencies, and transportation and insurance, and where the article is sold on credit a deduction must also be made for bad debts.—*Ib.*

55. "The rule . . . is to give the actual dam-

age or loss incurred by reason of the infringement, and that is the profits which the plaintiffs would have made if they had not been embarrassed by the interference of the defendants' machine, because the law presumes that the plaintiffs would have had the patronage which was diverted by the defendants. The profits which the plaintiffs have lost in consequence of the infringement, affords, therefore, a criterion by which to determine the amount of damages they have sustained." *Tatham et al. v. Le Roy et al.*, 2 Blatch. 474.—NELSON, 1852.

56. The jury may take interest upon damages into account.—*Ib.*

57. The patent in suit was for the Woodworth planing machine, and, in accounting, the master found defendants' profits on the basis of what might have been realized with diligence. The Supreme Court held that this finding was wrong, and that it ought to have been made on the basis of actual profits. *Livingstone et al. v. Woodworth et al.*, 15 Howard, 546.—SUP. CT. 1853.

58. Damages are not to be awarded "upon the principle that, if the defendant had not interfered with the patentee, all persons who bought the defendant's machines would necessarily have been obliged to go to the patentee and purchase his machine." *Seymour et al. v. McCormick*, 16 Howard, 480.—SUP. CT. 1853.

59. "The act of 1793 enacted, 'that the infringer should forfeit and pay to the patentee a sum equal to three times the price for which the patentee has usually sold or licensed to other persons the use of said invention.' Here the price of a license is assumed as a just measure of single damages, and the forfeiture by way of penalty is fixed at triple that sum. But as experience began to show that some inventions or discoveries had their chief value in a monopoly of use by the inventor, and not in a sale of licenses, the value of a license could not be made a universal rule as a measure of damages. The act of April 17th, 1800, changed the rule, and compelled the infringer 'to forfeit and pay to the patentee a sum equal to three times the actual damage sustained by such patentee.' The act continued in force till 1836."—*Ib.*

60. "The patent act of 1836 confines the jury to the assessment of 'actual damages.' The power to inflict vindictive or punitive damages is committed to the discretion and judgment of the court, within the limit of trebling the actual damages found by the jury."—*Ib.*

61. It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature

of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted. —*Ib.*

62. The measure of damages for infringing a patented improvement of a machine is not the same as if the whole of the machine had been patented, and the defendant had pirated it. —*Ib.*

63. "Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage when his invention has been used without his license. If he claims anything above that amount he is bound to substantiate his claim by clear and distinct evidence. When he has himself established the market value of his improvement, as separate and distinct from other machinery with which it is connected, he can have no claim, in justice or equity, to make the profits of the whole machine the measure of his demand. It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss." —*Ib.*

64. "Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee 'would have made, if the infringer had not interfered with his rights,' is a question of fact, and not a 'judgment of law.' The question is not what speculatively he may have lost, but what actually he did lose. It is not a 'judgment of law,' or necessary legal inference, that if all the manufacturers of steam-engines and locomotives who have built and sold engines with a patent cut-off or steam-whistle, had not made such engines, that therefore all the purchasers of engines would have employed the patented cut-off or whistle; and that, consequently, such patentee is entitled to all the profits made in the manufacture of such steam-engines by those who may have used his improvement without his license. Such a rule of damages would be better entitled to the epithet of 'speculative,' 'imaginary,' or 'fanciful,' than that of 'actual.'" —*Ib.*

65. "It is a very grave error to instruct a jury 'that as to the measure of damages the same rule is to govern, whether the patent covers an entire machine, or an improvement on a machine.'" —*Ib.*

66. "In cases where a patentee avails himself of his invention, and of his exclusive right to the enjoyment of its profits, by putting it into the market, and selling rights under it, as is

most usually the case with inventors—that is, rights for states, or counties, or smaller districts, or portions of the invention itself—in such cases, the customary charge for the right to use the patented invention is the measure of damage which the patentee is entitled to recover, in case of an infringement, with interest upon the same from the time of infringement." *McCormick v. Seymour et al.*, 3 Blatch. 209.—NELSON, 1854.

67. "If the patentee comes to the conclusion not to vend to others his rights under the patent, and not to avail himself of the proceeds of sales of his mere patent right, but to use the patented invention exclusively himself, and to furnish the products to the community himself, out of his own manufactory or establishment—in such cases a different measure of damages is to be adopted by the jury. And that is this—if the patent is for a machine, an entire machine, the patentee is entitled, as damages in case of infringement, to the profits he could have made in constructing and vending his machine, over and above the mere profits arising out of its manufacture. By that" is meant "the mere profits of its mechanical construction, and not the profits that grow out of the exclusive right to manufacture the invention under the patent. The latter belong to the patentee, while the former, the mere mechanical profits, are excluded from the damages. And if the case is one of an improvement on a machine, then he is entitled, as a measure of damages, to all the advantages of the use of his patented improvement, excluding the profits of the manufacture, and also the value, if any, of the use of the old machine. Now, so far as respects the benefits and advantages that a patentee would derive from an improvement on an old machine, . . . they would depend very much, if not altogether, upon the usefulness of that machine with that improvement, compared with its usefulness without that improvement." —*Ib.*

68. For example of a license fee used as a basis for computation of damages, see —. *Winans v. New York & Harlem R. R. Co.*, 4 Fish. P. C. 1.—NELSON, 1855.

69. "No fixed and certain rule can be established applicable to all cases, but the statute has itself fixed the general rule which must govern a jury in their estimating damages. They are to give the actual damage which the plaintiff has sustained—no vindictive or speculative damages, but such damages as the plaintiff, by his proofs, has shown to the satisfaction of the jury that he has actually sustained by the infringement of his patent." *Ransom et al. v. New York*, 1 Fish. P. C. 252.—HALL, 1856.

70. Where the infringement is by a city, of a patent for fire-engines, the benefits which have actually accrued to the city are to be taken into consideration.—*Id.*

71. The jury are to give the plaintiff "the actual damages he has sustained by the infringement, whether such infringement was an intentional violation of the patent or not, and in estimating the actual damages the jury is to give the value of such use during the term of the illegal user." *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILLSON, 1856.

72. As to damages "the only precise rule furnished by the law is, that the patentees are entitled, when a verdict is given in their favor, to recover the actual damages they have sustained by the infringement of their patent. No legal measures being furnished by which that amount can be ascertained, the subject is left to the sound sense and judgment of the jury. There can be rarely occasion for vindictive damages, because almost invariably the infringement arises out of some colorable claim of right by the party sued." The quantity made by the defendant's infringing machine, and the profits thereby saved to him, are fair subjects for consideration, but are hardly to be relied upon as fixing with any certainty either the quantity of work done or its value. *Carr v. Rice*, 1 Fish. P. C. 198.—BETTS, 1856.

73. "An infringement of the . . . right of a patentee or his assignee, implies a right to sue for and recover damages for the injury. The general rule of damages is the amount of profits made, by the person infringing the patent, from the unlawful use of the improvement. On the theory of the patent laws, this measures the loss sustained by the owner of the patent. There may be circumstances of aggravation attending the infringement that will justify a jury in returning damages beyond the amount of profits derived from it." *Wayne v. Holmes*, 1 Bond, 27.—LEAVITT, 1856.

74. "If the patentee has an established price in the market for his patent right, or what is called a patent fee, that sum, with the interest, constitutes the measure of damages. Of course the defendant cannot complain of that, because, if in fact he is an infringer, he has been using the property of the plaintiff, and whatever profits he has made out of its use belong, in equity, to its owner." *Sickels v. Borden*, 3 Blatch. 535.—NELSON, 1856.

75. The patented machine being an improvement in saws, the court directed the jury to "assess the actual damages the plaintiff has sustained, by the use of his improvement, dur-

ing the term of the illegal user, or the amount of the profits actually received by the defendant during the time he ran his mill with the improvement of the plaintiff. To apply this rule, take one day as the measure of time, and so many thousand feet of lumber as the result of that time. Having fixed the day and feet, and price in the market at the time the saw was thus used, you can arrive at a satisfactory conclusion." *Page v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

76. Complainant's patent being for a machine for making mouldings, the court said: "The rule of damages is the profits which have been derived to the defendants from making mouldings by means of his machine over any other mode which the defendants had the right to adopt, deducting from them, as is agreed, ten per cent." *Serrell v. Collins et al.*, 4 Blatch. 61.—INGERSOLL, 1857.

77. Where the infringement is free from any aggravating circumstances, and defendants supposed they were protected by the patent of another, "they will be held responsible only for the profits realized after a deduction of all expenses, etc., in carrying on their operations." *Pitts v. Edmonds et al.*, 1 Bissell U. S. C. 168.—MCLEAN, 1857.

78. "The profits recoverable in a case for a violation of an exclusive right under a patent, are not regarded in the light of liquidated damages. The right to recover rests upon the principle that the party complained of has unlawfully appropriated to himself the benefits of an improvement or discovery which belongs exclusively to another, and that so far as he has made profit by such appropriation, he is liable to the party injured. This profit is ascertainable by evidence, and does not, like the claim for damages in an action for tort, rest in the discretion of a court or jury." *Jenkins v. Greenwald*, 1 Bond, 126.—LEAVITT, 1857.

79. Where the defendant had the right to construct the patented machine within certain limits, "implying a right to sell outside of such limits, but without any right to use or authorize others to use the machine, the injury sustained by the complainant," where the machines are sold outside of the limits as carrying with them the right to use, "is to be measured by the profits which, as a manufacturer and not as a patentee," defendant realized.—*Id.*

80. Where, during years of infringement, different parties have at different times been concerned in the infringement, the decree will apportion the damages in accordance therewith.

*Tatham et al. v. Lowler et al.*, 4 Blatch. 86.—NELSON, 1857.

81. "The practice . . . in equity is to take the account down to the time of the hearing before the master, if the infringement continues to that period, thereby preventing the necessity and expense of a new suit."—*Ib.*

82. The patent in question being for an improvement in making lead pipe, the master arrived at defendants' profits by taking the difference between the price of pig lead and the price of lead pipe, and deducting therefrom the costs of manufacturing the pipe, and he added interest to the time of his report. The report was confirmed.—*Ib.*

83. The rule of damages is not what defendants could have realized with reasonable diligence, but what in fact they did realize. *Dean v. Mason et al.*; 20 Howard, 198.—SUP. CT. 1857.

84. "There is no unbending or unyielding rule of damages, though that usually recognized as the true rule has been to give to the plaintiff as damages the amount of profits which the defendants have derived from the use of the plaintiff's improvement, not the amount which they might have realized, or which they made from the use of improvements other than those of the patentee, but what they actually did make from the machine as patented." *Bells v. Daniels et al.*, 1 Bond, 212.—LEAVITT, 1858.

85. Where plaintiff's patent was for an improvement in the mode of applying the waste heat of blast furnaces and steam boilers, the court instructed the jury that the value of the coal saved by the use of the plaintiff's invention was a satisfactory basis for an award of damages.—*Ib.*

86. Although there are cases where a license price is a criterion of damages, there are few instances where an invention is pirated that the patentee ought to be concluded by a former offer to sell.—*Ib.*

87. The object of the statutory provision authorizing the court to treble the damages "was to remunerate patentees who were compelled to sustain their patents against wanton and persevering infringers. There may be, and doubtless are cases in which the discretion vested in the court for this purpose should be exercised, but it would hardly seem that the spirit of the act was intended to include suits brought upon an expired patent, which are merely cases of collection, the sole object being the recovery of damages." *Bell v. McCullough et al.*, 1 Bond, 194.—LEAVITT, 1858.

88. Where, on the trial of a case at law, complainant is seeking mainly to establish his right,

and states that the amount of damages recovered is not a material matter, the jury will not be expected to give large damages. *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

89. "Where a patent has been violated it necessarily follows that the plaintiff is entitled to some damages. The act of violation is proof that he is entitled to some damages, and when the question of damages is not proved, the rule is that the jury give nominal damages; but if the plaintiff intends to claim more than nominal damages, he, being entitled to recover his actual damages, must satisfy the jury what his actual damages are." *Poppenhusen v. N. Y. Gutta-Percha Comb Co.*, 4 Blatch. 184.—INGERSOLL, 1858.

90. Plaintiff's patent being for a mode of making brass kettles, the court charged the jury that one element of damages was the difference between the cost of manufacture under the old hammering process and the plaintiff's patented process, also that another element was the difference in the value of the article made by this different process. *Waterbury Brass Co. v. New York & Brooklyn Brass Co.*, 3 Fish. P. C. 43.—INGERSOLL, 1858.

91. "Upon this question the general rule is, that the patentee or his assignee, in case of an infringement or an appropriation of his invention by another without his license, the patentee or assignee, as the case may be, is entitled to the actual damages which he has sustained by reason of this infringement. It is often, indeed almost always, an exceedingly difficult question to arrive at, upon any certain or satisfactory data. The theory, or the principle in respect to the damages, is that a third person who adopts, appropriates, or uses the improvement of another interferes with his custom, his monopoly, or, rather, property (for it is not a monopoly, being the fruits of his own mind), and affects the benefits which he would otherwise be entitled to; and the jury should look into the case with a view to ascertaining the actual damages which the patentee under such circumstances has sustained. The rule of law excludes any exaggerated or vindictive damage, which is sometimes allowed in cases of wilful trespass." *Smith et al. v. Higgins et al.*, 1 Fish. P. C. 537.—NELSON, 1859.

92. One view which may be taken of the question of damages is this: "The benefits and advantages, whatever they may be, if there are any, derived in the use of the plaintiffs' improvement over the old modes practised and in use, and this is the useful result, if any, consequent upon the new invention over old modes. If it can be

shown that there are benefits and advantages derived by the use of the new mode over the old, these are such as are to be taken into consideration upon the question of damages."—*Id.*

93. Although estimates and opinions are not always reliable or very certain, they are competent and admissible on the question of damages, and proper to be taken into account.—*Id.*

94. "When ascertainable, the defendants' profits are the proper rule of damages."—*Id.*

95. The damage in some cases "will be the amount of profits that the defendant has made."—*Id.*

96. Although the principal thing desired by the plaintiff be the establishing of his right, it is competent to give him damages that will compensate him for the actual damages sustained by the infringement. *Morris v. Barrett et al.*, 1 Bond, 254.—LEAVITT, 1859.

97. The patentee is entitled to such actual damages as he has sustained. "The actual damages are the profits the defendant has made." *Conover v. Rapp*, 4 Fish. P. C. 57.—INGERSOLL, 1859.

98. "Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right." *Teese et al. v. Huntington et al.*, 23 Howard, 2.—SUP. CT. 1859.

99. "Where a plaintiff is allowed to recover only actual damages he is bound to furnish evidence by which the jury may assess them. If he rest his case, after merely proving an infringement of his patent, he may be entitled to nominal damages but nothing more. He cannot call on a jury to guess out his case without evidence. Actual damages must be calculated, not imagined, and an arithmetical calculation cannot be made without certain data on which to make it." *New York v. Ransom et al.*, 23 Howard, 487.—SUP. CT. 1859.

100. Where only nominal damages are claimed, only nominal damages will be given. *Judson v. Cope et al.*, 1 Bond, 327.—LEAVITT, 1860.

101. The plaintiff who prevails is entitled to "the actual damage sustained by him by the defendant's infringement of his right." *Matthews v. Skates et al.*, 1 Fish. P. C. 602.—JONES, 1860.

102. Where there are no data given for an award of damages "the whole subject is within the discretion of the jury." *Judson v. Moore et al.*, 1 Bond. 285.—LEAVITT, 1860.

103. "If the inventor's profit consists neither in the exclusive use of the thing invented, nor in the monopoly of making it for others to use, but in having a general use of it by all who are

willing to pay him the price of his license, then the non-payment of the license fee by the infringer is the only wrong done to the patentee." *Livingston et al. v. Jones et al.*, 3 Wall. Jr. 330.—GRIER, 1861.

104. "The only cases in which the measure of the patentee's damages is the amount of the infringer's profit are, when the invention is of some new machine, or a new form of any kind of known machine which, as a distinct species of machine or manufacture, is more valuable, or can be put into market cheaper, so as to supersede or exclude other machines or manufactures of the same genus, and where the profit of the patentee consists in a complete monopoly of the right to make and vend the new machine or manufacture as a unit and in the exclusion of all competition. In such cases the only measure of damage in a court of equity is the amount of profits made by the infringer, and it is in such cases that the injured party should seek the remedy in a court of chancery, where he can have a decree for an account and an injunction to protect his monopoly."—*Id.*

105. "It is plain that a patentee, whose invention is only valuable because used by all who pay a license fee, and who suffers no other wrong than the detention of such fee, has fixed his own measure of compensation, and needs none of the remedies which it is the duty of the chancellor to give for his protection. An injunction would do him no good, an account is not wanted, and the only remedy to which he is entitled being a judgment for a given sum of money with interest, a court of law is his proper resort, where also he may recover a penalty to the extent of treble damages, if the judge sees fit to inflict it."—*Id.*

106. "Does the value of a patent to its owners consist in the close monopoly of the right to make and sell this species of 'device' as one individual machine? Has it peculiar characteristics which distinguish it from other machines of the same genus, and which give it a peculiar value in the market? If so, the complainants have a right to demand that the defendants, who have infringed their exclusive right to make and sell this peculiar machine or manufacture, are justly liable to refund all the net profits made by such infringement. If, on the contrary, the patent is for some addition or improvement on an old and well-known implement, or some separate part or device thereof of small importance compared with the whole, if the license to use the improvement or addition was sold as separate and distinct from the whole machine, the measure of damage would be the price of a li-

cense, and not the profit made by the exclusive right to make and sell the whole machine."—*Id.*

107. "The Janus-faced lock is a specific article (although of the genus lock) known in the market, having peculiar value; and the . . . value of the monopoly granted by the patent consisted in the exclusive right to manufacture this peculiar machine without any competition, and have all the profits of such monopoly. The respondents have made large gains by trespassing on the rights of the complainants. The profits they made by this trespass justly belong to the true owner. They have partaken equally with the complainants in the profits of the monopoly granted to them alone, without license and in defiance of their rights. The only measure of the redress to which the complainants are entitled is an account of the actual profits made by respondents. . . . The machine being a unit, a specific article well known in the market, having peculiar value because of the patentee's discovery or invention, the attempt to arbitrarily divide the profits of the monopoly of the whole machine among its parts is without precedent."—*Id.*

108. Where the value of the monopoly granted by the patent consists in the exclusive right to manufacture the patented thing, the complainants are entitled to the actual profits made by respondents, and those are "all that can be made matter of account in equity."—*Id.*

109. It is the duty of the jury "to give the plaintiff such actual damages as he has proved . . . he has sustained at the hands of the defendants." By actual damages is meant "damages in fact, and not what is sometimes called in the law vindictive and exemplary damages." *Goodyear v. Bishop et al.*, 2 Fish. P. C. 154.—SHIPMAN, 1861.

110. "Although the plaintiffs might have made \$27,000 profits if they had made and sold these goods, which the defendants manufactured and sold, that is by no means conclusive evidence that \$27,000 is the actual damages they are entitled to recover."—*Id.*

111. Where plaintiff makes his patent valuable by licenses for which he has a uniform price, the license fee is one proper measure of damages.—*Id.*

112. For an example of interest added to damages from the time of infringement see — *Id.*

113. In some cases a measure of actual damages unattended with difficulty is to give the plaintiff whatever profits the defendants have received from the use of the invention. *Cove v. Griggs et al.*, 1 Bissell, 862.—DRUMMOND, 1861.

114. In the case of such a patented machine

as a sower, the clear and simple rule of damages is "to ascertain what pecuniary profits or benefits the defendant has derived from the use of the invention of the plaintiff." *Case v. Brown*, 1 Bissell, 382.—DRUMMOND, 1862.

115. In an action at law for infringement of a patent, damages can only be given for the time prior to the date of the writ. Subsequent damages may be recovered in another action. *Hayden v. Suffolk M'g Co.*, 4 Fish. P. C. 86.—SPRAGUE, 1862.

116. In awarding damages the jury is not to look at the financial situation of either party to the case.—*Id.*

117. Where there are two patents in suit, one for an article of manufacture, and one for a machine for making that article, the rule of damages as to either or both patents is defendants' profits on its sales of the infringing article. *Magie Ruffle Co. v. Douglas et al.*, 2 Fish. P. C. 330.—SHIPMAN, 1863.

118. "Where an inventor has invented only an improvement, and there is a violation of his right under his patent to use that improvement in connection with the invention of others, or in connection with a machine previously known and used, in either case his damages must be limited to the value of his improvement in connection with the other elements of the machine. This is a subject in regard to which it may be difficult to give definite proof; but the difficulty does not change the legal principle which applies. Such proof must be given." *Burdell et al. v. Denig et al.*, 2 Fish. P. C. 588.—SWAYNE, 1865.

119. "When the plaintiffs show . . . that they intend to keep a close monopoly, and there was no proof to the contrary, then, undoubtedly, according to all the authorities on the subject, they were entitled to recover damages according to the principle of profits."—*Id.*

120. "Where, from the evidence, the damages are to be calculated upon the basis of profits, it is incumbent on the plaintiff to prove those profits as the basis and data of that calculation, and where, from the state of the evidence, the other principle applies—compensation for a license fee—the same principle of evidence applies, and the same result ensues, the burden of proof rests upon him."—*Id.*

121. If the use of one patented invention involves the use of another patented invention, the damages to be recovered as regards the first mentioned, must be confined to the utility of the first mentioned. *Sayles v. Chicago & N. W. R. R. Co.*, 1 Bissell, 468.—DRUMMOND, 1865.

122. The value of the patent is not a proper

subject for consideration in estimating damages. The value of the use of the improvement over old methods is proper for consideration. *Suffolk Co. v. Hayden*, 3 Wall. 315.—SUP. CT. 1865.

123. "The jury, in ascertaining the damages . . . is not to estimate them for the whole term of the patent, but only for the period of the infringement."—*Id.*

124. Plaintiff and defendants owned territorial rights under the same patent for fanning machines. It was proved that defendants had sold seven machines within plaintiff's territory, and that the plaintiff's profit was \$15 a machine. The jury had given a verdict for \$105 damages, and there were no facts in evidence to show the circumstances surrounding the infringement sales. The court refused to treble the damages. *Schwarzel v. Holenshade et al.*, 2 Bond, 29.—LEAVITT, 1866.

125. "It has happened, and may occur again, that a meritorious inventor of a valuable improvement, after spending years of patient thought and toil in making it practically useful, and obtaining a patent for it, has been wantonly and unjustly pirated upon, and compelled, for the establishment of his rights, to engage in long, vexatious, and expensive litigation, in which, at last, the sum that may be awarded by the verdict of a jury may be wholly inadequate as a compensation for the wrongs and injuries he has sustained. In such a case the instincts of justice would demand of a judge that he should exercise the discretion invested in him by law, by trebling the damages, and thus, as far as practicable, doing justice to one who, from the great utility of his invention, may be entitled to the name of a public benefactor."—*Id.*

126. In an action against the United States in its Court of Claims for the use of a patent on locks for mail-bags used by the Government, the contract price of the locks, if they had been made by the patentee, was \$94,279; of that sum the court allowed as profits thirty-three and one third per cent, that is, \$31,216, and from this deducted \$4000 for a factory, leaving a balance of \$27,426. *Nock v. United States*, 2 Nott & Huntington, 451.—NOTT, 1866.

127. Complainants' patent was for a machine for repairing railway rails. Defendant having infringed in the repairing of three thousand and forty-one rails, the average length of weld being 17.4 inches per bar, the court awarded as damages \$1292. *Turrill et al. v. Illinois Central Railroad Co.*, 3 Bissell, 66.—DRUMMOND, 1867.

128. The patent in suit was for an amalgamating barrel. Defendant had made and used twenty-three of them—twenty-one before the is-

sue of the patent and two afterward. Twenty-five hundred dollars were awarded as damages. *Brodie et al. v. Ophir Silver Mining Co.*, 5 Sawyer, 608.—FIELD, 1867.

129. "The act of Congress of July 4th, 1836, does not compel the court to treble the actual damages as did the act of 1800. The power to increase the actual damages now rests in the discretion of the court, to be exercised in view of all the circumstances of the case. It should only be exercised to remunerate parties who have been driven to litigation to sustain their patents by wanton and persistent infringement."—*Id.*

130. "A party can sue at law for damages for an infringement, but in equity he can obtain no such damages. His right may be maintained and protected for the future, and an account may be required." *Hoffheins et al. v. Brandt*, 3 Fish. P. C. 218.—GILES, 1867.

131. The improvement in suit being Whitney's process for making car-wheels, the master reported defendant's profits to be \$90,000. He also reported that defendant manufactured car-wheels without annealing, that these latter wheels sold for the same price as the annealed, and cost twenty-five cents less apiece. The court held that the new step or feature of Whitney's improvement was the reheating of the wheel to be annealed, in all else the process being old, and said: "It might as well be said that the plaintiff was entitled to the entire profit of the running gear, other than the wheel, or upon the entire car . . . as the entire profit made on this wheel." *Whitney v. Mowry*, 4 Fish. P. C. 141.—SWAYNE, 1868.

132. *Query.* Whether, when some slight feature of improvement gives the thing its whole marketable value, the profit upon the entire article ought not to belong to the plaintiff?—*Id.*

133. "An action on the case for damages brought under Section 14 of the act of July 4th, 1836," is "the only species of suit in which the plaintiff can recover damages for the infringement of a patent. The plaintiff in a suit in equity on a patent does not recover damages." *Goodyear et al. v. Allyn et al.*, 6 Blatch. 33.—BLATCHFORD, 1868.

134. In taking an accounting the master is "not limited to the date of the decree. In such cases it is proper to extend the account down to the time of the hearing before him, unless the infringement ceased prior to that time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment. The practice saves a multiplicity of suits, time, and expense,

and promotes the ends of justice." *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

135. The defendant company manufactured articles covered and articles not covered by the patent in suit, keeping no separate account as to their respective cost and profit. The master applied the principle of apportionment as follows: "The gross amount of sales of articles of both classes was \$2,648,131.49. The gross amount of sales of articles covered by the patent, \$1,899,696.78. Gross amount of profits, \$349,520.02. Proportion of profits due to articles covered by the patent, \$250,757.72." "In making up the account the master allowed deductions from profits for bad debts, for rents and interest paid, debiting rents and interest received; he allowed for the market value of the materials on hand when the infringement began, for the cost of those acquired afterward to carry on the business, and for the usual salaries of the managing officers." The master reported "Large amounts appear by the books to have been expended in the repairs of building and machinery, and in the purchase of new machinery, tools, and fixtures. No further allowance is made by the master for wear and tear, and depreciation." "He refused to allow the extraordinary salaries which it appeared by the books had been paid, being satisfied they were dividends of profit under another name, and put under that guise for concealment and delusion. The allowance for repairs and other items mentioned in this connection doubtless exceeded the wear and tear which could have occurred during the time of the infringement. The market was a rising one. The defendants had the benefit of it as to those which were tainted by dishonesty." "He refused to allow the profits due to elements not patented which entered into the composition of the patented articles. There may be cases in which such an allowance would be proper. This is not one of them."

"He refused to allow the manufacturers' profits and interest on the capital stock. This was correct. The profits made in violation of the rights of the complainants in this class of cases, within the meaning of the law, are to be computed and ascertained by finding the difference between the cost and yield. In estimating the cost, the elements of price of materials, interest, expense of manufacture and sale, and other necessary expenditures, if there be any, and bad debts, are to be taken into account, and usually nothing else. The calculation is to be made as a manufacturer calculates the profits of his business. 'Profit' is the gain made upon any business or investment when both the re-

ceipts and payments are taken into account. The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty and invite to aggression." The master's findings were sustained.—*Id.*

136. The defendant company did not keep its books in a manner which enabled the master to find what profits were due to the elements of the infringing machines and which were not; and the master therefore refused the defendant such profits. The court sustained the master, saying: "The conduct of the defendants in this respect has not been such as to commend them to the favor of a court of equity. Under the circumstances every doubt and difficulty should be resolved against them."—*Id.*

137. "The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume, and the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender."—*Id.*

138. The use of shop-room and tools is a necessary ingredient in the expense of manufacturing most articles, and should be allowed as part of the expense account. *Troy Iron and Nail Factory v. Corning et al.*, 6 Blatch. 328.—SHIPMAN, 1869.

139. An allowance for the use of the circulating capital of defendants' manufacture is proper in getting at profits.—*Id.*

140. The patent in suit was for machinery for making hook-headed spikes. Defendants infringed seven years and a half, making and selling 19,000,000 pounds of spikes, which sold for \$700,000, and the master found that they made no profits but rather a large loss. The court deduced the profits through its own estimate of the cost of the rods from which the spikes were made, defendants being the manufacturers thereof, and found a profit of over \$8000.—*Id.*

141. Interest is to be allowed on profits from the time when infringement stopped down to the date of final decree.—*Id.*

142. "A patentee whose rights are infringed has his election of remedies. He may treat the infringer, who illegally appropriates the invention to his own use, making profit thereby, as his trustee in respect to such profits, and compel him to account therefor in equity. In such case, the plaintiff may recover those profits, be they more or less; and he can recover no more, however great the damages may be, which illegal



interference has occasioned. If, on accounting, it should appear that the defendant used the invention so unskillfully that he realized no profit, there could be no recovery. On the other hand, the patentee may sue at law for the damages which he has sustained, and those damages he is entitled to recover, whether the defendant has made any profit or not. In such an action it is precisely what is lost to the plaintiff, and not what the defendant has gained, which is the legal measure of the damage to be awarded. Under this rule it may often be entirely proper to prove the profits of the ordinary use of the invention, and the demand existing in the market evidenced by sales made, and so, as an element of consideration, show the profits realized by the defendant, in order to furnish to the jury all proper materials for determining how much the plaintiff has lost. But . . . they are to answer the precise question, How much loss has the plaintiff sustained by reason of the defendant's infringement?" *Covving v. Rumsey et al.*, 8 Blatch. 36.—WOODRUFF, 1870.

143. "There may be cases so peculiar that there may be no means of proving the plaintiff's loss without proof of the defendant's profits, and such proof becomes clearly admissible; but, even then, the recovery is what the jury shall find to be the plaintiff's loss, not because the defendant realized profits, but because, under all the circumstances, the jury infer, as a fact, that but for the interference, the plaintiff would have realized those profits."—*Ib.*

144. Where the court is of opinion that the charge to the jury was erroneous in a substantial point, plaintiff may avoid a new trial by remitting the damages.—*Ib.*

145. "Different rules for the assessment of damages prevail in suits in equity from those which are recognized in actions at law, but in all other respects the rights of the parties depend upon the same considerations." *Hudson v. Draper et al.*, 4 Cliff. 178.—CLIFFORD, 1870.

146. "The mere infringement of the plaintiff's patent entitles the plaintiff to nominal damages, without any proof as to the actual damages sustained." *Campbell v. Barclay*, 5 Bissell, 179.—BLODGETT, 1870.

147. The price for which the plaintiff has sold his rights to certain territory is no criterion by which to arrive at the value of his patent, or the damages sustained by its infringement in the territory retained.—*Ib.*

148. The amount of damages is not "to be measured solely by the profits which the defendant realized by the use of the patented things. He may have conducted his business in so neg-

lectful a manner as to have made no profits. . . . The true question is, What advantage, if any, has the defendant obtained or which he might by skill have obtained by using this patented device over the use of the old device or process to obtain the same end?"—*Ib.*

149. Under the act of July 8th, 1870, "the damages spoken of in Section 55 can have no greater scope or extent than those spoken of in Section 59. The provisions of Section 59, in regard to damages, are but a re-enactment of the provisions on the same subject in Section 14 of the act of July 4th, 1836. Under the latter act it is well settled, by authoritative decisions, that counsel fees paid or incurred by the plaintiff in an action at law for the infringement of a patent, are not a proper element for the consideration of the jury in the estimation of the damages to be recovered in such action." *Bancroft et al. v. Acton*, 7 Blatch. 505.—BLATCHFORD, 1870.

150. "At law, the plaintiff recovers damages as such, and the plaintiff must prove the damages sustained by him from the infringement. In equity, the plaintiff may seek and may require an account of the gains and profits derived by the defendant from the unlawful infringement, and these gains and profits he may recover." *Perry v. Corning et al.*, 7 Blatch. 195.—WOODRUFF, 1870.

151. "The measure of damages, and the consequences of a recovery, should have some relation to the mode of remuneration adopted by the patentee, and to the nature of the injury inflicted by the infringement. Even the consequences of a recovery with respect to the subsequent rights of the parties may be modified by the measure of damages adopted." *Spaulding v. Page et al.*, 1 Sawyer, 702.—SAWYER, 1871.

152. "If no patent fee has been adopted, then, generally, the patentee is entitled to recover the profits made in the use of the machine. A recovery of the profits for the use of the machine does not vest the title in the defendant, for the recovery, based upon this rule of damages, can only be for the use of the machine prior to the recovery, and ordinarily does not cover the value of the use for the entire period over which the patent right extends, or the period during which the particular machine is capable of being used."—*Ib.*

153. "While the recovery of the established patent fee covers the entire value, as fixed by the patentee himself, of the use for the entire term, and affords a complete compensation, the recovery of the profits for the use is but for a limited portion of the time, and but a partial compensation."—*Ib.*

154. The patent in question was for detachable saw-teeth for circular saws. Complainant worked the patent solely himself. He recovered damages and profits against the makers of the saws, and was refused damages and profits in a subsequent suit against the user of the same saws.—*Ib.*

155. "It is one of the misfortunes incident to all violations of the rights of individuals, that the injured party is rarely compensated for all the expenses and vexations involved in an enforcement of his rights through legal proceedings. Patentees are not exceptions to this general rule."—*Ib.*

156. "Perhaps a patentee would not be compelled, in a suit for infringement by the use of a patented machine, to accept the established patent fee as the measure of damages, instead of the profits derived from its use."—*Ib.*

157. The saving effected by the use of a patented process forms a proper basis for the award of profits. *Tilghman v. Mitchell*, 9 Blatch. 1.—BLATCHFORD, 1871.

158. "Damages must be found from the evidence, not from mere conjecture independent of the evidence." *Carter et al. v. Baker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

159. "The profits made by the defendants in selling the machines are proper to be given as a part of the damages; for the right to make and vend the patented machine being the plaintiffs' property, the profits resulting from the sale of it ought to belong to them. But as mere profits, the plaintiffs are only entitled to the profits of the sale of their machine as patented. If the defendants have improved their machine, and if any of the profits are properly to be credited to defendants' improvement, they do not belong to the plaintiffs; but as the defendants have wrongfully connected the plaintiffs' improvement with their own, and thus caused the confusion of rights, if any portion of the profits are properly to be credited to the defendants' improvement, the burden rests upon them to show affirmatively the fact, and how much of those profits ought to be credited to their improvement and deducted from the profits of the sale of the whole machine as improved."—*Ib.*

160. "The plaintiffs, by the infringement, may have sustained other damages beyond the profits actually received by the defendants. The plaintiffs may have chosen to sell at a higher rate, and they were entitled to sell at a higher price, if they were able to get their 'machines' off in the market at higher prices."—*Ib.*

161. "The jury should also take into consid-

eration the probabilities, as developed by the evidence, as to whether, if the defendants had not infringed the patent, the plaintiffs would have been able to sell as many machines at a *higher* price, or as many at *any* price, as have been sold by both plaintiffs and defendants together."—*Ib.*

162. "If the plaintiffs have manufactured machines under the infringed patent, which they could have sold but for the acts of defendants, in unlawfully selling the same machine, and which, in consequence of such unlawful acts of defendants, they were unable to sell, and were compelled to carry over, they would also be damaged to the extent of the value of the use of the capital invested in such manufactured machines during the time they were compelled to carry them, in consequence of such unlawful acts of the defendants."—*Ib.*

163. "If further improvements have been made in the plaintiffs' machines and subsequently patented, and if the plaintiffs, during the time of the alleged infringement, manufactured and put upon the market" machines "embodying the first patent, they are not entitled to recover, as damages, that portion of the price which they might have obtained, that is due to the greater value of the machine occasioned by combining the last improvement with the first."—*Ib.*

164. "It rarely happens that all the damages, incidental and remote, resulting from a wrongful act, are permitted to be recovered by the law. Only those damages which directly and immediately flow from the wrongful act can be considered. Remote consequential damages must be discarded."—*Ib.*

165. Although plaintiffs may, by reason of defendants' infringement, have lost the sale of the patented machines, and as a consequence thereof lost other and additional trade, the damages resulting from the loss of such other and additional trade cannot be taken into account.—*Ib.*

166. Plaintiffs' patent was for improvement in gang ploughs. The claims were to certain combinations therein. Thereof the court said: "Beyond the mere profits of manufacturing the machine, the profits in the plough must almost necessarily be all due to the patented improvement. It is that which fixes the price beyond the expense of manufacturing. At all events, the holder of the patent alone is entitled to make, use, and vend the machine as a whole, and he must, therefore, necessarily, be allowed the profits of the whole machine."—*Ib.*

167. Although in an action at law the action

is in form *tort*, the verdict should be for actual damages only. *Russell v. Place et al.*, 9 Blatch. 173.—WOODRUFF, 1871.

168. Where a court is of opinion that a verdict gives too large damages, new trial may be avoided by remission of the excess on the part of the plaintiff.—*Ib.*

169. Notwithstanding that a jury may have given a plaintiff damages in excess of what they should, the plaintiff may remit the excess and the court then increase the damages under the statute.—*Ib.*

170. Where an infringement seems deliberate and intentional, though it may have been committed under an erroneous idea of plaintiff's rights, a case is formed for increase of damages under the statute.—*Ib.*

171. A party A bought from a party B the right to use a patented sawing machine within a certain district. A party C had at that time the right to use one machine in that district, and the party A also bought that right from the party C. The party C then proceeded to arrange with still another party for infringement. In suit against C, plaintiffs had a verdict for \$5000; the court increased it to \$7500. *Peek et al. v. Frame et al.*, 9 Blatch. 194.—WOODRUFF, 1871.

172. "Profits are to be accounted for by the respondent . . . whenever a decretal order to that effect is rendered against the respondent for an infringement; and if it appears that the injuries which the complainant sustained by the infringement are greater than the gains and profits realized by the respondent in making and using the invention, and vending it to others to be used as estimated and assessed, then the complainant is entitled to recover compensation for the excess of the injuries sustained beyond the amount estimated and assessed for the gains and profits received by the respondent. Actual damages for the injuries sustained by the complainant beyond the amount estimated and allowed for the gains and profits made by the respondent, must be assessed in the first instance, but the court, in its discretion, may increase the amount so allowed to any sum, according to the circumstances, not exceeding three times the amount estimated and assessed as the actual damages sustained beyond the gains and profits realized by the respondent."—*Ib.*

173. It is not an unfair presumption that the defendant's profits are not greater than those made by the complainant and patent owner. *Mowry v. Whitney*, 14 Wall. 620.—SUP. CT. 1871.

174. Where an improved process is in ques-

tion "it is the additional advantage the defendant derived from the process—advantage beyond what he had without it—for which he must account."—*Ib.*

175. "It is as true of a process invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of the entire profits in the manufacture."—*Ib.*

176. Where the result reached by the process of the patent in suit is a result which can be reached by a process or processes old in the art, the measure of damages is that advantage which defendant derived by the use of the patented process, as compared with the use of the old processes.—*Ib.*

177. "The profits which are recoverable against an infringer of a patent are, in fact, a compensation for the injury the patentee has sustained from the invasion of his right. These are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages."—*Ib.*

178. In the case of infringement of a patent for a process for making car-wheels, the court said: "The question to be determined in this case is, What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits."—*Ib.*

179. In the case of infringement of a patent for a process for making car-wheels the court disallowed interest before final decree, and said: "The profits which are recoverable against an infringer of a patent are, in fact, a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages."—*Ib.*

180. Where defendant's infringement is not wanton, and he has a patent for the improvement he practises, those facts ought to relieve him from liability to interest on profits.—*Ib.*

181. Complainants' patent was for a tremolo attachment for organs. The master in his report of defendants' profits, permitted no deduction on account of the general expenses of the business, holding that it cost no more to handle an organ with a tremolo attachment than one without. The court ruled the other way. *Hitchcock et al. v. Tremaine et al.*, 9 Blatch. 385.—WOODRUFF, 1872.

182. Where a patent is for such a thing as a tremolo attachment for organs, complainants are not to be deprived of defendants' profits on the attachment because defendants have made no profit on the entire organ.—*Ib.*

183. Where a portion of defendants' profits on a patented device arises from the sale of something not patented, defendants should be permitted to prove, and have deducted the amount thereof.—*Ib.*

184. "If the manufacturer of the locomotive engine has sold it at a higher price than he would without the addition of" a "patented cut-off or whistle, or if he has in any way made a saving of expense or a profit to himself by the piracy of" a "patented improvement, the patentee is entitled to recover that profit, without regard to the fact that the infringer has made no profit on the manufacture and sale of the whole machine to which he has attached the patented contrivance or mechanism." *Graham et al. v. Mason*, 1 Holmes, 88.—SHEPLEY, 1872.

185. "In making up the account of profits, the master sometimes takes into account the cost of the whole number of infringing mechanisms or contrivances made by the defendant, and the proceeds of all the sales, and gives the patentee the net profits on the whole amount manufactured. This would be a correct rule in some cases, but it would not be just to the patentee in cases where the infringer had made profits on one fraction of the whole number made and sold, and through the defective manufacture or unskillful management of his business had met with losses on a larger fraction, so that a correct account of the whole operation would show a loss on the total manufacture. In such a case, if the patentee, with a full knowledge of all the facts, should bring his bill declaring specifically for the infringement only by the manufacture of those specified mechanisms in the making and selling of which the infringer had made profits, he would certainly be entitled to recover the profits thus made. It is not easy to see why he is not entitled to such profits in a bill counting generally against the infringer, without offset or deduction for losses made in the manufacture and sale of other infringing mechanisms."—*Ib.*

186. "It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature of things, be any rule of damages, or any rule for estimating profits which will equally apply to all cases. The mode of estimating profits or damages must necessarily depend on the peculiar nature of the monopoly granted."—*Ib.*

187. "Where the patentee is entitled to dam-

ages, the rule must be so modified as to afford him indemnity, and give him the actual damage he has suffered by the infringement. Where he is entitled to profits, he is entitled to any profit the infringer has made by the unlicensed use of the contrivance included in the monopoly, and of that alone without regard to profit or loss on the whole structure or machine of which such mechanism forms a part, and without recoupment for losses on other infringing mechanisms made or sold."—*Ib.*

188. "It does not affect the question of profits because the infringer could make his infringing contrivance cheaper than he could make the contrivance in the exact form and shape described in the patent. Nor does the rule with regard to the renovation and repair of licensed machines apply to cases of infringement."—*Ib.*

189. "Where a manufacturer has paid complainant a sum of money to release dealers in the article from claim of infringement, such sum of money is not to be deducted in considering the damages and profits of the manufacturer."—*Ib.*

190. An infringer is a trustee, for the benefit of the patent owners, of profits realized by the infringement. *Steam Cutter Co. v. Sheldon et al.*, 10 Blatch. 1.—WOODRUFF, 1872.

191. Where a suit in equity was begun prior to the act of July 8th, 1870, complainant was held not entitled to damages as such, notwithstanding the fact that his supplemental bill was filed after the passage of the act.—*Ib.*

192. In a case at law the rule as to damages "is not what defendant made by the infringement, or what he might have made, but it is the loss sustained by the plaintiffs by reason of the infringement. . . . It is proper to inquire how many customers were diverted from plaintiffs by reason of the wrongful conduct of defendant, and what loss plaintiffs have sustained in profits by reason of such diversions. If plaintiffs were ready to supply the market with their patented goods, and their business was hindered or interfered with by the competition of defendant, plaintiffs' damages will be the amount of profit which they have lost by reason of such interference."—*Ib.*

193. "The act of Congress, approved July 8th, 1870, Section 38 (16 Stat. at Large), requires that every patented article sold shall be stamped with the word 'patented,' and the day and year the patent was granted; and, in any suits for infringement by the party failing to so mark, no damage shall be recovered by plaintiff, except on proof that the defendant was duly notified of such infringement, and continued, after such

notice, to make, use, and vend the article patented. So that, if defendant has neglected to prove that his patented article was stamped, or that he gave the notice required by statute, you cannot award him more than nominal damages."—*Ib.*

194. In a suit in equity brought previous to the act of July 8th, 1870, both profits and damages cannot be recovered. *Williams v. Leonard et al.*, 9 Blatch. 476.—WOODRUFF, 1872.

195. "What, in good faith, the defendants pay to others as expenses, may be taken as the cost to them of their manufacture. What they take to themselves are gains. They might, perhaps, have earned and gained as much, or perhaps more, by laboring in some other business, in no violation of the rights of their neighbor; but they cannot be permitted to gain either wages or salary by a violation of such rights."—*Ib.*

196. When the complainant has conveyed away the patents in suit, his recovery terminates with the date of the assignment. *Wheeler v. McCormick*, 11 Blatch. 334.—WOODRUFF, 1873.

197. In an action at law where plaintiff gave his consent to the manufacture, damages as to the same cannot be recovered; "as to the others, if any, he is to receive manufacturer's profits thereon." *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

198. "In cases in which gains and profits alone are to be awarded, . . . where the defendant has used the infringing machine so unskillfully, or in a manner so unbusiness like that he has made no profits, the complainant can recover none; but, on the other hand, the defendant cannot prejudice the complainant by applying the gains arising from the use of an infringing machine, to make up losses on other branches of his business." *Conover v. Mers*, 11 Blatch. 197.—WOODRUFF, 1873.

199. A bill of complainants need not specifically pray for damages in order to have damages allowed. The general prayer for gains and profits and other relief is sufficient. *Emerson et al. v. Simms et al.*, 6 Fish. P. C. 281.—NIXON, 1873.

200. "Damages follow, by the law, as one of the results of the decree, whether specifically prayed for or not."—*Ib.*

201. Defendants purchased a patented machine in open market without a knowledge of the patent, used it about nine months solely in their own business, in sawing boards for the manufacture of trunks, and abandoned the use when notified of infringement and before suit. The court awarded as damages \$1200, complainants' usual license fee.—*Ib.*

202. "Although no rule can be laid down applicable to all cases, there is one which ordinarily applies to all cases, . . . where the patentee depends upon license fees or royalties for his compensation for the use of his invention. If he has an established license fee, the amount of such fee is his loss or damage for the use of his invention without a license." Defendants sought to avoid the application of this rule by showing that they gave up the use of the patented machine as soon as notified of infringement. Thereof the court said: "The defendants seek to avoid the application of this rule in the present case by showing that they ceased to use the complainants' invention when apprised of the patent, and substituted other appliances, which rendered the machine quite as effective and useful for their purposes. I do not now listen to the suggestion of complainants' counsel that these substituted appliances are mere mechanical equivalents, for this is not the proper time and mode of trying that question; but surely the defendants are not permitted to get rid of the consequence of a confessed infringement by alleging that they might have used some other machine as advantageously as the complainants'."—*Ib.*

203. Complainant's patented invention being in an improvement for preserving fish, complainant contended that the enhanced profits realized by defendants on their fresh fish, through their ability to withdraw the balance of stock from the market by the use of the patented invention, should belong to complainant. The court held these profits too remote. *Piper v. Brown et al.*, 1 Holmes, 196.—SHEPLEY, 1873.

204. "Where profits are recoverable by the owner of a patented invention against an infringer, they are such profits or gains as result directly or immediately from the wrongful act of the infringer. Remote and contingent profits or gains, depending upon the result of successful schemes or investments, are never allowed. The resultant profits are ordinarily best arrived at by determining the difference between the actual ascertained cost and the actual ascertainable value to the infringer, which value, in case of sales by him, is the price obtained, or the market value of the thing sold. Profits contingent upon future bargains or speculations, or future states of the market, are not estimated and are not recoverable."—*Ib.*

205. An exception to the finding of a master on a question of fact where the whole evidence is not reported, and where the finding depended, more or less, on an inspection of a machine by the master, will not be sustained.—*Ib.*

206. "It is not customary, in establishing

profits from an infringement, to allow the infringing parties compensation for their own time and labor."—*Id.*

207. When a case is referred to a master for an accounting in profits and damages, it is not for him to go into the general state of the art in order to determine whether defendants' machines infringe, or to consider the general scope and extent of the patent. *Turrell v. Ill. Cent. R. Co. et al.*, 5 Bissell, 344.—*DRUMMOND*, 1873.

208. In an accounting before a master, defendants offered to prove that the use of the patented device was unprofitable, and the master refused to admit the evidence. The court sustained the master.—*Id.*

209. In considering a patent on a machine for repairing railroad rails, it is proper to get at defendants' profits by ascertaining what saving they made by using the patented device as compared with using the least expensive device of the prior art.—*Id.*

210. When, during a period of infringement, there has been a change of parties as regards a certain line of infringement, the master should make a finding enabling the court to apportion the damages and profits if necessary.—*Id.*

211. In a case which went to trial on the plea of *non-assumpsit*, the court said: "The rule in suits in equity, of ascertaining by reference to a master the profits which the defendant has made by the use of the plaintiff's invention, stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of these profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by a jury." *Packet Co. v. Sickles*, 19 Wall. 611.—*SUP. CT.* 1873.

212. "The measure of the damages to be recovered against infringers, prescribed by the act of 1836 as well as by the act of 1870, is the actual damage sustained by the plaintiff. Where the plaintiff has sought his profit in the form of a royalty paid by his licensees, and there are no peculiar circumstances in the case, the amount to be recovered will be regulated by that standard. If that test cannot be applied, he will be entitled to an amount which will compensate the injury to which he has been subjected by the piracy. In arriving at their conclusion, the profit made by the defendant and that lost by the plaintiff are among the elements which the jury may consider. Where the infringement is confined to a part of the thing sold, the recovery must be limited accordingly. It cannot be as if

the entire thing were covered by the patent; or, where that is the case, as if the infringement were as large as the monopoly. Counsel fees cannot be included in the verdict. The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved, and not guessed at." *Philp et al. v. Nock*, 17 Wall. 460.—*SUP. CT.* 1873.

213. "Before the act of 1870, the plaintiff, in equity, recovered of the defendants the profits the latter had made, and, on the law side of the court, his damages; and it was doubted whether, in equity, he could recover more than the actual profits defendants had made, even though they might, by proper skill, etc., have made more, or even though the plaintiff's loss of profits had been large through defendants' infringement." *Putnam v. Sudhoff et al.*, 1 Banning & Arden, 198.—*TREAT*, 1874.

214. "It is very far from clear that the provisions of Section 39 are not designed to cover profits as well as technical damages; yet . . . Section 55 seemingly maintains the distinction between them."—*Id.*

215. In a case where plaintiff had failed to stamp his articles with the date of his patent, the decree was for the "actual profits of the plaintiff, to be ascertained by the master, said profits to be confined to the difference between the prices paid by defendants and those at which plaintiff sold the genuine fasteners."—*Id.*

216. "The ascertainment of the profits made by the use of . . . patented improvements to produce heat by the burning of wet fuel, necessarily presents, as the question to be determined, What advantage did the defendants derive in producing heat from burning wet tan by the employment of the patented improvements over what would have resulted to them from the use, to produce equally beneficial results in the way of heat, of other methods for producing such equally beneficial results, open to the public and to them, to be used at the time they used the patented improvements? This requires that the inquiry should be limited to the production of equally beneficial results in the way of heat, but it does not require that the heat should be that capable of being produced by burning wet tan alone. It extends to any fuel." *Black et al. v. Thorne et al.*, 12 Blatch. 20.—*BLATCHFORD*, 1874.

217. In a suit for infringement of a patent for burning wet fuel, and on the hearing in damages and profits before a master, a witness was asked whether he had examined and worked any furnaces substantially different from complainants' furnace, and worked substantially differen

from complainants' process which existed at the time defendants constructed their furnaces, and, if he had, what was the economical working of those furnaces as compared with complainants' furnaces and process. This was objected to as incompetent, but was allowed by the court.—*Ib.*

218. "An infringer of the rights of a patentee is accountable, in equity, for the profits accruing to him by the appropriation to his own use of the patentee's invention. These profits are properly acquired by the infringer, which rightfully belong to the patentee. He may, therefore, instead of resorting to an action at law to recover damages commensurate with the loss caused by the unlawful act of the infringer, elect to treat him as a trustee of the profits realized by him, and enforce his accountability for them in that character in a court of equity." *Smith v. Baker's Administrators*, 1 Banning & Arden, 117.—McKENNAN, 1874.

219. Infringers are, in equity, to be treated as trustees for the benefit of the patentee, of the profits realized by the infringement. *Troy Iron & Nail Factory v. Winslow et al.*, 11 Blatch. 513.—WOODRUFF, 1874.

220. The patent in suit being for an improvement in pumps, defendants having been found infringers, and the case having been referred to a master, "the complainants proved the expenses of making and selling the pumps in question, that they were prepared and ready to fill the orders taken by the defendants, and the prices at which the pumps were sold by the defendants. The master found the damages to be the difference between such expenses and such prices, and reported accordingly." This finding of the master was not sustained by the court. The court held that only a special construction of the side chamber was claimed, whereby the same was adapted to use with a valve chamber, bolted on the outside. *Goulds M'fg Co. v. Cowing et al.*, 12 Blatch. 243.—HUNT, 1874.

221. "When a patent is for an improvement on a machine, the damages for the infringement of such patent are confined to the profits made by the use of the improvement only, and not by the manufacture of the whole instrument."—*Ib.*

222. As to damages and profits, the burden of proof rests upon the complainant. "The damages to the plaintiffs or the profits to the defendants (they are the same thing) must be proved, like the other points in the case. For all the profits or advantages with which they have been charged (except that precise advantage derived from using the plaintiffs' improvement), the defendants may still be liable to other inventors, or they may already have paid for them to those

inventors. Upon no principle can the plaintiffs assume that they belong to themselves, and call upon the defendants to disprove this assumption."—*Ib.*

223. "Equitable accountability for the unauthorized use of a patented invention proceeds from the hypothesis of a trust. An infringer, although technically a trespasser, is treated as a trustee of the gains resulting from the use of the patent property, and is held accountable accordingly. The benefit thus accruing to him is regarded as the patentee's contribution to his profits and is the primary measure of his accountability. To obtain a just account of these profits is, therefore, the special object of the master's researches, but it is not attainable by a uniform pursuit of the same methods." *Wetherill et al. v. New Jersey Kine Co.*, 1 Banning & Arden, 485.—McKENNAN, 1874.

224. "Different modes of computation are indicated by different subjects and circumstances, but they must be appropriate means of ascertaining the actual benefit derived from the use of the patentee's exclusive property. Where the appropriated invention is an art, the simplest method of obtaining this is, perhaps, by a comparison between it and the cognate means used and available for the production of the same result. The saving in the cost of production due to the new process is a fair measure of the infringer's actual profits."—*Ib.*

225. Complainants' patent was for an improved process for producing white oxide of zinc. The process could not be practised without using a furnace patented to another. Under these circumstances the court awarded as profits one half of the saving which was effected by the use of the process as compared with the cost of the old and common process. *Ib.*

226. For an example of the allowance of interest on profits prior to final decree, see —. *Ib.*

227. "It is important to ascertain, if we can, the principle on which the complainant's profits for the illegal use of his patent are to be estimated. This obviously depends upon the character of the patented invention, and upon the mode in which the owner chooses to allow the public to use his monopoly, and upon the methods of procedure in the tribunal to which he appeals for redress." *American Nicholson Pavement Co. v. City of Elizabeth et al.*, 1 Banning & Arden, 439.—NIXON, 1874.

228. "For what profits should the infringer account for the unauthorized use of the invention? It may be answered generally that the patentee is entitled to a just compensation for the injury which he has sustained from the in-

vasion of his rights. How this is to be ascertained depends upon the facts and circumstances of each case. If the owner's profits consist in having a license fee paid to him by all who use the invention, the amount of the license is his profit; and when that is paid, the injury done by the use without a license is satisfied. If it consists in the exclusive use of the thing patented, or in the monopoly of making it for others to use, additional considerations are involved. We are then to inquire, What is the character of the invention? Is it a new machine, or manufacture, or composition of matter, whose entire value and usefulness result from the mechanism, combination, or constituents, which the genius of the patentee has originated, arranged, or produced? Or is it a mere addition to, or improvement of, an existing machine, manufacture, or process, rendering them more valuable and profitable, but not necessary to their use, and which may be used in a less profitable way, without the addition or improvement? In other words, when profits have gone into an infringer's pocket, he is regarded as the holder of property not belonging to him, but which he must restore to the rightful owner. If the invention infringed covers the entire machine, manufacture, or combination used by the infringer, then the whole profits should go to the patentee. If it cover only a part, and there are other and different elements in the organism, contributing to make up the aggregate profits, then only such proportion should go to him as have sprung from his contribution toward the value of the whole."—*Id.*

229. Where the "exclusive use or monopoly of the complainant has been interfered with by the defendants, . . . the rule in equity seems to be settled, under such circumstances, that the measure of damages due to the complainant is the amount of profits made by the infringers, unless . . . some portion of the profits have been derived from the use of constituents of the combination, not the property of the patentee, and for the use of which he is not entitled to compensation."—*Id.*

230. Where defendants "had caused a mingling and confusion of rights, by unlawfully adding an improvement of their own to the property of the complainant, . . . it was their duty, and not the complainant's, to prove what portion of the profits, if any, ought to be credited to the changes which they had made in the combination of the complainant."—*Id.*

231. Where defendants urge, against the finding of profits, that there were other forms akin to the patented improvement that they might have

used, it is a sufficient answer to say that they did not choose to use such other forms.—*Id.*

232. In computing defendants' profits due to complainant's invention, those that are not collectible are not to be counted.—*Id.*

233. "While courts will rebuke all attempts on the part of the infringers to cover up and absorb gains and profits, under the names of salary or compensation for personal service, yet, in those cases where defendants have not forfeited the favor of the court by their naked piracy of the rights of others, a reasonable allowance will be made to them from the profits for their care and skill in directing the execution of the works."—*Id.*

234. For an example of an allowance of \$7000 to three defendants for conducting and superintending the infringing work, see—*Id.*

235. In an accounting defendants contended for an allowance of \$6107.50 for an expense of which they did not give the items. The master allowed this, and the court did the same.—*Id.*

236. In a hearing in damages and profits, defendants contended for an allowance of a loss and gain account, without giving items. Both the master and the court denied it.—*Id.*

237. In making up damages and profits, that which is paid by defendants for the use of another patent is properly deducted.—*Id.*

238. For an example of the disallowance of interest before final decree on damages and profits, see—*Id.*

239. A gave a grant under a patent to B, and subsequently reissued the patent. A infringed B's rights both under the original and reissued patents. It was held that B might recover damages both under the original and reissued patents.—*Id.*

240. The defendants' conduct in withholding statements which they ought to make will incline the court to resolve any doubts against them on the question of damages and profits.—*Id.*

241. The patent in suit was for a picker-staff motion in looms, and the master reported that the defendants had sold a certain number of looms including the motions, the cost of which was \$59.63; that the cost of the patented attachments was 91 cents for each loom, and that the profit on the entire loom was \$5.64 each; defendants insisted that their profit ought to be based on the same ratio to the whole profit that the cost of the attachments bore to the entire cost of the loom, which would give defendants' profit on each attachment as 8 $\frac{1}{10}$  cents. It appeared also from the master's report that defendants had sold several hundred pairs of the attachments separately at \$2 per pair, and 297 $\frac{1}{2}$  other



pairs for \$534.75. These separate sales were taken as furnishing the measure of defendants' profits as regards the patented attachments which were sold upon looms. Defendants had made an improvement of their own by which the attachments cost per pair 50 cents less than otherwise, and were allowed this as a deduction. *Mason v. Graham et al.*, 23 Wallace, 261.—SUP. CT. 1874.

242. The patent in suit was for a "tremolo attachment" to musical instruments. Defendants sold musical instruments some of which contained the "tremolo attachment" and others did not. In the ascertainment of defendants' profits they were allowed to prove the general expenses of their business, and to deduct a ratable proportion from the profits made by the sale of tremolo attachments, and this course was sustained by the court. *Tremain et al. v. Hitchcock et al.*, 23 Wall. 518.—SUP. CT. 1874.

243. Where a patented improvement is but a part of an entire organization, and an order referring the case to the master is broad enough to cover profits and damages on the whole structure, such order is too broad, and will serve as a basis for reversing the final decree. *Littlefield v. Perry*, 21 Wallace, 205.—SUP. CT. 1874.

244. In a case where the patent is for an improvement and not for the entire structure, profits actually realized are usually the measure of unliquidated damages, and interest will not be added.—*Ib.*

245. "Prior to the act of 1870 authorizing the Circuit Court, as a court of equity, to decree the payment of damages in patent cases, damages were not recoverable in equity suits. A bill in equity proceeded, prior to that act, upon the theory that the infringer was equitably bound, as a trustee, to pay to the patentee the profits which had been made by an unlawful use of the invention." *Magic Ruffle Co. v. Elm City Co.*, 13 Blatch. 151.—SHIPMAN, 1875.

246. Where, after suit brought, complainants assign away a portion of the patent in suit, the award of profits and damages as to such part thus assigned away stops at the date of the assignment. *Boomer et al. v. United Power Press Co. et al.*, 13 Blatch. 107.—SHIPMAN, 1875.

247. "In the inquiry concerning profits, the question is not what *could* be, but what *was* produced by the use of the complainants' invention." *Webster et al. v. New Brunswick Carpet Co.*, 2 Banning & Arden, 67.—NIXON, 1875.

248. The patent in suit was for an improvement in looms. Defendant had used 31 looms, with an average productive capacity of 48 yards per day for 303 days, giving an aggregate pro-

duction of 153,472 yards. The ordinary loom had a productive capacity of only 30 yards per day, and 31 looms of that kind would have produced in the same 303 days 95,820 yards. The difference, 57,552 yards, was therefore held to be due to the use of the patented improvement; and as defendant made a profit of 20 $\frac{3}{4}$  cents per yard, the profits awarded complainant were \$11,741.40.—*Ib.*

249. For a case in which interest was not allowed on defendant's profits until the final decree, see —. *Ib.*

250. "The proper measure of damages is the difference between the value of the improvement used by the defendant, and any other like device which was open to him without royalty, or by the payment of less royalty." *Ingels v. Mast*, 1 Flippin, 424.—EMMONS & SWING, 1875.

251. "A fair construction of Section 55, of the act of 1870, . . . only allows a decree for the damages arising from the specific infringement alleged in the bill of complainant." *Rumford Chemical Works v. Hecker*, 2 Banning & Arden, 351.—NIXON, 1876.

252. "When a patentee chooses to use his invention himself, and finds his remuneration in the sale of the products of its use, and to prevent others from using his invention, it is his right, and then a recovery of profits and damages will be limited to the profits and damages up to the time of recovery. Such a recovery will not carry with it any right to the future use by the infringer of the invention." *Perrigo et al. v. Spaulding*, 13 Blatch. 389.—JOHNSON, 1876.

253. "By Section 4921 of the revised statutes, which is substantially a re-enactment of Section 55 of the act of July 8th, 1870, courts of equity are authorized, upon a decree being entered in any case for an infringement, to award to the complainant, 'in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby.' Before such jurisdiction was vested in the equity courts, damages could only be recovered by suits at law." *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 2 Banning & Arden, 252.—NIXON, 1876.

254. "The terms *profits* and *damages*, as used in the statute, are hardly convertible. Profits, doubtless, refer to what the defendant has gained by the unlawful use of the patented invention; and damages, to what the complainant has lost."—*Ib.*

255. "It is generally pertinent to inquire how the owner of the patent has seen fit to use his invention. He may retain a close monopoly in it, and then the damages are computed by investi-

gating the defendant's profits, which are reckoned a fair criterion of the complainant's loss; or he may grant license fees allowing the benefit of his invention to every one who will pay a stipulated price for its use, in which case the amount of the license fee fixed by the complainant is usually considered a proper compensation in damages, except in those cases where the evidence warrants an allowance of exemplary or punitive damages by reason of a wanton infringement."—*Ib.*

256. The patent in suit was for a dental vulcanite plate. Complainant was accustomed to charge a license fee to dentists of \$60 a year. Defendant had used the invention during two successive years. The court awarded \$120 damages and no profits.—*Ib.*

257. The patented thing being an improvement in watches, the master multiplied the number of infringing watches made by defendants by the profit which complainant made upon his watches, and gave the same as damages. This finding was not sustained by the court. *Buerk v. Imhaeuser et al.*, 14 Blatch. 19.—JOHNSON, 1876.

258. "Section 55 of the patent act of July 8th, 1870, substantially re-enacted in Section 4921 of the revised statutes, gives to a successful plaintiff in an equity suit for infringement the damages which he has sustained, in addition to the profits to be accounted for by the defendants. But it by no means follows that, in every case, such damages are in excess of the amount of profits made by the infringer."—*Ib.*

259. "If it appears that the injuries which the complainant sustained by the infringement are greater than the gains and profits realized by the defendants, then the complainant is entitled to recover compensation for the excess of the injuries sustained beyond the gains and profits received by the defendants."—*Ib.*

260. Where defendants are in good faith manufacturing under a patent they are not wilful infringers, and therefore not to be visited with punitive damages.—*Ib.*

261. "It is only actual damages which are proved to have been sustained by the plaintiff that he can, in any event, recover. It is not enough that he may have suffered loss, for he cannot have compensation for conjectural losses. The losses must be proved and not guessed at."—*Ib.*

262. In the assessment of damages against a defendant, manufacturer's profits are to be deducted.—*Ib.*

263. "When the inventor charges a royalty or license fee, he isolates the value of the use of

his invention, and, separating it from all other things, fixes its value as against himself and in favor of others. If he also makes and sells the machine in which the invention is embodied, there will enter into the price not only the cost of materials and the ordinary profit of manufacture, but also an amount of additional profit, which is the equivalent of this license fee, and adds to the price that additional sum as compensation for the invention. It is this price of the invention which the inventor is entitled to recover as damages against an infringer; and in ordinary cases it is this only. Wanton infringement may induce other considerations, but such is the measure of damages when the case is simply one of infringement."—*Ib.*

264. In an accounting in damages and profits, an effort to show what the complainant had recovered in another suit is immaterial.—*Ib.*

265. For an example of interest allowed upon damages and profits from the date of the master's report, see —. *Ib.*

266. "In cases where profits are the proper measure, it is the profits which the infringer makes or ought to make which govern, and not the profit which the plaintiff can show that he might have made. . . Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies eminently and mainly to cases in equity, and is based upon the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes; a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine defendant's books and papers, and examine him on oath, as well as all his clerks and employees. On the other hand, . . . the sale of licenses of machines, or of a royalty established, constitute the primary and true criterion of damages in the action at law. No doubt, in the absence of satisfactory evidence of either class, in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained; but it cannot be admitted . . . that in an action at law the profits which the other party might have made is the primary or controlling measure of damages." *Burdell et al. v. Denig et al.*, 92 U. S. 716.—SUP. CT. 1876.

267. "In settling an account between a patentee and an infringer of the patent, the question is not what the latter has made in his business, or from his manner of conducting it, but what advantage he has derived from his use of

the patented invention." *Illinois Central Railroad Co. v. Terrill*, 94 U. S. 695.—SUP. CT. 1876.

268. "In the ascertainment of profits made by an infringer of a patented invention, the rule is a plain one. The profits are not all he made in the business in which he used the invention, but they are the worth of the advantage he obtained by such use; or, in other words, they are the fruits of that advantage." *Mess v. Conover*, 11 Of. Gaz. 1111.—SUP. CT. 1876.

269. In computing defendant's profits where the product of the patented invention works a saving to him, it is not material that his general business is unprofitable.—*Id.*

270. "Juries, in an action at law for the infringement of a patent, are required to find the actual damages sustained by the plaintiff in consequence of the unlawful acts of the defendant. Power is given to the court in such a case to enter judgment for any sum above the amount of the verdict, not exceeding three times the amount of the same, together with costs; but the jury are strictly limited in their finding to the actual damages which the plaintiff has sustained by the infringement." *Birdsall et al. v. Coolidge*, 93 U. S. 64.—SUP. CT. 1876.

271. "Damages are given as a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant. Compensatory damages and actual damages mean the same thing—that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less, whether the injury is to the person or estate of the complaining party."—*Id.*

272. "Prior to the passage of the act of July 8th, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two. He might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such a suit being regarded as the trustee of the owner of the patent as respects such gains and profits; or the owner of the patent might sue at law, in which case he would be entitled to receive, as damages, compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts; the measure of damages in such a case being not what the defendant had gained, but what the plaintiff had lost. . . . Where the suit is at law, the measure of damages remains unchanged to the present time, the rule still being that the verdict of the

jury must be for the actual damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict, not exceeding three times that amount, together with costs."—*Id.*

273. "Damages of a compensatory character may . . . be allowed to the complainants suing in equity, in certain cases where the gains and profits made by the respondents are clearly not sufficient to compensate the complainants for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent, in which event the provision is that the complainants shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages they have sustained thereby."—*Id.*

274. "Evidence of an established royalty will undoubtedly furnish the true measure of damages in an action at law, where the unlawful acts consist in making and selling the patented improvement, or in the extensive and protracted use of the same, without palliation or excuse; but where the use is a limited one and for a brief period, as in a case before the court, it is an error to apply that rule arbitrarily and without any qualification."—*Id.*

275. After a court has construed a patent and sent it to a master for an accounting in damages and profits, it is not open to the master to vary that construction. *Ruggles v. Eddy et al.*, 2 Banning & Arden, 627.—WHEELER, 1877.

276. "The extent of the monopoly must first be correctly defined, then the extent of the infringement ascertained, and from that basis the consequent profits or damages found."—*Id.*

277. Where a master has erred in departing from the construction of the patent as settled by the court, the case will be sent back to the master for further and proper procedure.—*Id.*

278. Even if it be conceded that complainants' patented apparatus and process was used by defendants, it does not follow that the profits of defendants' business are due to that source. *Black et al. v. Munson et al.*, 14 Blatch. 265.—HUNT, 1877.

279. The patent in suit was for burning wet tan. Defendants, in the use of improvement, saved \$5691 in the item of wood. The court held it was not shown that the saving was due to the use of the improvement.—*Id.*

280. If, on a hearing in damages and profits, complainants fail to make a case, it is not ma-

terial whether defendants give any or immaterial evidence.—*Ib.*

281. "In an action in equity, . . . profits made by the infringer by the use of the improvement constitute the general measure of damages. Sales, or a royalty established, on the other hand, constitute the primary criterion of damages in actions at law; . . . but, in any court, this latter rule can only be applied where there is a fixed and established price at which a license is granted. No price can be said to be fixed, or royalty established, where the patentee varies his price according to the courage or the ability to resist of the infringer, or where there are other circumstances showing the absence of a fixed established fee."—*Ib.*

282. Complainants showed a certain profit on their patented machines, but they did not show how much was due to certain other patents, or how much was manufacturer's profit, and they were given nominal damages only. *Robertson et al. v. Blake*, 94 U. S. 728.—*SUP. CT.* 1876.

283. "Damages of a compensatory character may be allowed to a complainant in an equity suit, where it appears that the business of an infringer was so improvidently conducted that it did not yield any substantial profits." *Marsh et al. v. Seymour et al.*, 97 U. S. 348.—*SUP. CT.* 1877.

284. "To a court which has decided what evidence of a particular fact is necessary, it is no answer to say that it cannot be given. The consequence of that state of things is, that the party on whom the burden rests must fail." *Goulds M'fg Co. v. Cowing et al.*, 14 Blatch. 315.—*JOHNSON*, 1877.

285. "Profits may be defined to be the net gains of the infringer from the use of the patented invention, while damages are the losses sustained by the owner in consequence of the infringement." *La Baw et al. v. Hawkins et al.*, 2 Banning & Arden, 561.—*NIXON*, 1877.

286. "No general rule can be announced to govern the master in taking the account. . . . Sometimes the profits of the infringer are the sole criterion of the actual damage sustained by the patentee, and then a report of the net gains covers the whole ground of profits and damages. In other instances . . . it would be the duty of the master, under such a reference, to add together the net gains of the infringer, and the license fee which the patentee has fixed, and to make the aggregate the measure of profits and damages, which the wrong-doer ought to pay."—*Ib.*

287. "A transfer by the owners of their entire interest in the patent, to be paid for by a certain

royalty, is not the establishment of the ordinary license fee, by the payment of which any one acquires the right of using the patented invention. It grants a monopoly; in consequence, the grantees can afford to pay a much larger price for its exclusive use than if they were subject to competition from other licenses. It cannot be invoked as a safe criterion of the measure of the complainants' damages, unless evidence is offered showing that the licensees of the complainants were deprived of the sale of the number of . . . machines which the defendants manufactured and sold."—*Ib.*

288. Where defendants seek an abatement of damages and profits by reason of royalty payable to a third party, "the rule for the master on a reference in such cases is to inquire whether the defendants were acting in good faith under another patent; and if he finds they were, to allow all necessary expenditures incurred in its use. If they are wanton infringers of the complainants' rights, and seek to justify their infringement by the pretext of working under the protection of some other patent, which, in fact, adds nothing to the efficiency and value of the complainants' invention, other considerations come in."—*Ib.*

289. Where defendants seek abatement of profits and damages by reason of royalties payable to a third party, "it is not a question of payment but of liability. If the defendants are liable for such royalty or license fee, it can hardly be maintained that the complainants ought to have the amount, because the defendants have not fulfilled their obligations, and paid the other patentee."—*Ib.*

290. Money paid by defendants for electrotyping and engraving is properly to be allowed as a part of the expense of conducting business.—*Ib.*

291. The patented article was a new ornamental chain or necklace, a new article of manufacture, and the claim in question had been held by the court to be a claim for a chain composed of alternate closed links and open spiral links, formed of one or more coils of gold tubing. The court held—in considering damages and profits—that this was the case of a new process of manufacture, and that the proper inquiry was, What was the advantage in bringing the article by the patented process to a state of perfection, over bringing it to the same state by other processes open to the public, and which would be equally beneficial? *Mulford et al. v. Pearce et al.*, 14 Blatch. 141.—*SHIPMAN*, 1877.

292. "A party who has earned profits by the infringement of a patent is chargeable as trustee

for the use of the real owner." *Vaughan v. East Tennessee, Virginia & Georgia R. R. Co.*, 1 Flippin, 621.—BROWN, 1877.

293. The amount of profits on a manufactured article is not invariably, and in all cases, the rule of damages for infringement. *Magie Ruffle Co. v. Elm City Co.*, 14 Blatch, 109.—SHIPMAN, 1877.

294. Where an assignment of a patentee carries with it past damages and profits, the assignee can recover the same. *Hamilton v. Rollins*, 5 Dillon, 495.—NELSON, 1877.

295. The rule of damages at law is the exact damage actually sustained. Sometimes royalty is a measure, and sometimes not. *Rice v. Heald*, 13 Pac. Law Rep. 33.—SAWYER, 1877.

296. The complainant made his patent profitable by granting licenses upon royalty. Had defendants taken a license, their royalty would have been \$1400. Defendants' profits amounted to \$1916.28, and this complainant sought to recover. Defendants sought to confine complainant to the license fee. The court awarded the profits. *Wooster v. Taylor et al.*, 14 Blatch, 403.—WHEELER, 1878.

297. "On many questions of damages, strictly such, the license fees are evidence of damages, and sometimes the limit of recovery of damages, but cannot be evidence, and, much more, not a limit of profits to be accounted for."—*Ib.*

298. Defendants cannot escape an accounting in damages and profits by showing that they have ceased to infringe, and by showing that there have been no profits. *Bullock Printing Co. v. Jones et al.*, 3 Banning & Arden, 195.—WHEELER, 1878.

299. "Gains and profits are the proper measure of damages in equity suits, except in certain cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent. Examples of the kind may be mentioned as falling within the exception where the business of the infringer was so improvidently conducted that it did not yield any substantial remuneration beyond expenses, and cases where the products of the patented improvement were sold by the infringer greatly below their just and market value, in order to compel the owner of the patent, his assignees, and licensees to abandon the manufacture of the patented product." *Brady v. Atlantic Works*, 3 Banning & Arden, 577.—CLIFFORD, 1878.

300. "Masters charged with that duty may examine the respondent, and, if necessary, inspect his books; but it is incumbent upon the complainant to furnish proof of whatever else is

necessary to enable the master to make the proper computation."—*Ib.*

301. "Actual profits made by the infringement of the invention secured by letters-patent are the profits which the complainant is entitled to recover, excluding those made in the construction of such portions of the infringing machine as are not embodied in the patented mechanism."—*Ib.*

302. In computing profits the general expenses of defendant's business are to be taken into account, and a proper part apportioned to the infringing part of the business.—*Ib.*

303. Extra expenses which are actual expenditures are to be considered in computing defendant's profits.—*Ib.*

304. Interest on profits may properly be refused.—*Ib.*

305. Charges for extra work and materials furnished were allowed to the defendant, in consideration of which the master required the defendant to assign the charges for the same to the complainant. This was sustained by the court.—*Ib.*

306. Before a master the defendant rendered an account of the number of machines which he had made, some of which he represented as infringing "three claims, . . . and others only the eighth claim." The complainant then alleged that he had "for many years, to the knowledge of the defendant, exacted and received from many other persons a royalty of two and a half mills upon all harnesses manufactured by the use of machines similar to those employed by defendant," who thereupon admitted in writing "the license and the terms of the same as alleged" by the complainant. Here the complainant rested his case. The defendant then offered to verify the statement of his account that a large part of his machines infringed only one of the three claims mentioned in the original decree. The master held this evidence to be inadmissible, and assessed damages for all the machines at the usual rate. The court sustained the master. *Kendrick v. Emmons*, 3 Banning & Arden, 623.—LOWELL, 1878.

307. "Expenses of suit are never allowed. . . . Interest may sometimes be added to the profits, but only under peculiar circumstances." *Holbrook et al. v. Small*, 3 Banning & Arden, 625.—LOWELL, 1878.

308. "The power to treble the damages does not extend to profits in a suit in equity. It is true that under some circumstances a jury may consider the profits in ascertaining the damages, when no better means are at hand, and so it may incidentally happen that in increasing the dam-

ages the court is adding to the profits ; but profits are never, of themselves, the measure of damages at law."—*Id.*

309. The statute "not only expressly authorizes the recovery in equity of the profits resulting from the use of the invention, but in addition thereto the damages which the defendant would be entitled to recover at law ; and the latter, in the discretion of the court, may also be trebled. The established royalty might be the measure of the mere damages, but it constitutes no element affecting the profits derived by the defendant from the use of the invention." *Knorr et al. v. Great Western Quicksilver Mining Co.*, 6 Sawyer, 430.—SAWYER, 1878.

310. "It is not the profits of a business as a business that are to be considered, but the advantage derived to the infringer in the diminished cost, etc., of carrying on the business by the use of the invention."—*Id.*

311. Defendant sought to have the patented device compared, in point of saving and utility, with devices not in existence during a large portion of the time covered by the accounting. The court said : "The comparison must be with machines at the time of the infringement, both known and open to the public."—*Id.*

312. An account of profits and damages should cover all infringements down to the time of taking the account.—*Id.*

313. The claim in complainant's patent in suit was for "the arrangement of tar paper or its equivalent," etc. In the accounting the master proceeded on the principle that the entire value and usefulness of the pavement laid by defendant was due to the use of this process. The court held otherwise, saying that the improvement contributed but a small part to the usefulness of the pavement, and that the value due to the patented improvement must be separately proved. *Schillinger v. Gunther*, 15 Blatch. 303.—BLATCH. 1878.

314. The complainant's patent in suit was for "the arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth." The master gave complainant as special damage \$900 as damage on a piece of pavement laid by defendant, when defendant had underbid complainant. This finding of the master was disallowed because it was not based upon proof of the value specifically due to the use of the patented improvement.—*Id.*

315. "Where the suit is at law, the measure of damages is, that the verdict of the jury must be for the damages sustained by the plaintiff, subject to the right of the court to enter judgment

thereon for any sum above the verdict, not exceeding three times that amount, together with costs." *Judson v. Bradford et al.*, 3 Bann. & Ard. 359.—CLIFFORD, 1878.

316. "Frequent cases arise where proof of an established royalty furnishes a pretty safe guide for the instruction of the court and the finding of the jury, but cases also arise where it cannot be applied without qualification, as where the patented improvement has been used only to a limited extent and for a very short period."—*Id.*

317. The patented thing was a cuspidor. During the time of infringement plaintiff sold 90,554 of the patented cuspidors at a loss of \$10,325.84, as compared with previous prices ; the master reported that such a reduction in price was, to a great extent, occasioned by the infringement. The master also reported that during the period of infringement defendants sold 1003 infringing cuspidors, which plaintiff would have sold if the defendants had not sold them, with a certain profit. The court rejected the conclusions of the master, saying that the price which plaintiff would have received but for defendants' infringement was a question of fact ; also the amount of reduction, and how much of it was occasioned by the acts of the defendants, and how much of it was attributable to the fact that the infringing articles contained the patented feature ; such also was the question as to whether, if the infringing cuspidors had not been sold, the plaintiff would have sold any more than he did, and what profit he would have made on them and what part of such profit was to be assigned to the patented feature. The court rejected the conclusions of the master because the evidence was in the shape of estimate, conjecture, and opinion. *Ingersoll v. Musgrove et al.*, 14 Blatch. 541.—BLATCHFORD, 1878.

318. It cannot be assumed without sufficient evidence that the market for a patented thing is made solely by the patented improvement. That does not follow if such patented thing has driven all other things of its class out of the market, for energy, diligence, business tact, superior facilities, and skill and fortuitous circumstances, contribute largely to success in the market. *Garretson v. Clark et al.*, 15 Blatch. 70.—BLATCHFORD, 1878.

319. "The patentee must, in every case, give evidence tending to separate or apportion the defendants' profits and the patentee's damages, between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative ; or he must show, by equally reliable and satisfac-

tory evidence, that the profits and damages are to be calculated on the whole machine for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."—*Ib.*

320. If the complainant fails to give adequate evidence as to profits and damages, defendants are not to be put on their defence in that respect, and it is unimportant whether defendants give competent evidence or no evidence.—*Ib.*

321. Where, upon the coming in of a case from the master, the court awards only nominal damages, the case will not be sent back to the master in the absence of evidence showing good reason therefor.—*Ib.*

322. "After May 10th, 1878, at which time the defendants dissolved partnership, two of the defendants, William G. Gage and Frederick A. Gage, continued to use the device until November 1st, 1876, and . . . these two defendants, in conjunction with one Henderson, continued to use it from November 1st, 1876, until October 3d, 1877." It was held that complainants were entitled to recover not only the profits made by the defendants, but also, as against William Gage and Frederick Gage, what the former made while they were using the device. *Herring et al. v. Gage et al.*, 15 Blatch. 124.—WALLACE, 1878.

323. On the question as to what defendants have made by the use of the complainants' device, evidence as to what other like devices save is important.—*Ib.*

324. "In settling an account between a patentee and an infringer, the real inquiry is, What is the advantage which the infringer has derived from the use of his invention? If he has derived a profit attributable directly to the employment of the invention, the profit belongs to the patentee and is the measure of his recovery."—*Ib.*

325. "The infringer is, at the election of the patentee, treated as a trustee, and as such required to account for the profits actually made by the use of the patentee's property. It would be a novel defence to permit a trustee, who has made a profit by the use of the money or property of his *cestui que trust*, to show that he would have made an equal profit if he had used the money or property of a third person, or if he had used his own money or property."—*Ib.*

326. "Undoubtedly interest and cost of power enter into the account of profits to be ascertained from a given manufacture. Profit is the gain made upon any investment when both receipts and payments are taken into the account. Where

interest has been paid upon the capital invested, or where it is to be paid upon borrowed capital, it should be allowed in estimating profits."—*Ib.*

327. Profits do not usually draw interest without a special order of the court. *Partes et al. v. Booth*, 102 U. S. 96.—SUP. CT. 1879.

328. Expenses and counsel fees are not to be allowed as damages.—*Ib.*

329. "The provision in law which gives a complainant in equity, whose right is established and has been infringed, the right to recover damages in addition to profits, appears to intend that he may have either profits or damages, as may be most for his advantage in the particular case. To this end the profits may be assessed by the master, and, if they prove to be less than the damages, a sum may be added to make up the difference, which brings the decree simply to an assessment of damages." *Star Salt Caster Co. et al. v. Crossman et al.*, 4 Banning & Arden, 566.—LOWELL, 1879.

330. "There is . . . a noticeable reluctance in the courts to add damages, when the profits are a substantial sum; and very clear proof is required before the addition will be made."—*Ib.*

331. Where, in a hearing in damages and profits, the counsel employed are not experienced in such matters and overlook material points, it is proper that the court call attention thereto and allow the case to be recommitted.—*Ib.*

332. "The rule is now well settled, that the profits which a plaintiff is to recover must be those only which can be proved to have resulted from his particular improvement upon the existing machine or manufacture, and that the burden of proof is upon him to show what his profit was. The rule, though just, is at times harsh in its operation."—*Ib.*

333. "An established royalty is so clearly and properly the usual measure, in case of articles made and sold, that it would not be departed from without good cause shown."—*Ib.*

334. A suit for infringement was brought against the seller of patented articles; there was a pending suit against the manufacturer of the same. The pendency of the latter suit was held not to interfere with an accounting in damages and profits in the former suit. *Tucker v. Burditt et al.*, 4 Banning & Arden, 569.—LOWELL, 1879.

335. "Reduction of prices and consequent loss of profits, enforced by infringing competition, is a proper ground for awarding damages. The only question is as to the character and sufficiency of the evidence in the particular case."

*Sargent v. Yale Lock M'fg Co.*, 17 Blatch. 244.—BLATCHFORD, 1879.

336. Witnesses estimated the value of complainant's patented device in a lock made and sold by defendant at a certain sum. The court rejected this sort of testimony. *Sargent v. Yale Lock M'fg Co.*, 17 Blatch. 249.—BLATCHFORD, 1879.

337. In estimating damages and profits, "where there were two factors, the value or proportion of one of which was known and the other unknown, and which co-operate with each other, they must necessarily be treated as co-equal in their contribution to the general result."—*Ib.*

338. Where an infringing defendant used the invention of complainant until a subsequent invention was made by a third party, it was held equitable to allow complainant for the use of his device, in an accounting, a sum equal in value to the said subsequent invention during the period the patented device was used by defendant.—*Ib.*

339. Where defendant's article became unsalable, and the use of complainant's patented device restored its salable character, there was an advantage which, on proper evidence, might be measured in money value and recovered.—*Ib.*

340. The price paid for a license by an infringer after he has been prosecuted does not tend to prove an established license fee. *Greenleaf v. Yale Lock M'fg Co.*, 17 Blatch. 253.—BLATCHFORD, 1879.

341. Where two suits are pending for infringement, one against the maker of an infringing article and the other against the seller, accounting will only be ordered in the case against the maker. *Harper v. Cooke et al.*, 5 Banning & Arden, 50.—LOWELL, 1879.

342. Where one of the defendants has received nothing, otherwise than as a stockholder of the other defendant, on account of the infringement, no decree for the payment of any money can be made against him. *Steam Stone Cutter Co. v. Windsor M'fg Co. et al.*, 17 Blatch. 24.—WHEELER, 1879.

343. "There was nothing in the statutes relating to patents, before the act of 1870, providing expressly for the recovery of the gains and profits of an infringement of a patent by suit in equity. The right must have been derived from the application of the general principles of justice, as administered in courts of equity."—*Ib.*

344. "The patentee owns the monopoly of the patented invention. When an infringer converts any part of the monopoly into money or into anything else, the owner has the right to

follow his property in its new form. The person in whose hands it is has become his trustee; not because he was ever a trustee of the invention or monopoly, or had any right whatever to dispose of it for the owner, but because he had the money or other thing in his hands, which the owner of the invention had the right to claim because the invention brought it."—*Ib.*

345. Defendants made sales of an infringing machine for profit; that profit complainant was entitled to have. Defendants made other infringing machines at a loss, not selling them. Such loss cannot be deducted from such profits.—*Ib.*

346. Insurance premiums are not to be allowed in computing defendants' profits.—*Ib.*

347. Local taxes are not to be allowed in computing defendants' profits.—*Ib.*

348. Where defendants have sold for profit the machine patented to complainant, "the only reason why the orator is entitled to any avails of the sales is, that by the sales the defendants have converted the orator's property into money, which the orator is entitled to have in place of the property. The sale, to be an infringement, so as to entitle the orator to anything more than a mere nominal sum, must be a sale for use."—*Ib.*

349. In getting at the profits of a defendant corporation which had sold infringing machines, the court took the gross sum realized by the defendant corporation from its infringing sales and deducted therefrom, *first*, the cost of the machines; *second*, an item for the use of real or personal estate and repairs; *third*, salaries of certain stockholders, and *fourth*, the sum due to the presence of another invention.—*Ib.*

350. Defendants sold an infringing machine with a special guaranty of the right to use, and received therefor \$1000 in money and \$3000 in notes; the contract between the defendants and the purchaser was afterward rescinded; complainant was given no part of this money as defendants' profit.—*Ib.*

351. In computing defendants' profits, the entire profit on the infringing article is to be allowed "only in a case where the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patentable feature." *Garretson v. Clark et al.*, 4 Banning & Arden, 536.—BLATCHFORD, 1879.

352. It is "not the province of the master, nor is it the province of the court, to suggest any specific line of proof either as proper or necessary. The burden is on the plaintiff to lay a basis, by evidence, for ascertaining the proper profits or damages. If he produces certain evidence, and lays a certain basis, all that the mas-



ter and the court are to do is to say whether he has made out his case or not. If he has not made out his case, that is all there is to be said."—*Ib.*

353. "A plaintiff is required to separate between the patented part of what the defendant makes and sells and the unpatented parts, and not between such patented part and something which the defendant does not embody in his machine. The distinction is a plain one."—*Ib.*

354. A defendant that has profited by infringing a patent cannot be treated as a trustee *de son tort*. *Sayles v. Richmond, Fredericksburg & Potomac Railroad Co.*, 3 Hughes, 172.—HUGHES, 1879.

355. "A claim to recover profits or damages for past infringement cannot be severed from the title by assignment or grant, so as to give a right of action for such claim, in disregard of the statute. The profits or damages for infringement cannot be sued for except on the basis of title as patentee, or as such assignee or grantee of the whole or a part of the patent, and not on the basis merely of the assignment of a right to a claim for profits or damages severed from such title." *Gordon v. Anthony et al.*, 16 Blatch. 234.—BLATCHFORD, 1879.

356. A rescinded contract between complainants and respondent rejected as a measure of damages, and, in default of other evidence, nominal damages awarded. *Bussey et al. v. Excelsior M'fg Co.*, 1 McCrary, 161.—TREAT, 1880.

357. "Whatever question there might be if the subject was new, it now seems to be settled that savings in cost, by infringement of a patent, may be recovered as profits." *Campbell v. James et al.*, 18 Blatch. 92.—WHEELER, 1880.

358. By the court: "It is said that the master erred, because the defendant might have used another form of stamp which would not have been an infringement, and that the saving by using the patented invention instead of that would have been much less than the saving reported. It does not appear, however, but that such use of the other form would have been an infringement; and if that appeared, it appears that the other form was not known to the defendant, and that the saving reported was in fact saved by substituting the patented improvement for what was known and would probably otherwise have been used. The saving, therefore, appears to be wholly due to the infringement."—*Ib.*

359. That the patented invention can only be used in the postal service is not pertinent. "If it was true that because those who can make use of a patented invention could also do without

it, would show that no injury resulted to the owner of the patent from such use, and cut off all claim for damages, there are probably few inventions that would sustain claim for damages at all."—*Ib.*

360. That the saving made through the infringement has inured to the benefit of the Government, through the act of the defendant, a postmaster, will not save the defendant from paying the same to complainant.—*Ib.*

361. "He could have refused the office, or resigned it, or have let this invention alone."—*Ib.*

362. The right to recover damages and profits for infringement of a patent is a chose in action.—*Ib.*

363. By the court: "The profits allowed consist in money saved from salaries."—*Ib.*

364. Complainant's patent was for a combination of a swing truck with a locomotive. The master held that, "in estimating profits, the comparison of advantages should be made between complainant's invention and an engine having a rigid truck and forward driving wheels without flanges," which "was then in common and unrestricted use," the advantages of complainant's invention being obtained thereby. Complainant offered little or no evidence, on this point, and the master found that no profits had been realized. Finding sustained. *Locomotive Safety Truck Co. v. Pa. R. R. Co.*, 2 Fed. Rep. 677.—STRONG, 1880.

365. Complainant having a fixed royalty for the use of the invention, the master adopted such royalty as the measure of damages.—*Ib.*

366. The "rule is that the measure of profits, as distinguished from damages for which an infringer is responsible, is the aggregate of savings which he has made from the use of the patented invention, above what he would have made in doing the same work by the use of any other device or process existing at the time, capable of accomplishing the same purpose or obtaining the same result and free or open to public use."—*Ib.*

367. "In accounting for profits, as such, for which an infringer is liable, the state of the art when the invention was made is always to be considered."—*Ib.*

368. "The defendants are not to be held liable for profits in any amount unless there is some satisfactory evidence that profits to that amount were made." Estimates rejected.—*Ib.*

369. "There is no conceivable reason why the damages sustained by a patentee, from the infringement of his patent, are not the same whether he proceeds at law or in equity."—*Ib.*

370. "It is doubtless the general rule that in-

terest to the final decree is not to be allowed upon profits or damages, because, until the decree, they are unliquidated." Where a royalty is adopted as a measure of damages, the rule is otherwise, for in that case the damages are liquidated from the first.—*Ib.*

371. Complainant's patented locomotive lamp was the first one to burn kerosene successfully in that class of lamps. The master computed defendant's profits by ascertaining the saving defendant made by burning kerosene in these lamps over what it would have cost to burn lard oil, the cheapest of other oils. The master computed complainant's damages by the profit he would have if he had sold the defendant its lamps. The master found the same profits where only a few claims were infringed as where more claims were infringed, for the reason that in the former case enough of the invention was used to enable the lamps to burn kerosene. Finding sustained. *Williams v. Rome, W. & O. R. R. Co.*, 18 Blatch. 182.—BLATCHFORD, 1880.

372. In suits at law damages only are recoverable; in suits in equity damages and profits are recoverable.—*Ib.*

373. The patent "was for an additional partial set of reeds placed in the common double reed board of an organ." The profits made on these by defendants were found by the master, who reported that a portion of such profits was due to the wave tuning of said partial set, wave tuning being old. No deduction was made from the profits on account of the wave-tuning factor. *Burdett v. Estey et al.*, 19 Blatch. 1.—WHEELER, 1880.

374. The master reported "that horizontal partial sets placed on the upper surface of the reed board, instead of being inclined to it, not covered by any patent and not then in use, would have been practically as good as the inclined sets" of the patent. The court said of defendants: "They are liable to account . . . for what they have gained, . . . without reference to what they might have gained if they had taken something else."—*Ib.*

375. "As no profits accrued to the defendants on a part of the organs made and disposed of by them containing the orator's improvement, none can be decreed to the orator on account of that infringement."—*Ib.*

376. Profits made between the date and ante-date of a patent can be recovered.—*Ib.*

377. Infringement, with knowledge of complainant's patent, makes the defendants trustees of the profits realized, for complainant's benefit.—*Ib.*

378. Interest may be allowed on profits realized by defendants through infringement committed while defendants had knowledge of complainant's patent.—*Ib.*

379. Where interest on defendants' profits is allowable, it does not begin to run till after disclaimer filed, in that case where a disclaimer is necessary.—*Ib.*

380. In that case where a patent had two claims and the plaintiff had an established license fee of \$10 for the use of what was covered by the first claim, and \$50 for what was covered by both claims, and the first claim turned out to be void, it was held that no measure of damages as to the second claim was in evidence, and that nominal damages only must be found for plaintiff. *Proctor v. Brill et al.*, 4 Fed. Rep. 415.—BUTLER, 1880.

381. A salesman on commission can be enjoined and his profits recovered by complainant. A suit against the salesman's employer is no bar to the suit against the salesman. In an accounting by the employer, the salesman's profits—*i.e.*, commission, cannot be recovered from the employer. *Steiger v. Heidelberger*, 18 Blatch. 426.—BLATCHFORD, 1880.

382. A case went to a master after a decree *pro confesso*. Complainants were unable to show the number of infringing articles made and sold by defendant. Thereupon only nominal damages were recovered. *Fisk et al. v. West, Bradley & Cary M'fg Co.*, 19 O. G. 545.—BLATCHFORD, 1880.

383. Where Congress has fixed a maximum amount of damages to be allowed under a patent in a claim against the Government, and the court is of opinion that the claimant is entitled to more than the sum fixed, it will order the sum fixed by Congress. *Dahlgreen v. United States*, 16 Nott & Hopkins, C. C. 30.—DAVIS, 1880.

384. The Supreme Court gave damages, "with costs and interest, until paid, at the same rate per annum that similar decrees bear in the courts of the State of Illinois." This was held to mean the rate of interest prescribed in the statutes of Illinois. *Chicago & Alton Railroad Co. v. Turvill*, 101 U. S. 863.—SUP. CT. 1880.

385. "It is urged that the right to recover gains and profits would not pass without the right to the patent itself. This is probably true at law, but not so in equity." *Campbell v. James et al.*, 5 Fed. Rep. 806.—WHEELER, 1880.

386. "The statute authorizes an increase of damages, not an increase of gains and profits."—*Ib.*

387. When the infringement is not wanton, and the defendants' use is really to the advan-

tage of complainant, damages will not be increased.—*Ib.*

388. The master took the profit made by complainant on a single one of the infringing articles as the amount of complainant's damage on a single infringing article sold by defendant, and computed this damage on all the infringing articles sold by the defendant; and the finding was sustained by the court. *Am. Saw Co. v. Emerson*, 8 Fed. Rep. 806.—MCKENNAN, 1880.

389. Prior settlements of damages by agreement of parties do not make a precedent for a court to follow. *Matthews v. Spangenburg*, 14 Fed. Rep. 350.—WALLACE, 1882.

390. By the court: "Everything is left to conjecture and speculation, except the fact that there was a recognition of liability to the complainant for the unlawful use of his invention. The master fixed the complainant's damages at a nominal sum. In this there was no error."—*Ib.*

391. The master gave complainant "the entire profits of the business, on the ground that the defendants failed to separate the profits traceable to the defendants from the general profits." The court held that the complainant must offer proof properly apportioning the profit due to the use of the invention, or only have a nominal award. *Kirby v. Armstrong et al.*, 10 Bissell, 135.—GRESHAM, 1881.

392. A master found the savings and advantages realized by the defendant railroad company, through the use of the complainant's patented brake, to be \$30 per annum for each car; also that for the latter portion of the term of infringement the complainant had an established license of \$25 per annum for each car. The court adopted the rate of \$25 per year as the rate of damages for the whole term of infringement. *Emigh v. B. & O. R. R. Co.*, 4 Hughes, 271.—MORRIS, 1881.

393. The savings effected by the use of the above invention were arrived at by comparing the patented brake with a prior brake.—*Ib.*

394. It is necessary only for the complainant to show to the court before its masters, by testimony, facts upon which compensation is to be based, and by which it may be computed, as clearly as circumstances will permit.—*Ib.*

395. When the patent is one which is valuable to the patentee only as others will use it, an established license fee, if there be one, is the safest rule of compensation.—*Ib.*

396. The right to recover the gains, savings, and advantages of an infringement in an equity suit existed prior to the act of 1870, and the specification thereof (as well as the profits and

damages) in an interlocutory decree referring the case to a master for an accounting is proper. *Coburn et al. v. Schroeder et al.*, 19 Blatch. 493.—WHEELER, 1881.

397. Five dollars being found as the damages recoverable on infringing articles made and sold in the United States, \$2.50 was found as damages on infringing articles made here and sold out of the United States, the court remarking that this was not intended as a precedent in other cases against a higher rate of damages for infringing articles made here and sold out of the United States. *Ketchum Harvester Co. v. Johnson Harvester Co.*, 19 Blatch. 367.—BLATCHFORD, 1881.

398. By the court: "I consider the law to be well settled that when a complainant's patent covers but one of many features of a machine, the gains on the whole machine cannot be reckoned as damages, but only the gains arising from the use of the special device or element covered by the complainant's patent. If the other parts of the machine, which go to make the whole a complete and operative mechanism manufactured by defendants, are covered by patents in which complainant has no interest, or even if they are public property, the complainant cannot claim profits made by the use of such parts even in combination with his device." *Calkins v. Bertrand*, 10 Bissell, 445.—BLDGETT, 1881.

399. The complainant must offer proof, reliable and tangible, not conjectural or speculative, what defendant's profits and complainant's damages are, or nominal damages only will be awarded.—*Ib.*

400. By the court: "For illustration, if an operative cultivator could be made without the use of any patented device, but by the use of a certain patent a better or improved cultivator can be made, the damages to the patentee for the use of a patent so used would be the increased value given the machine by the use of the patent, not the profits on the entire machine."—*Ib.*

401. The United States Circuit Court for the District of Vermont, in Rule 11, provided that "the creation, continuance, and termination of liens and rights created by attachment of property, on the arrest of a defendant shall be governed by the laws of this State." *Held*, that it had the right, in an equity cause, to issue a writ of sequestration, in the nature of an attachment, to created lien for satisfying a decree, pending the taking of an account of damages and profits in a patent suit. *Steam Stone Cutter Co. v. Sears*, 20 Blatch. 23.—WHEELER, 1881.

402. The defendant, a user of the patented

article in his business, infringed by making the article for his own use. *Held*, that if he had not thus infringed he would have been obliged to buy of complainant, and that complainant's damages were the profits he would have made if he had sold the articles to defendant; and that the fact that the patent covered only a part of the articles does not affect the rule. *Putnam v. Lomar*, 10 Bissell, 546.—BLODGETT, 1881.

403. "The theory of the law is that the complainant shall recover the actual damages which he has sustained by reason of the infringement. In arriving at such damages, it is held that where the patentee does not desire to retain a close monopoly of his invention, the amount of the license fee which he has fixed in his dealings with other parties may be considered a proper compensation in damages, where the character of the infringement does not justify exemplary damages." In this case complainant had in evidence one license providing for a royalty of \$10 on each patented machine, qualified by various provisions materially affecting its character as a license. Another license to another party provided for a royalty of \$3; under this license nothing was done, and it afterward was revoked. Under still another license a royalty of \$5 was provided subject to reduction to \$3 for faithful performance; this license was still in force. The court fixed the damages at \$3 on each machine. *Graham v. Geneva Lake Crawford M'fg Co.*, 11 Fed. Rep. 138.—DYER, 1881.

404. For an example of an allowance of interest, on damages awarded, from the date of interlocutory decree, see — *Ib.*

405. Defendant having made carpets with infringing designs which were exact counterparts of complainant's patented designs, and having made no defence to the action, was found to be a "wilful infringer," and as such was held to "most rigid accountability," with no intendment in his favor founded upon inconclusiveness of the evidence; and the proof was "interpreted most liberally in favor of the complainant." The damages were found by multiplying the number of yards of infringing carpet sold by defendant, by the profit per yard that complainant had made prior to the infringement. *Bigelow Carpet Co. v. Dobson*, 10 Fed. Rep. 385.—MCKENNAN, 1882.

406. The patent in suit was for pressing and binding short cut hay into bales. The master having reported \$4 per ton as defendants' profits, the court annulled the finding, held that defendants' profits were "the extra profits due to selling short cut hay pressed and bound into bales, over selling it as loose, short cut hay, or as short

cut hay manipulated for market in some prior known way;" and held that, in the absence of evidence to be offered by complainants establishing such profits, only nominal profits could be allowed. The case was referred back to the master, with liberty to complainants to give further evidence if the master saw fit to allow it. *Faulks et al. v. Kamp et al.*, 10 Fed. Rep. 675.—BLATCHFORD, 1882.

407. For a *résumé* of decisions upon damages and profits in patent cases, see — *Root v. L. S. & M. S. Railroad Co.*, 105 U. S. 189.—SUP. CT. 1882.

408. "If, without the improvement, a machine adapted to the same uses can be made which will be valuable in the market, and salable, then, as was further said in *Mowry v. Whiting*, page 651, the inquiry is, 'What was the advantage in cost, in skill required, in convenience of operation or marketability' gained by the use of the patented improvement?" *Goulds M'fg Co. v. Cowing et al.*, 105 U. S. 253.—SUP. CT. 1882.

409. Where a patented pump for oil wells had but a local and very limited market, the defendants' whole profit was allowed complainant, although the invention was but a mere improvement on the existing devices, the court saying: "This is an exceptional case."—*Ib.*

410. The court objected to the master's ascertainment of defendants' profits because, in the making up of defendants' net cost, there was "nothing for the use of tools, machinery, power, and other facilities employed in the manufacture, and nothing for wastage and expense of marketing."—*Ib.*

411. "The mere assignment of a patent would give the assignees no right to damages or profits already accrued." *Merriam v. Smith et al.*, 11 Fed. Rep. 588.—LOWELL, 1882.

412. "A practice has grown up in the circuit courts of looking upon a patentee's remedies at law and in equity as concurrent, and upon his rights to profits as something which follows necessarily from the establishment of his title. But it has been decided by the Supreme Court at this term that a court of equity is to proceed under the patent law just as it does in any other case of a violated legal right, and to grant relief only when the remedy at law is inadequate."—*Ib.*

413. Complainant had a patent for a machine for forming welts which was used in making leather trimmings for carriages. For many years defendants used the improvement in the manufacture of boots and shoes. Complainant had not had knowledge of the infringement, nor had

the defendants had knowledge of the patent. It was held that complainant could not recover profits, but might damages by a suit at law. But an injunction was ordered to issue with an order for an account from the date of the bill of complaint, or from any earlier time when defendants had knowledge of complainant's title.—*Ib.*

414. "The right to recover for infringement of a patent, like other choses in action, is assignable in equity, and the real owner of the right is entitled to maintain a suit upon it, in equity, in his own name." *Shaw v. Colwell Lead Co.*, 20 Blatch. 417.—WHEELER, 1882.

415. By the court: "The infringement by defendants of complainant's patent was neither wilful nor malicious. The case does not justify a decree against them beyond the net profits realized by the manufacture and sale of the patented articles. That sum is found to be \$28.06." *Ford v. Kurtz et al.*, 11 Bissell, 324.—HARLAN, 1882.

416. By the court: "The faucet consisted in connection with a twisting handle, which is a portion of the screw follower in this new combination of old and common elements. There are no other parts or features in the structure apart from the ordinary induction and education way. Other faucets had quick-threaded screws, and valves operated by the screw follower, and probably had their own advantages, but this novel arrangement of all the elements of such a faucet had a peculiar utility which gave it its value and character, and created a wide market. When the defendants took this combination, they took that which had given the Jenkins faucet its value and success, and they took the combination which made the faucet." *Zane et al. v. Peck Bros. & Co.*, 13 Fed. Rep. 475.—SHIPMAN, 1882.

417. By the court: "The remaining class of exceptions is, that the master erred in finding that the plaintiffs were damaged by the defendants' infringement by loss of sales to the amount of \$1615.14, that amount being the profits which the plaintiffs would have made had they supplied the same purchasers. I think that the master was justified by the testimony in finding that, but for the infringement, the plaintiffs would have made the sales of their faucets to their old customers which were made to them of the infringing faucets by the defendants, and that the plaintiffs' profits would have been \$1615.14."—*Ib.*

418. By the court: "The question on this point of the case being as to the loss or damages, in excess of the defendants' profits, which the plaintiffs sustained by reason of the infringement,

and the master having properly found that, by reason of the infringement, the plaintiffs lost the specified sales, the damage is fairly estimated by the amount which the plaintiffs would have received for the goods, deducting the cost of manufacture and of sale. In the cost of sale, the store expenses, such as clerk hire, storage, freight, etc., should be estimated upon sales of any large amount. In this case, in view of the fact that the principal part of plaintiffs' faucets are sold by Mr. Ades, of New York, this class of expenses upon sales of about \$3800 would add such a trifling amount to the existing expenses of conducting the plaintiffs' business, that it is not desirable to subject the defendants to the expense of sending the case back to the master for a reaccounting. The amount, if any, which would be deducted from the \$1615.14 would be very small. The defendants' exceptions are overruled."—*Ib.*

419. The patented thing was a cartridge which the Government had used. The manufacturer's price was \$1.25 a box. The court found that twenty per cent of the manufacturer's selling price is ordinarily considered a fair royalty. This amounted to twenty-five cents a box. The court deducted five cents a box for the presence of another invention in the cartridge, and allowed the patentee twenty cents a box. *McKeever v. U. S.*, 14 Nott & Hopkins, D. C. 396.—SUP. CT. 1878.

420. By the court: "The rate of damages in patent cases may now be said to be generally (1) that the plaintiff may recover, in equity, the profits which the infringer has made from the use of the invention; or (2) that he may recover at law the profits which he, the plaintiff, has lost by reason of the defendants' infringement; and that these profits lost, where it can properly be done, will be regarded as simply the fee which would have been charged if the infringer had procured a license. But in cases where the plaintiff has evinced an intention to exercise an exclusive use of his invention, and in cases where the sales of licenses have been too few to establish a criterion of their actual market value, courts have sought for other elements or evidences to determine the profits lost."—*Ib.*

421. Where complainant has had a decree for the recovery of profits upon infringing machines against one party, such machines go to a third party free from liability to complainant; and an injunction restraining the use of such machines *pendente lite* will be dissolved. *Steam Stone Cutter Co. v. Sheldons et al.*, 21 Blatch. 260.—WHEELER, 1883.

422. "An infringer is liable to account for the

profits of the infringement to the owner of the patent, because they are the avails of the property of the owner in the hands of the infringer, which he has no right to detain from the owner." *Lewis v. Standard Steam Laundry Machine Co. et al.*, 21 Blatch. 184.—WHEELER, 1883.

423. In this case the amount of a former royalty was found as damages upon a basis that the profits were retained by the defendants, and that the royalty furnished no measure of damages beyond profits.—*Ib.*

424. By the court: "The damages recovered by the orator are not for a sale for use, which would probably free the whole use." *Matthews v. Spangenberg*, 15 Fed. Rep. 813.—WHEELER, 1883.

425. Where the defendants show that other parties had infringing articles in the market during the period covered by the accounting, but do not show that such other infringing articles had an effect in reducing complainants' prices, the presence of such other articles in the market is an immaterial fact. *Fitch et al. v. Bragg et al.*, 21 Blatch. 302.—SHIPMAN, 1883.

426. The article in dispute being a snap hook, and the improvement in question being an improvement in the tongue, the court held that it was not incumbent on complainants to apportion the damages as between the tongue and other parts.—*Ib.*

427. By the court: "I do not suppose that the principle that the plaintiff must affirmatively show by satisfactory evidence how much of the damage was attributable to the infringement means that, after he has proved that the infringement was the sufficient operative cause of the entire damage, and has refuted all the suggestions of contributory causes which the defendant made, he must disprove the existence of all the possible causes which might have existed, but which it was not suggested ever did exist."—*Ib.*

428. "The defendants are liable only for the pecuniary advantages which accrued to them by the use of complainant's system, beyond that which would have resulted from the use of the other systems which they had the right to employ in attaining the same end." *Munson v. City of New York*, 21 Blatch. 342.—WALLACE, 1883.

429. The patented invention being an improvement in preserving, filing, and verifying bonds, coupons, certificates, and the like, an estimate by the treasurer of a railroad corporation, who had used the patented system, as to the savings attained thereby, was rejected as incompetent evidence.—*Ib.*

430. A decree for nominal damages recovered by a patentee against the manufacturer of infringing machines, does not operate to license those machines as far as users of such machines are concerned. "The infringement by the manufacturer and the infringement by the user of an infringing machine are separate trespasses, and judgment because of one is no bar to an action for the other. To create a bar there must be satisfaction, and nominal damages is not satisfaction." This rule is not altered because the nominal damage against such a manufacturer was found under a stipulation entered into by the parties. *Blake v. Greenwood Cemetery*, 21 Blatch. 222.—BENEDICT, 1883.

431. Where a patentee received \$600 on all the machines manufactured under his patent, that sum was taken as the damages to be found against an infringer.—*Ib.*

432. Where complainant showed the value of the advantage of his stone-crushing machine over crushing stones by hand, but the evidence showed the existence of another stone-crushing machine open to defendant to use, with no evidence as to the value of complainant's machine over such other machine, it was held that the evidence did not warrant the finding of more than nominal profits.—*Ib.*

433. Where a license fee is appurtenant to a patent having a number of claims, and defendants infringe only one claim, such license cannot be taken as a measure of damages. *Wooster v. Simonson et al.*, 16 Fed. Rep. 680.—WALLACE, 1883.

434. "Where damages are sought by the patentee against an infringer, his inquiry, as in all other cases where a plaintiff's right of property has been invaded, is, what is the value of the right and the extent of the injury? If the injury amounts to a deprivation or appropriation of the entire right of property in a patent, the value of the patent is the measure of damages." *Ib.*

435. A license fee is ordinarily the measure of damages.—*Ib.*

436. "Although the patent secures to the patentee the whole invention as described and claimed, the several claims may secure him against quite different and distinct appropriations of his property. Where less than the whole invention has been infringed, evidence must be given to show the nature of the part appropriated."—*Ib.*

437. "Where a patentee recovers from an infringing manufacturer full damages and profits, on account of the infringement, the purchaser from such a manufacturer, who is a user of the machine, will be protected in such use against

a suit for infringement, as he would be if he were a licensee from the patentee. . . . To effect such a result it must further appear that the patentee's claim to profits and damages against the manufacturer has been actually paid and satisfied." *Allis v. Stowell*, 16 Fed. Rep. 788.—DYER, 1883.

438. "The patentee of an improvement is limited in his recovery to such profits as may be properly apportioned to the use of his improvement. He can only recover profits upon the entire article where such article is wholly his own invention, or where its entire value is properly and legally attributable to the patented feature." (Citing many cases.) *Maier v. Brown*, 17 Fed. Rep. 736.—BROWN, 1883.

439. "If one discovers a new composition of matter, such as gun-cotton, nitro-glycerine, or vulcanized rubber, or invents some new machine, such as the telephone, or some new article of manufacture, such as barbed wire, or a new pavement, he would obviously be entitled to damages arising from the manufacture and sale of the entire article. Upon the other hand, if his invention were limited to some particular part of a large machine, such as the cut-off of an engine, the axle of a wagon, or the seat upon a mowing machine, it is equally clear that his recovery must be limited to such profits as arise from the manufacture and sale of the patented feature."—*Ib.*

440. "Damages, too, must be proved and not left to conjecture, and the fact that it is impossible to separate the profits arising from the improvement from those incidental to the manufacture of the whole machine, is an insufficient reason for awarding the plaintiff more than he is justly entitled to. (Cases cited.) In case he is unable to prove how much of the entire profits upon his machine is due to his patent, he can recover only nominal damages."—*Ib.*

441. The patented thing being a rustic trunk covered with slats upon the outside, the master gave the complainant the entire profits arising from the manufacture and sale of the trunk. The court sustained exceptions to this action of the master, and said: "A proper method of estimating damages in such cases would be to take the profits made by the defendant upon one of these trunks, and deduct from them the profits upon an ordinary trunk of similar size and general description. The difference might be properly attributed to the plaintiff's invention. . . . If the profits on plaintiff's trunks were no larger than upon ordinary trunks, it would indicate that he had suffered no damage legally capable of estimation."—*Ib.*

442. While it is true that defendant may have sold infringing articles which complainant would have sold if defendant had not infringed, damages thereby occasioned cannot be inferred without proof. "Defendant's sales may have been the result of superior energy, diligence, and business capacity, or the accident of trade," and the burden is upon complainant to show that defendant's sales were attributable to the increased value given the thing by the patent.—*Ib.*

443. "An infringer is liable to account for the profits of the infringement to the owner of the patent, because they are the avails of the property of the owner in the hands of the infringer which he has no right to detain from the owner." *Smith v. Standard Laundry Machine Co.*, 25 O. G. 393.—WHEELER, 1883.

444. "Mere delay in seeking relief when there is no estoppel will not in general prevent an injunction, though it may preclude the plaintiff from right to an account for past profits." *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1883.

445. Where a bill of complaint does not show in the complainant a right to profits and damages accruing before the complainant took its assignment of the patent, the decree cannot cover profits and damages accruing before such assignment.—*Ib.*

446. In a case where the complainants own but a part of a patent in suit, the recovery of damages and profits must be limited to such part. *Adams et al. v. Howard et al.*, 22 Blatch. 47.—WALLACE, 1884.

447. Although a patent expires pending a litigation upon it, an equity suit previously commenced will be retained to complete the accounting.—*Ib.*

448. The plaintiff began an action at law for infringement of his patent. After beginning this action the plaintiff brought his bill in equity for the same infringement, and the case was carried to a final decree, covering all defendant's profits but no damages, because plaintiff elected to put in no evidence thereupon. He then sought to recover damages in his action at law, and the court said: "The plaintiff having elected to take judgment for his profits for the precise infringement which is the subject of this action, which judgment has not been reversed, he cannot now prosecute his action for other damages arising out of the same acts of infringement." *Child v. B. & F. H. Iron Works*, 19 Fed. Rep. 258.—LOWELL, 1884.

449. Machines made in infringement of a patent can be enjoined after the expiration of the

patent and a right to an accounting follows. *Reay et al. Ex'tr'x v. Raynor et al.*, 22 Blatch. 13.—WHEELER, 1884.

450. "As a general rule, a patentee is not entitled to interest on profits made by an infringer. The reason is that profits are regarded in the light of unliquidated damages. But in many of the cases it is said that circumstances may arise in which it would be proper to add interest." *Ill. Central R. R. Co. v. Turrill Ad'tr'x*, 4 Sup. Ct. Rep. 5.—Sup. Ct. 1884.

451. It seems that interest begins to run from the date of a final decree. Subsequent proceedings, changing the amount of the recovery, do not alter this rule so far as the amount finally recovered is concerned.—*Id.*

452. The price for a perpetual license for a driven well for factory purposes being \$125, and defendant having used the well but a short time, the court remarked that a recovery of \$125 would be excessive unless it could be shown that the defendant's profits equalled that sum. *Green v. Barney*, 19 Fed. Rep. 420.—LOWELL, 1884.

453. "The burden of proof is upon the plaintiff to show the amount of damages that he has suffered, and to furnish the jury reasonably satisfactory evidence to enable them to reach a conclusion on that subject." *Nat'l Car B. S. Co. v. Terre Haute Car & M'fg Co. et al.*, 19 Fed. Rep. 514.—WOODS, 1884.

454. "It is competent for a patentee in order to enable the jury to measure the damages, to prove contract prices at which licenses had been granted under the patent while it was in force; but . . . it is not competent for him to prove the prices paid for infringements; that is to say, payments made in settlement of infringements already perpetrated."—*Id.*

455. Where an action is at law and for damages, the defendants are liable for the value of the invention at the time they appropriated it; in estimating damages, the patented thing may be compared with unpatented things designed to serve the same end as far as may be, and also with patented things; but in the latter case the value of other patents is to be considered.—*Id.*

456. Where complainant shows that defendants have made one infringing device, and also shows that defendants have had made a number of devices for the same purpose, it cannot be assumed that all the devices are infringements, nor the burden of proof be put on defendants to separate the infringing from the non-infringing devices, and complainant is not relieved from the operation of this rule because defendants' books, when produced, do not make the desired distinction, unless the evidence goes so far as to

show that defendants have consciously done wrong in the premises.—*Id.*

457. "Where a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of other parts, so that the benefits derived from it may be distinctly seen and appreciated." *Garretson v. Clark et al.*, 111 U. S. 120.—Sup. Ct. 1884.

458. Complainant's patent being for an improvement in mop-heads, new simply in the mode of clamping, complainant proved the cost of his mop-heads and the price at which they were sold, and claimed the right to recover the difference as damages. The claim was rejected.—*Id.*

459. In an accounting "proof of license fees charged and paid, before use, for the right to use an invention, is admissible upon the same theory that proof of sales in open market of any marketable commodity is competent, because it shows or tends to show a market price. But settlements for past use of an invention cannot be brought within the rule because inconsistent with the principles upon which the rule rests. The infringer, or one who is accused of infringement, is from the necessity of the situation, under compulsion to make compensation as demanded, or to take the risk of a suit; and how much his action in a particular case of settlement may have been influenced by this or other special considerations it is impossible for the master or the court to determine, and therefore the inquiry should not be entered upon. The only way to escape the inquiry is to exclude the evidence." *Westcott et al. v. Rude et al.*, 19 Fed. Rep. 880.—WOODS, 1884.

460. "In respect to two or more claims in a patent, each of value and distinct from the other, one cannot equal both or all in value, any more than in mathematics a part can equal the whole. The licensee may, if he choose, bind himself to pay the same price whether he use the entire invention or a part only; but at the same time he acquires the right to use all, and so his agreement may not be unreasonable, but if, as against an infringer, such a license can have any force reasonably, it must be in the way only of establishing a royalty for the entire invention."—*Id.*

461. Defendants were found to infringe one claim among the six in complainant's patent, and the master reported as damages the license fee complainant was accustomed to charge for a license under this patent generally. The case was again referred to the master, with liberty



to the complainant to reopen his proofs, and he thereupon proved, by parol, that his said license fee was for precisely such a use as defendants had employed. On the coming in of the report, defendants objected to this finding as making a new case. The court held that the procedure was proper and overruled the exceptions. *Wooster v. Simonson et al.*, 20 Fed. Rep. 316.—WHEELER, 1884.

462. The patented thing was a mirror. Prior to infringement by defendants, complainants had the sole sale thereof. The master awarded damages on the theory that complainants lost the sale of all the mirrors sold by defendants. The judge refused to confirm this finding, and said: "The question is not what, speculatively, the complainants may have lost, but what they actually did lose. If the defendants had not sold the patented mirrors to their customers, it does not follow that the complainants would have sold them to the same customers or to retail merchants. . . . If it had been shown that the ordinary sales of the complainants for the same market fell off during the period of defendants' sales, in an amount equal to, or even approximating reasonably to the amount of defendants' sales, the master's finding could be approved. . . . For aught that appears, the defendants created a market by their own enterprise, and by selling the mirrors at a reduced price, that otherwise would not have existed." The court suggested, as a proper measure of damages, the profits that complainants would have made if defendants had continued to buy of complainants during the infringing period, at the rate of prices they had previously bought. *Hall et al. v. Stearn et al.*, 20 Fed. Rep. 788.—WALLACE, 1884.

463. Where damages and profits for infringement of a patent are under consideration, and it is claimed that expenses appurtenant to the maintenance of the defendant during a past period of his lunacy should be deducted from the damages and profits, it is not within the province of the court to make such allowance. *Avery et al. v. Wilson*, 20 Fed. Rep. 856.—DICK, 1884.

464. The complainants' patent being for improvement for burning tan-bark and the like in a wet state, the master in his first report gave complainants as profits the cost or value of the wood, which but for the use of the patented invention defendants would have burned. The court set this finding aside, and the master in his second finding gave nominal damages only, which report was confirmed and an appeal taken to the Supreme Court. The Supreme Court approved the latter finding, and said: "The difference between the cost of generating the heat by

the use of the improvements and wet tan, and the cost of producing it by wood as a fuel, could not be the measure of profit, unless with these improvements, or with other methods, wood was the only means besides wet tan of producing the same heat, and that was not shown. Other substances may have answered equally as well as fuel." *Black et al. v. Thorne et al.*, 111 U. S. 122.—SUP. CT. 1884.

465. "It does not always follow that because a party may have made an improvement in a machine and obtained a patent for it, another using the improvement and infringing on the patentee's rights will be mulcted in more than nominal damages for the infringement. If other methods in common use produce the same results with equal facility and cost, the use of the patented invention cannot add to the gains of the infringer or impair the just rewards of the inventor."—*Id.*

466. Where a license fee has been generally paid, its amount may be generally taken as a criterion of damages.—*Id.*

467. Complainant's patented machine was a device for repairing railroad rails. Defendant sought to reduce complainant's profits by showing that defendant might have used, with equally good results, another device originated subsequently to complainant's patent. The court held that such a comparison could not be made, and that in making such comparison it must be of the complainant's patented device, "with what was known and open to the public at or before the date of the . . . patent." *Turrell v. Ill. Central R. R. Co.*, 20 Fed. Rep. 912.—HARLAN, 1880.

468. In the case last quoted the court said: "Indeed, upon the principle or theory asserted by defendant's counsel, the junior patentee may himself use the invention of a prior patentee without liability to the latter for profits, provided he shows that had he used his own invention he would have accomplished the same, or better, at the same or less cost. I do not believe such to be the law, although in the several cases cited by counsel there are general expressions which seem to sustain that view. But, after close study of those cases, I am of opinion that in no one of them was the precise point now under consideration in the mind of the court, or necessarily involved in the decision."—*Id.*

469. A part of the question before a master was, what portion of defendant's profits arose from the use of certain non-infringing machines? The master found this sum to be represented by a certain fraction of the whole. Defendant contended that this sum would be properly rep-

resented by a larger fraction of the whole. The court, on the evidence, was unable to agree exactly with the master or with the defendant's contention, and reached a result by adopting a mean or middle point between the two.—*Ib.*

470. Where a patentee does not stamp the patented articles he sells with the date of his patent, as required by law, but gives an infringer notice, the patentee cannot recover damages or profits arising prior to the time of the notice. *Allen v. Deacon*, 21 Fed. Rep. 122.—*SAWYER*, 1884.

471. An action at law or a bill in equity can be maintained during the life of a patent for the use of patented machines apart from the sale, if there has been no recovery for the sale and use. *Steam Stone Cutter Co. v. Sheldons et al.*, 22 Blatch. 484.—*WHEELER*, 1884.

472. A complainant cannot, in any mode, recover both the profits of a sale for use and the profits of the use. Each is a trespass on the complainant's exclusive rights, but not a separate and distinct trespass. A recovery for one includes a recovery for a part, at least, of the other, so that a recovery can be had for either but not for both. When a complainant has a recovery for one he cannot have a recovery for the other.—*Ib.*

473. Recovery of the profits of a sale for use, vests the title to the use in the purchaser of the patented machine.—*Ib.*

474. "Where an owner of a patent has compensation for the sale of a specific machine embodying the invention, that machine is forever freed from the monopoly."—*Ib.*

475. "Evidence of settlements for infringements is not competent to show a license fee or royalty; and upon the same principle a license (for the future) given wholly or partially in consideration of a settlement for infringements, is not admissible in evidence against a stranger." *Gottfried v. Crescent Brewing Co.*, 22 Fed. Rep. 433.—*WOODS*, 1884.

476. It seems that where there is a direct conflict between the evidence of complainant and respondent as to the value of an invention, the master's finding may be based upon his opinion.—*Ib.*

477. It was shown that the patented machines had been sold at prices varying from \$100 to \$40, and that in a contract between the patentees whereby one of them was to manufacture and sell the machines, it was stipulated that the other should be entitled to a royalty of \$10 only upon each machine. It was held that while these facts constituted competent evidence against complainant in respect to the value of the invention, complainant was not concluded

thereby, because the sales were not made in such numbers and at such uniform prices, as to constitute an established license fee.—*Ib.*

478. Where the patented thing was a design for a newel post, it was shown before the master that the cost of making the posts was \$5 each, and that ten per cent was a fair manufacturer's profit. The balance the master and court gave as defendant's profits. *Simpson et al. v. Davis*, 22 Blatch. 113.—*BENEDICT*, 1884.

479. The master and the court arrived at defendant's profits by adding the manufacturer's profit to the cost and deducting the amount from the selling price. Defendants showed that they realized the same profit from another unpatented article of the same general kind, but the court held that this evidence did not affect the finding as to the defendants' profits on the patented article.—*Ib.*

480. "When it appears, in a case in equity, that the defendants' profits, derived from the use of plaintiff's invention, do not amount to so much as the plaintiff's damages arising from the infringement, the court may add to the amount of the defendants' profits a sum sufficient to make the amount awarded by the decree equal to the plaintiff's damages."—*Ib.*

481. "If one person is in any case exempt from being sued for damages for using the same machine, for the making and selling of which damages have been recovered against and paid by another person, it can only be when actual damages have been paid, and upon the theory that the plaintiff has been deprived of the same property by the acts of two wrong-doers and has received full compensation from one of them." *Birdsell et al. v. Shaliol et al.*, 112 U. S. 485.—*SUP. CT.* 1884.

482. "The question for the master to settle is the advantage which the defendant derived from the use of the part of the patented invention which was infringed, over what he had in using other machines then open to the public, and this accounting must be confined to an account of the profits received by the defendant as a direct result of the use of that part of the invention which was infringed and which is specified in the other." *Fischer v. Hayes*, 22 Fed. Rep. 529.—*SHIPMAN*, 1884.

483. "It will not be proper for the master to infer because a certain amount of advantage can be derived from the use of the patented machine, the amount of profit was enjoyed by the defendant from the infringement of the feature of the machine specified in the . . . claim," there being other claims in the patent.—*Ib.*

484. Although defendant has been adjudged

to be an infringer of only one claim among several, it is yet competent for the complainant to show the advantage over other machines derived by the use of the patented machine as an entirety, if in addition thereto he offers other evidence which tends to properly apportion that part of the profit which belongs to the mechanism covered by the claim which defendant is adjudged to infringe.—*Id.*

485. A master reported as damages what he found the defendants would have been willing to pay as a license fee on the whole machine. The machine embodied other patented devices. To warrant the finding it should have been proved that the particular patent embraced all the mechanism of value in the machine. Where the patent covers only a part of the mechanism, either it should appear what portion of the license fee was paid for its use, or what portion was paid for the use of other inventions embodied in the machine. "The fact that there was no evidence introduced as to the value of any of the other inventions, would not, of itself, warrant the conclusion that the license fee was paid solely for the use of the patent in suit. Damages must be actual and must be proved." *Porter Needle Co. v. Nat'l Needle Co. et al.*, 22 Fed. Rep. 829.—COLT, 1885.

486. "In equity as is the settled doctrine, an infringer is treated as a trustee of the patentee of the gains derived by him from the infringement." *Gordon et al. v. St. Paul Harvester Works et al.*, 23 Fed. Rep. 147.—NELSON, 1885.

487. The patented thing being a folder, the master allowed the complainants all the profits made by defendant by the use of the patented machine, in folding cloths and strips, as compared with doing the same thing by hand. Defendant took exception to this. There was evidence in the case tending to sustain this finding and no evidence adduced to contradict it. The finding was sustained. *Thompson et al. v. Wooster*, 114 U. S. 104.—SUP. CT. 1885.

488. The patented thing was a folder, and the master, in allowing profits, took no account of the fact that folded strips, such as those used by defendant, were an article of merchandise, cut and folded by different parties at a charge of only twenty-five cents for one hundred and forty-four yards, or about one sixteenth of a cent per yard, whereas the defendant was charged with a profit of one half of a cent per yard. Defendant took exception to this finding. The evidence before the master did not show by what process such folded strips were made, and as the proofs stood they must have been made by the use of the complainants' machine, for there was no

other machine upon which they could have been made. The master's ruling sustained.—*Id.*

489. In a suit upon a design patent, the findings of the Circuit Court allowed as damages "the entire profit to the plaintiffs per yard in the manufacture and sale of carpets of the patented designs, and not merely the value which the designs contributed to the carpets. There was no evidence as to that value." The Supreme Court said: "Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure to obtain a purchaser, aside from the pattern or design, and to attribute in law the entire profit to the pattern, to the exclusion of the other merits, unless it is shown by evidence as a fact that the profit ought to be so attributed, not only violates the statutory rules of 'actual damages' and of 'profits to be accounted for,' but confounds all distinctions between cause and effect." *Dobson et al. v. Hartford Carpet Co.*, 114 U. S. 439.—SUP. CT. 1885.

490. In this case, where the infringement was deliberate, where four infringing machines had been used eighteen months, and two others three years, and where the complainant was accustomed to make his patent profitable through licenses, it was held that notwithstanding the short terms of infringement, the proper measure of damages was the customary license fee. *Stutz v. Armstrong et al.*, 25 Fed. Rep. 147.—ACHE-SON, 1885.

491. "While the patentee may, if he choose, confine himself to a recovery for past infringement, and insist that the further use of the infringing machine be enjoined, yet, if he elect as his measure of damages the full license fee established by himself, the payment thereof operates to vest in the defendants the right to use the machine during the term of the patent, or until that particular machine is worn out."—*Id.*

492. Complainants' patent was for minor combinations in a tuck-marker. Tuck-markers, generally, were old. Complainants failed to prove the proportion of profits justly ascribable to their improvement. The court gave nominal damages only. *Bostock et al. v. Goodrich*, 25 Fed. Rep. 819.—BUTLER, 1885.

493. Prices paid by infringers in settlement of suits do not tend to establish a fixed royalty, and therefore a rule of damages. *Cornely v. Marckwald*, 23 Blatch. 163.—WALLACE, 1885.

494. For an example of a refusal to allow, as damages, complainant's alleged forced reduction of prices, see—*Id.*

495. It seems that where the Government uses

a patented invention without a specific contract, an implied contract arises that the Government shall pay for such use. *Hubbell v. United States*, 20 Nott & Hop. 354.—DAVIS, 1885.

496. It seems that where the Government without authority uses a patented article a license will be implied and also a contract to pay for its use. *Palmer v. United States*, 20 Nott & Hop. 432.—NOTT, 1885.

497. In a suit upon a reissued patent defendant offered no evidence and did not appear at the hearing. At the accounting in damages defendant offered the original patent in evidence, "for the purpose of showing that there was no infringement of the reissue upon any construction of it that would be valid on comparison with the original. The master rejected this evidence and took an account of the damages due to the extent of what was shown by the orator's evidence in chief." The master's finding was sustained. *Wooster v. Thornton*, 34 O. G. 560.—WHEELER, 1886.

498. "An established royalty or license fee is evidence, and not an absolute test of value."—*Id.*

499. A reduction in the price of complainant's patented goods through defendant's infringing competition, "is a pecuniary injury caused by the infringement, and is the subject of an award of damages, although the defendant may have made no profits and the plaintiff may have had no established license fee." *Yale Lock M'fg Co. v. Sargent*, 117 U. S. 537.—SUP. CT. 1886.

500. In the case last cited the patent was for permutation locks. Complainant granted no licenses, but supplied the demand for the lock and was able to supply the demand. The market for the lock was limited to safe-makers. None but a safe-maker wanted, or would buy, such a lock. The turning-bolt was the essential feature of the patented lock. Defendant adopted that turning-bolt, reduced the price of the lock, and forced the patentee to do the same. Defendant was the patentee's only competitor. The court gave, as damages, complainant's loss through enforced reduction of prices.—*Id.*

501. "The plaintiff must show what profit or damages were attributable to the use of the infringing design." *Dobson et al. v. Dornan et al.*, 118 U. S. 10.—SUP. CT. 1886.

502. Where a patented thing is a machine, which defendant has used but not made, and complainant has an established royalty, complainant, on bringing suit in equity, is entitled to an injunction without damages, or, if he prefers, an account of profits and an injunction against further use. *Bragg v. City of Stockton*, 27 Fed. Rep. 509.—SAWYER, 1886.

503. Where, of three patents in suit, one is void, the second immaterial, and only two important claims of the third are valid, nominal damages are proper. *Moffitt v. Cavanaugh*, 27 Fed. Rep. 511.—SHIPMAN, 1886.

504. Where a license fee is based on the use of a double process of which defendant has used only one part, and the value of that part is not established by evidence, nominal damages are proper.—*Id.*

505. Where an infringer makes sales of the patented goods, which the patent owner would otherwise have made, the damage to the patent owner is the loss he sustains through the loss of such sales. *Hobbie et al. v. Smith et al.*, 27 Fed. Rep. 656.—COXE, 1886.

506. If a patent owner is compelled to reduce his price by reason of an infringer's unlawful sales, such reduction of price forms a part of the patent owner's damages.—*Id.*

507. A fixed license constitutes a proper measure of damages. (Said in a case at law.) *May v. County of Fond du Lac*, 27 Fed. Rep. 691.—DYER, 1886.

508. For an example of an allowance of interest upon damages, see—*Id.*

509. "Before the act of July 8th, 1870, patentees were not authorized in a single suit to recover both profits and damages. They had their election, either to treat the infringer as their trustee, and to file a bill in equity to recover the profits which the infringer had made by the unlawful use of the patented invention, or to sue at law for the damages which they had sustained, without reference to the question whether the wrong-doer had gained or lost by its use; the measure of damages being not what the defendant had gained, but what the plaintiff had lost. But under Section 55 of that act (Section 4921 of Rev. Stat.), courts of equity, on a decree for an infringement, may award to the complainant, 'in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby.'" *Willimantic Thread Co. et al. v. Clark Thread Co.*, 27 Fed. Rep. 865.—NIXON, 1886.

510. Where a patentee has an established license fee for the use of his patent, which patent has different claims, and a defendant infringes only a part of the claims, it is the duty of the master to ascertain the relative value of the different claims as nearly as the nature and circumstances of the case allow, and to charge the defendant only as to the claims infringed.—*Id.*

511. The burden of proof is upon the complainants to prove the value of different claims under their patent. (This rule applied.)—*Id.*

512. Where there has been inexcusable laches on the part of the complainants, and entire good faith on the part of the defendants, complainants' claim to profits is destitute of equity. (In this case a license fee of \$1000 was taken as a measure of damages.) *Keller et al. v. Stolzenbach et al.*, 28 Fed. Rep. 81.—ACHESON, 1886.

513. Where a patented improvement is for a portion of a device, as for a curved harrow-tooth, profits upon the whole device are not to be given to complainants. *Tuttle et al. v. Gaylord*, 28 Fed. Rep. 97.—COXE, 1886.

514. "Royalty paid for licenses for the right to use the invention is not evidence of damages sustained by the patentee, by the sale of the patented article, sufficient to authorize a recovery. The value of some patents consists principally in the right to use the invention; the value of others, in the right to sell; an infringement by selling, and infringement by use of the patented article are essentially different invasions of the patentee's property." *Colgate v. Western Electric M'fg Co.*, 28 Fed. Rep. 146.—WALLACE, 1886.

515. "Royalty paid for the whole monopoly of selling and manufacturing under a patent, is not sufficient evidence of the value of the right to make occasional sales in a particular territory." "An exclusive licensee may well afford to pay a much larger consideration for the property right than the patentee could command from purchasers of license to compete with other sellers."—*Id.*

516. "The burden of proof is on the plaintiff to prove . . . an established fee or royalty. . . . To be binding on a stranger or infringer, sales of licenses must be sufficient in number to establish the fee or royalty charged for the use of the patent at its market value. . . . These license fees must be sufficient in number to establish the fee or royalty charged, and must also be uniform, and be actually paid or secured before the defendants' infringement was committed. The license fee or royalty must relate exclusively to the patent claimed to be infringed. . . . License fees for the use of that and another patent blended together would establish a royalty as to either patent. The royalty must be for the use of the identical patent in controversy, and for that alone, in order to fix the market value and render it the established license fee." *Adams v. Bellaire Stamping Co. et al.*, 36 O. G. 567.—JACKSON, 1886.

517. The patent in suit was for an improvement in pumps, and the improvement consisted in the chamber and valves so arranged in a diaphragm pump that they could be reached and the valves

removed by hand. The master, in awarding profits and damages, found that no prior pump contained any part of the patented improvements as defined by the court. The court sustained the master, saying that the fact that in prior piston pumps the chamber and valves could be reached and removed by hand was immaterial. *Loud v. Stone*, 28 Fed. Rep. 749.—COLT, 1886.

518. In computing damages and profits the prior art is sometimes pertinent, and so is the question whether or not the prior thing was an abandoned experiment.—*Id.*

519. "It is a general rule in patent cases that established license fees are the best measure of damages that can be used. There may be damages beyond this, such as the expense and trouble the plaintiff has been put to by the defendant, and special inconvenience he has suffered from the wrongful acts of the defendant; but these are more properly the subject of allowance by the court under the authority given to it to increase the damages." *Clark et al. v. Wooster*, 119 U. S. 322.—SUP. CT. 1886.

520. It is the duty of the plaintiffs to point out the damages to a jury, and satisfy the jury what they are, and to discriminate the damages done to the plaintiffs by defendant's use of the patented mechanism from the damages done to the plaintiffs, if any have been done to them, by the use of any other devices which the plaintiffs may have patented, or which the defendant may have used. *Royer et al. v. Coupe*, 29 Fed. Rep. 358.—CARPENTER, 1886.

521. The patent in suit was for spring tooth-harrows. The master's report gave the complainants defendants' entire profit on the entire harrow. Judge Withey had overruled defendants' exceptions and confirmed the report. A later report came before the present court and was excepted to. The patent in suit had more than one claim, and that covering only a part of the whole device was in issue under the accounting. It was held that the award of profits must be confined to the specific improvement in issue. *Reed et al. v. Lawrence et al.*, 29 Fed. Rep. 915.—SEVERNS, 1886.

522. "Of course it can make no difference in the rule (as to apportionment of profits) whether the unpatented features were in use before or only since the patent was obtained. In either case, the public is entitled to use them, and the patentee, therefore, has no right to recover damages which include such use."—*Id.*

523. "The rule (as to apportionment between patented and unpatented parts) would be the same if the inquest were one of damages to complainants, as, indeed, it should be; for the un-

derlying principle is the same, and is not affected by the mode of redress elected. That this is very clearly indicated in the opinion of the Supreme Court in *Dobson v. Hartford Carpet Co.*—*Ib.*

524. In an action at law it is a proper mode of computing damages to show the value of the invention to any person using it, "and the law deems it a fair inference that, whatever value has been received by the defendant through the use of this invention, so much has been taken away from the plaintiff, and he is entitled to have it restored to him."—*Ib.*

525. Where A is a dealer in infringing goods, and sells infringing goods for B, recovery may be had against both, but one satisfaction is satisfaction for both. *Jennings et al. v. Dolan*, 38 O. G. 1018.—WHEELER, 1887.

526. It seems that a patent owner who does not grant licenses or operate personally under his patent is not entitled to damages as such. *Everest v. Buffalo Lubricating Oil Co.*, 31 Fed. Rep. 742.—COXE, 1887.

527. In proving defendant's profits, complainant must first show that defendant derives some profit from the practice of the invention, and then what portion of the profit was due to the practice of the invention.—*Ib.*

528. Where an infringement of a patent has been committed by A and B under a contract which A and B entered into jointly, and A has permitted B to reap all the benefits of the infringement, A is yet liable for the damages. *Am. Bell Tel. Co. v. Albright*, 32 Fed. Rep. 287.—BRADLEY, 1887.

529. Two parties, A and B, were joint infringers of a patent. They were sued separately, and an award of damages and costs was made against B. It was sought to recover the real damages against A, but it was contended that the nominal damages had been paid by B. This was not proved and A was held to pay the damages.—*Ib.*

530. By the court: "The plaintiff is entitled to recover damages (if he establish the infringement by the defendant) arising from the use of the valid claims of his patent, and the measure of such recovery would be the profits or advantages derived by the defendant in the use of said claims in the plaintiff's patent, for the period in which he so used, and any specific damages which he may show he has sustained by such use, or by reason of such use; and in the absence of proof of such profits and gains or specific damages so sustained, the plaintiff would only be entitled to nominal damages." *Byerly v. Cleveland Linseed Oil Works*, 31 Fed. Rep. 73.—WELKER, 1887.

531. The patent in suit was for a single feature of a lock for travelling-bags. The complainant had granted no license, but himself made and sold the locks; he showed that his profit was ninety-one cents per dozen, and that defendants had made and sold, with bags, 38,265 of them. He made no further showing of profits. The court said: "Two defects are apparent in the plaintiff's claim in this respect—one is, that the case does not show that plaintiff's profits are due to the patented feature of the locks, in whole or in any definite part; the other is that these facts do not show that the plaintiff would have had an opportunity to make and sell these locks if the defendants had not made and sold them with their bags. The case shows that there are other kinds of locks for such bags, and that they are mere incidents to the bags for their more convenient use." *Roemer v. Simon et al.*, 31 Fed. Rep. 41.—WHEELER, 1887.

532. Where, on a hearing in profits and damages, it appears that, prior to the patent in suit, there were other devices in use for the same purpose it becomes obligatory upon the complainants to adduce clear and positive proof appropriating the profits, or equally convincing proof that they should not be apportioned, for the reason that the entire market value of the machine is due to the invention. *Fay et al. v. Allen*, 30 Fed. Rep. 446.—COXE, 1887.

533. "The Cowing case was an exceptional one. The patent covered a pump designed for a special purpose in a particular locality. There was no other pump which performed the same functions. The market value of the machine was due solely to the invention. To remove the patented features was like taking out the heart and lungs of a human being. The machine was dead. It became an inert mass of iron, utterly useless for drawing off the gas from the casing of an oil-well. Vitality could be restored by replacing the parts thus removed, but in no other way."—*Ib.*

534. Where complainants have failed to produce satisfactory evidence apportioning damages and profits, and it seems likely that complainants can do so, it is proper to order a rehearing in damages and profits for that purpose.—*Ib.*

535. Where the bill of complaint sets out an act of infringement, and the bill is of a certain date, complainants cannot recover for acts of infringement prior to that date. *Koalatype Engraving Co. et al. v. Hoke et al.*, 30 Fed. Rep. 444.—THAYER, 1887.

536. Although evidence taken upon the trial of a case upon its merits may be used in an accounting before a master in damages and profits

upon proper notice at that time, it cannot be so used if first referred to in the argument. *Bell et al. v. United States Stamping Co.*, 32 Fed. Rep. 549.—WHEELER, 1887.

537. Where a patent owner has given an exclusive license under a patent, and afterward brings suit for infringement, a royalty under that exclusive license is not a measure of profits and damages.—*Ib.*

538. It is not to be inferred because a defendant has made sales of infringing articles, that the patent owner or his licensee would have made such sales if the defendant had not. Such a contention requires proof to be of any avail.—*Ib.*

539. Damages will not be increased under Sections 4919 and 4921 of the revised statutes on the suggestion in argument that it is obvious that the patent owner has sustained damages in consequence of the infringement beyond those allowed.—*Ib.*

540. "There is no question but that an established license fee is a proper measure of damages for an infringement of the same extent. But this is not an unvarying rule, and does not carry the right of recovery beyond the actual damages when the circumstances vary and the actual damages are made to appear." *Bates Adm'r v. St. Johnsbury & Lake Champlain R. R. Co.*, 32 Fed. Rep. 628.—WHEELER, 1887.

541. A regular license fee does not fix the question of damages to be paid by defendant where the time of use is a limited one.—*Ib.*

542. "Although damages do not carry interest as such, interest may be allowed as a part of the damages by the trier of fact in awarding damages. This is only a mode of stating the amount found."—*Ib.*

543. An assignment used the following language: "I, the said George F. McGinnis, as administrator of the estate of Edwin May, deceased, have sold, assigned, transferred, and set over, and do hereby sell, assign, transfer, and set over unto the said Sarah May, all the right, title, interest, claims, and demands whatsoever, which the said estate of said Edwin May, deceased, has in, to, by, under, and through the said improvements, and the letters-patent, and extensions thereof therefor aforesaid." This was held to carry the right to sue for past damages and profits. *May v. Saginaw Co.*, 32 Fed. Rep. 629.—BROWN, 1887.

544. Previous to a certain date defendant had an exclusive license to make and sell certain patented articles on a ten per cent royalty. Being afterward sued for infringement, the court found such ten per cent to be defendant's profits and

allowed no damages. *Hammacher et al. v. Wilson*, 32 Fed. Rep. 796.—COLT, 1887.

## DATE OF PATENT.

### "DATE OF PATENT" IN THE PATENT ACTS.

Act approved July 4th, 1836.

SECTION 8. This section provides, that "Whenever the applicant shall request it, the patent shall take date from the time of the filing of the specification and drawings, not, however, exceeding six months prior to the actual issuing of the patent; and on like request, and the payment of the duty herein required, by any applicant, his specifications and drawings shall be filed in the secret archives of the office, until he shall furnish the model and the patent to be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications." [Repealed July 8th, 1870.]

Act approved March 3d, 1863.

SEC. 3. *And be it further enacted*, That every patent shall be dated as of a day not later than six months after the time at which it was passed and allowed, and notice thereof sent to the applicant or his agent. And if the final fee for such patent be not paid within the said six months, the patent shall be withheld, and the invention therein described shall become public property as against the applicant therefor. *Provided*, That in all cases where patents have been allowed previous to the passage of this act, the said six months shall be reckoned from the date of such passage. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 23. *And be it further enacted*, That every patent shall date as of a day not later than six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent; and if the final fee shall not be paid within that period, the patent shall be withheld. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4885. Every patent shall bear date as of a day not later than six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent; and if the final fee is not paid within that period, the patent shall be withheld.

## CASES.

1. After the lapse of thirteen years, it is too late to correct the antedate of a patent by reissue. *Cashman in re*, 1 MacArthur's P. C. 577.—DUNLOP, 1858.

2. Where the antedate of a patent is the delib-

erate act of the patentee, that antedate cannot afterward be changed by reissue.—*Id.*

3. The act of March 2d, 1861, which made the term of a patent seventeen years, did not do away with the provision for antedating patents contained in Section 8 of the act of July 4th, 1836. *Burdett v. Estey et al.*, 19 Blatch. 1.—WHEELER, 1880.

## DECREE.

### CASES.

1. A decree may establish the validity of a patent without giving it any construction, and restrain infringement in the same general terms. That is the common but not uniform practice, for it may be made more specific. *Ready Roofing Co. et al. v. Taylor et al.*, 15 Blatch. 94.—WHEELER, 1878.

2. Failure to mention, in a decree, that the same was by consent of parties spoken of as “unusual inadvertence.” *Washburn & Moen M’f’g Co. v. Caldwell Steel Barb Fence Co. et al.*, 1 Fed. Rep. 225.—SHIPMAN, 1880.

3. Serious doubt expressed whether a court has power to vacate or modify a decree at the instance of a stranger to the suit. Motion to such effect denied.—*Id.*

4. A decree cannot be modified to suit defendant’s fears as to something which may be done in the future. *Page et al. v. Holmes B. A. T. Co.*, 18 Blatch. 118.—BLATCHFORD, 1880.

5. A decree determining the question of infringement, although interlocutory in form, is final in its nature. *Coburn et al. v. Schroeder et al.*, 19 Blatch. 493.—WHEELER, 1881.

6. The patent in question being a design patent for a carpet, the reference to the master ordered an account to be taken of the profits of the defendants from infringing upon the exclusive right of the plaintiffs “by the manufacture, use, and sale of carpeting bearing said patented design,” and of the additional damages suffered by the plaintiffs “by reason of said infringements.” This was held to be a proper form of decree. *Dobson et al. v. Dorman et al.*, 118 U. S. 10.—SUP. CT. 1886.

## DESIGN PATENT.

### “DESIGN PATENT” IN THE PATENT ACTS.

Act approved August 29th, 1842.

SECTION 3. *And be it further enacted*, That any citizen or citizens, or alien or aliens, having resided one year in the United States, and taken the oath of his, her or their intention to become a

citizen or citizens, who by his, her, or their own industry, genius, efforts, and expense may have invented or produced any new and original design for a manufacture, whether of metal or other material or materials, or any new and original design for the printing of woollen, silk, cotton, or other fabric, or any new and original design for a bust, statue, or bass-relief or composition in alto or basso-rilievo, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted, or cast, or otherwise fixed on any article of manufacture, or any new and original shape or configuration of any article of manufacture not known or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent therefor, and who shall desire to obtain an exclusive property or right therein to make, use, and sell and vend the same, or copies of the same, to others, by them to be made, used, or sold, may make application, in writing, to the Commissioner of Patents, expressing such desire; and the Commissioner, on due proceedings had, may grant a patent therefor, as in the case now of application for patent. *Provided*, That the fee in such cases, which, by the now existing laws, would be required of the particular applicant, shall be one half the sum, and that the duration of said patent shall be seven years, and that all the regulations and provisions which now apply to the obtaining or protection of patents, not inconsistent with the provisions of this act, shall apply to applications under this section. [Repealed July 8th, 1870.]

Act approved March 2d, 1861.

SEC. 11. *And be it further enacted*, That any citizen or citizens, or alien or aliens, having resided one year in the United States, and taken the oath of his or their intention to become a citizen or citizens, who, by his, her, or their own industry, genius, efforts, and expense may have invented or produced any new and original design, or (for) a manufacture, whether of metal or other material or materials, and (an) original design for a bust, statue, or bass-relief or composition in alto or basso-rilievo, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted, or cast, or otherwise fixed on any article of manufacture, or any new and original



shape or configuration of any article of manufacture not known or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent therefor, and who shall desire to obtain an exclusive property or right therein to make, use, and sell and vend the same, or copies of the same, to others, by them to be made, used, and sold, may make application, in writing, to the Commissioner of Patents, expressing such desire; and the Commissioner, on due proceedings had, may grant a patent therefor, as in the case now of application for a patent, for the term of three and one half years, or for the term of seven years, or for the term of fourteen years, as the said applicant may elect in his application: *Provided*, That the fee to be paid in such application shall be, for the term of three years and six months, ten dollars; for seven years, fifteen dollars; and for fourteen years, thirty dollars: *And provided*, That the patentees of designs under this act shall be entitled to the extension of their respective patents for the term of seven years from the day on which said patent shall expire, upon the same terms and restrictions as are now provided for the extension of letters-patent. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 71. *And be it further enacted*, That any person who, by his own industry, genius, efforts, and expense, has invented or produced any new and original design for a manufacture, bust, statue, alto-rilievo, or bass-relief; any new and original design for the printing of woollen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the duty required by law, and other due proceedings had, the same as in the cases of inventions or discoveries, obtain a patent therefor.

SEC. 73. *And be it further enacted*, That patents for designs may be granted for the term of three years and six months, or for seven years, or for fourteen years, as the applicant may, in his application, elect.

SEC. 74. *And be it further enacted*, That patentees of designs issued prior to March two, eighteen hundred and sixty-one, shall be entitled to extensions of their respective patents for the term of seven years, in the same manner and

under the same restrictions as are provided for the extension of patents for inventions or discoveries issued prior to the second day of March, eighteen hundred and sixty-one.

SEC. 75. *And be it further enacted*, That the following shall be the rates of fees in design cases: For three years and six months, ten dollars; for seven years, fifteen dollars; for fourteen years, thirty dollars. For all other cases in which fees are required, the same rates as in the case of inventions or discoveries. . .

SEC. 76. *Be it further enacted*, That all the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries, not inconsistent with the provisions of this act, shall apply to patents for designs. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4929. Any person who, by his own industry, genius, efforts, and expense has invented and produced any new and original design for a manufacture, bust, statue, alto-rilievo, or bass-relief; any new and original design for the printing of woollen, silk, cotton, or other fabrics; any new and original impression, ornament, patent (pattern) print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the fee prescribed, and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor.

SEC. 4931. Patents for designs may be granted for the term of three years and six months; or for seven years, or for fourteen years, as the applicant may, in his application, elect.

SEC. 4932. Patentees of designs issued prior to the second day of March, eighteen hundred and sixty-one, shall be entitled to extension of their respective patents for the term of seven years, in the same manner and under the same restrictions as are provided for the extension of patents for inventions or discoveries issued prior to the second day of March, eighteen hundred and sixty-one.

SEC. 4933. All the regulations and provisions which apply to obtaining or protecting patents for inventions or discoveries, not inconsistent with the provision of its title, shall apply to patents for designs.

SEC. 4934. The following shall be the rate for patent fees:

In design cases: For three years and six

months, ten dollars ; for seven years, fifteen dollars ; for fourteen years, thirty dollars.

#### CASES.

1. The allowance of two years' public use prior to application applies to design patents. *Root v. Ball et al.*, 4 McLean, 177.—McLEAN, 1846.

2. If a patented design and figures are substantially adopted, the patent is infringed.—*Ib.*

3. "Where ornaments are used for a stove, it is infringement to adopt the design so as to produce substantially the same appearance."—*Ib.*

4. In a patent the claim was : "The radially formed ornaments on the face of the molds or blocks of which the button is formed, combined with the mode of winding the covering of the same, substantially as set forth." Thereof the court said : "The mode of winding claimed to be new is the arrangement of the different colored threads in the process, so as to produce what is called 'the radially formed ornaments on the face of the button.'" *Booth v. Garelly et al.*, 1 Blatch. 247.—NELSON, 1847.

5. The allowance of two years' public use prior to application for patent applies to design patents.—*Ib.*

6. It seems that an arm for sewing-machine parts, in the shape of the letter G, amounts to patentable design. *Gibbs v. Ellithorp*, 1 MacArthur's P. C. 702.—DUNLOP, 1859.

7. Complainant's patent for "the design and configuration of the reel," was for a reel for ruffles, consisting of two parallel disks of pasteboard connected by four bits of wood, the pasteboard being cut in the shape of a rhombus with the angles rounded. Thereof the court said : "In this case the reel itself, as an article of manufacture, is conceded to be old, and not the subject of a patent. The shape applied to it by complainant is also a well-known mathematical figure. Now, although it does not appear that any person ever before applied this particular shape to this particular article, I cannot think that the act quoted above was intended to secure to the complainant an exclusive right to use this well-known figure in the manufacture of reels. The act, although it does not require utility in order to secure the benefit of its provisions, does require that the shape produced shall be the result of industry, effort, genius, or expense, and must also, I think, be held to require that the shape or configuration sought to be secured shall at least be new and original as applied to articles of manufacture. But here the shape is a common one in many articles of manufacture, and its application to a reel cannot

fairly be said to be the result of industry, genius, effort, and expense. No advantage whatever is pretended to be derived from the adoption of the form selected by the complainant, except the incidental one of using it as a trade-mark. Its selection can hardly be said to be the result of effort even ; it was simply an arbitrary, chance selection of one of many well-known shapes, all equally well adapted to the purpose." *Wooster v. Crane et al.*, 5 Blatch. 282.—BENEDICT, 1865.

8. The claims of the patent in suit were : "First, we claim constructing the bed of the elastic material used in graining machines, in the form herein shown, substantially as and for the purpose specified. Second, we claim arranging the elastic material aforesaid, whether curved or rectangular in form, in a series of distinct staves or designs, substantially as and for the purpose herein shown and set forth." This was held not to be a lawful claim for a design patent. *Clark v. Bousfield*, 10 Wall. 133.—SUP. CT. 1869.

9. It will be seen by a reference to Section 11, of the act of 1861, that a claim patentable under it "must be a claim for an original design or impression, or ornament, or pattern, or picture, and the like, wholly irrespective of the means of producing it."—*Ib.*

10. "The same principles which govern in determining the question of infringement in respect to a patent, for an invention connected with the operation of machinery, must govern in determining the question of infringement in respect to a patent for design. A design for the configuration of an article of manufacture is embraced within the statute, as a patentable design, as well as a design for an ornament to be placed on an article of manufacture. The object of the former may solely be increased utility, while the object of the latter may solely be increased gratification to a cultivated taste, addressed through the eye. It would be as reasonable to say that utility should be the test of infringement in the first case, as to say that equal appreciation by the eye should be the test of infringement in the latter case. There must be a uniform test, and that test can only be, as in the case of a patent in respect to machinery, substantial identity, not in view of the observation of a person whose observation is worthless, because it is casual, heedless, and unintelligent, and who sees one of the articles in question at one time and place, and the other of such articles at another time and place, but in view of the observation of a person versed in the business of designs in the particular trade in question ; of a person engaged in the manufacture and sale of articles containing such designs ; of a person accustomed to compare such

designs one with another, and who sees and examines the articles containing them side by side. The question is not whether one design will be mistaken for another by a person who examines the two so carelessly as to be sure to be deceived, but whether the two designs can be said to be substantially the same when examined intelligently side by side. There must be such a comparison of the two features which make up the two designs. As against an existing patented design, a patent for another design cannot be withheld because, to a casual observer, the general appearance of the latter design is so like that of the earlier one as to lead him, without proper attention, to mistake the one for the other. The same test must be applied to the question of infringement." *Gorham Mfg Co. v. White*, 7 Blatch. 513.—BLATCHFORD, 1870.

11. "A patent for a design, like a patent for an improvement in machinery, must be for the means of producing a certain result or appearance, and not for the result or appearance itself." "Even if the same appearance is produced by another design, and if the means used in such other design to produce the appearance are substantially different from the means used in the prior patented design to produce such appearance, the latter design is not an infringement of the patented one."—*Id.*

12. "The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that, not as an abstract impression or picture, but an aspect given to those objects mentioned in the acts." *Gorham Mfg Co. v. White*, 14 Wallace, 511.—SUP. CT. 1871.

13. In a patentable design "the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture or article to which it may be applied or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a patented article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public." "Manifestly the mode in which those appearances are produced has very little, if anything, to do with giving increased salableness to the article. It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, or of ornament alone,

or of both conjointly, but, in whatever way produced, it is the new thing or product which the law regards. To speak of the invention as a combination or progress, or to treat it as such, is to overlook its peculiarities." "The controlling consideration is the resultant effect."

"What is the true test of identity of design? Plainly it must be sameness of appearance, and mere difference of lines in the drawing or sketch, a greater or smaller number of lines, or slight variations in configuration, if not sufficient to change the effect upon the eye, will not destroy the substantial identity. An engraving which has many lines may present to the eye the same picture and to the mind the same conception as another with much fewer lines. The design, however, would be the same. So a pattern for a carpet or a print may be made up of wreaths of flowers arranged in a particular manner. Another carpet may have similar wreaths, arranged in a like manner, so that none but very acute observers could detect a difference. Yet in the wreaths upon one there may be fewer flowers, and the wreaths may be placed at wider distances from each other. Surely in such a case the designs are alike. The same conception was in the mind of the designer, and to that conception he gave expression."—*Id.*

14. "If in the eye of an ordinary observer, giving such attention as a purchaser usually gives, the two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other."—*Id.*

15. Enamelling of metals being old, it is not patentable design to enamel metals in imitation of granite. *Neidringhaus v. Com'r*, 2 MacArthur, 149.—MACARTHUR, 1875.

16. It is very doubtful whether making sieves of a flaring shape, so that they can be nested, forms patentable subject-matter for a design patent. *Adams & Westlake Mfg Co. v. St. Louis Wire Goods Co.*, 3 Banning & Arden, 77.—TREAT, 1877.

17. The claim of complainants' design patent in suit was: "As a design for a cheese safe, the rectangular cage shown, having two vertical panels on each wall, a moulded top A, and a moulded base A'." The only novelty in this patented design was the use of an ogee moulding about the top and bottom, and the combination of this with panelled sides. Mouldings of this description had been used for a long time, not only in architecture, but upon articles of furniture and in the decoration of interiors. The application of the same to a cheese-safe was held

not to amount to patentable design. *Northrup et al. v. Adams*, 2 Banning & Arden, 567.—BROWN, 1877.

18. It may be questionable whether claims for the separate parts of a design may be maintained. *Perry et al. v. Starrett*, 3 Banning & Arden, 485.—WHEELER, 1878.

19. If all that the inventor of the design of a stove had done had been to take the legs of one stove, the base of another, etc., and unite them in one structure, he would not have produced a new and patentable design; but where the new union was brought about by the use of new forms, the resulting design was held patentable.—*Ib.*

20. "To constitute a new design that would be patentable as such, it must be so different from all others existing before as to appear to be such to ordinary observers."—*Ib.*

21. In determining the question of infringement of a design patented, the most potent evidence is the comparison of the two designs. They are alike in substance if the general effect is the same, even though there are minor differences in form and ornamentation, especially if it requires a study to point out the differences.—*Ib.*

22. Where a patent has been granted for a new article of manufacture, it cannot be construed to be a design patent. *Cone v. Morgan Envelope Co.*, 4 Banning & Arden, 107.—LOWELL, 1879.

23. "The fact that the original mechanical patent was issued more than two years after the design patent is of no importance," the latter covering shape, the former mechanical combination, and the former being applied for within two years after the date of the latter. *Collender v. Griffith et al.*, 18 Blatch. 110.—BLATCHFORD, 1880.

24. The patent in suit was "for a design for a card of buttons, divided into spaces, covered with foil, by narrow bands, with a dozen of pearl buttons in rows of three by four to each space." Said the court: "The design does not apply to the manufacture proper, but only to the arrangement of it for sale. . . Merely changing the mode of keeping and presenting an article for sale without changing its form or appearance will not support a patent for design." *Pratt et al. v. Rosenfield et al.*, 18 Blatch. 234.—WHEELER, 1880.

25. "Cards for buttons, faced with foil and divided into spaces by bands, were well known and in common use. Those for pearl buttons may not have been divided into dozens in rows of three by four, but they were divided so that dozens could be readily cut from the card, in

two rows of six and one of twelve; and there were cards divided into spaces for several dozens by such bands as the patent describes; and cards of cloth buttons spaced for dozens in rows of three by four. With these things known, there was nothing rising to the level of inventive skill in arranging pearl buttons by dozens on cards, in three rows of four."—*Ib.*

26. By the court: "A question is made by the defendant whether an inventor is not to be presumed to abandon his design when he exhibits it in the drawings of a mechanical patent. I do not see why this consequence should follow until the design has been in use for two years; but I do not decide this point." *Burton v. Greenville*, 3 Fed. Rep. 642.—LOWELL, 1880.

27. A person exhibited publicly to a committee and certain inhabitants, "more than two years before the application for complainant's design patent," a drawing of a lamp-post, which he was ready to sell them, and "which is like the patented and the infringing design." Such person testified "that he had made others like it, excepting the ornament on top, which forms no part of the plaintiff's claim," some months previous. The lamp-posts complained of were put up twenty months before application. Public use held to be established.—*Ib.*

28. "Regulations and provisions applicable to the obtaining or prohibition of patents for inventions or discoveries, not inconsistent with the existing patent act, apply to designs, without modification or variation." *Miller et al. v. Smith et al.*, 5 Fed. Rep. 359.—CLIFFORD, 1880.

29. By the court: "He points out the difference between figures in actual relief, such as are the figures of the patent in question, and figures where the effect is produced upon the eye merely by linear representation or artificial shading, as shown in several examples given in his testimony." . . . "Nothing of the exact kind is shown in these exhibits." (This concerning a design patent.)—*Ib.*

30. "Inventors may, if they can, keep their inventions secret, and if they do, it is a mistake to suppose that any delay to apply for a patent will forfeit their right to the same or present any bar to a subsequent application. Nor does any different rule prevail in the case of a design patent. Delay less than for a period of two years constitutes no defence in the case."—*Ib.*

31. In a suit for infringement of a design patent, for rustic letters used in jewelry, defendants insisted that the claim was bad, because it embraced more than one letter of the alphabet, which proposition, said the court, "is so obviously without merit that it is not deemed neces-

sary to enter into any discussion of the topic." —*Ib.*

32. The test of the infringement of a design patent is the determination of the question, whether the two designs are such as to be mistaken one for the other by "an ordinary observer giving such attention as a purchaser usually gives." —*Ib.*

33. By the court: "The wings of the bird are in a different position from those of the bird in the plaintiff's setting, and the upper leaf is turned differently; but the two leaves below the bird in the defendants' setting are in white or silver color, and somewhat resemble the diamonds upon that part of the plaintiff's, and altogether more is required than to observe and consider the artistic effect of each to bring these differences to notice. Looked at as ornaments, desirable for their beauty or appropriateness, according to the taste of the wearer, these differences in the detail become immaterial." *Wood v. Dolby et al.*, 19 Blatch. 214. — WHEELER, 1881.

34. Complainants, in a suit upon a design patent, put in evidence, as an infringement, an article made by defendant, without testimony that the article was an infringement. Defendant contended that this was insufficient. The court said: "In view of the proper test, as above given" (referring to *Gorham Mfg Co. v. White*, 14 Wall. 511), "and of the simple character of the designs in the present case, the absence of any testimony as to identity, does not make it improper for the court in this case to compare the defendants' nubia with the patents, as to design, and determine the question of identity from such comparison. It is not intended to imply that the practice can be extended to any other patent than one for a design, or that it ought to be extended to all design patents." *Jennings et al. v. Kibbe*, 20 Blatch. 353. — BLATCHFORD, 1882.

35. Defendant's show-case being a servile copy of what was shown in complainants' design, "excepting a slight inclination backward, hardly perceptible to the naked eye, of the glass constituting the front of the elevated portions of the case," was held to be an infringement. *Lehnbeuter et al. v. Holthaus*, 105 U. S. 94. — SUP. CT. 1882.

36. A design, in order to be patentable, need not be more graceful or beautiful than older designs. —*Ib.*

37. "In the matter of ornamentation, mere juxtaposition of old forms is doubtless sufficient to authorize a patent for an ornament when, by means of such juxtaposition, accompanied by industry, genius, effort, and expense, the old

forms are made to become component parts of an ornament substantially new in its effects. But the result of the industry, genius, effort, and expense employed must . . . be a single ornament, which, taken as a whole, can be considered to be the embodiment of a new idea in ornamentation. The amount of the novelty may be small, but the effect of the ornament must, to some extent at least, be new. The ornament may, in this sense, be new and ornamental, although all the forms used in its composition are old and well-known forms of ornamentation." *Simpson et al. v. Davis*, 20 Blatch. 413. — BENEDICT, 1882.

38. The "cap of a newel post is a manufacture within the meaning of the statute." —*Ib.*

39. A claim to a certain part of a newel post held void as being merely for an aggregation, without any new "combined effect." The claim for the design for the whole newel post sustained. —*Ib.*

40. To bring distinct and well-known ornaments into juxtaposition without the production of a new "combined effect" does not constitute patentable design. —*Ib.*

41. Design patents "differ from patents for inventions or discoveries in this respect, that they have reference to appearance rather than utility. The object is to encourage the arts of decoration more than the invention of useful products. A picture or design that merely pleases the eye is a proper subject for such a patent, without regard to the question of utility, which is always an essential ingredient in an invention or discovery patent." *Theberath v. R. C. Harness Trimming Co.*, 15 Fed. Rep. 246. — NIXON, 1883.

42. By the court: "There is . . . no foundation for the argument of the learned counsel for the complainant, that design patents are not void from being in public use or on sale for more than two years prior to the application of a patent." —*Ib.*

43. A patented design was for the shape or configuration of a series of patterns for gored skirts, printed upon a piece of fabric, to be cut apart and sewed together in the making of the skirts. The patent was not attacked on the ground of its covering improper matter for a design patent, but the court remarked: "The invention would seem to have been better adapted to a patent for a manufacture than to one for a design." *Dryfoss v. Friedman et al.*, 21 Blatch. 563. — WHEELER, 1884.

44. "The difference necessary to take away their identity in law is understood to be such appearances as would attract the attention of an

ordinary observer, giving such attention as a purchaser usually gives. This, of course, means purchasers of the article in question for the purposes for which they were intended and are purchased."—*Ib.*

45. "There doubtless might be an infringement of a patented design without taking the whole of it, but in such cases the part taken must be a part covered by the patent."—*Ib.*

46. Complainant's design patent for a watch-case consisted in the representation of a locomotive engine and tender upon a railroad track, with ornamental plants in the foreground, the whole surrounded by a ring of dots and an ornamental border. There were two claims: one for the engine and tender on the track, and the other for the same surrounded by the ring of dots and ornamental border. The design differed chiefly from the prior art in that the figures were made in relief, and defendants' design had that feature; but complainant's patent did not describe them as being in relief nor so claim them, and it was held that defendants' design did not, therefore, come within the complainant's patent. *Untermeyer v. Jeannot et al.*, 20 Fed. Rep. 503.—*WHEELER*, 1884.

47. "It is by no means necessary that the patented thing should be copied in every particular. If the infringing design has the same general appearance, if to the eye of an ordinary person the two are substantially similar, it is enough. It is of no consequence that persons skilled in the art are able to detect differences. Those who have devoted time and study to the subject, who have spent their lives in dealing in articles similar to those in controversy, may see at a glance features which are wholly unimportant and unobserved by those whose pursuits are in other directions, and who are attracted only by general appearances. If the resemblance is such that a purchaser would be deceived, it will not aid the infringer to show that he has deviated slightly from a straight line in one place and from a curved line in another, or that he has added or omitted something which an expert can discover." *Thompson v. Willets Mfg Co.*, 23 Fed. Rep. 895.—*COXE*, 1884.

48. Complainant had two design patents of the same date, one for a table fork and one for a spoon, in both of which the main feature of the design was described in the words, "With the outline edge of the plate turned backward at a nearly uniform distance from its front." The court held such designs patentable. *Foster v. Crossin et al.*, 23 Fed. Rep. 400.—*CARPENTER*, 1885.

49. "Design, of course, relates solely to the

appearance of the article to the ordinary purchaser; and when the question is whether a difference of design be substantial and valuable, surely there can be no tests better than the practical test which is furnished by observing the effect of the two designs upon the appreciating observation of the purchasing public."—*Ib.*

50. In a suit upon a design patent, the findings of the Circuit Court allowed as damages "the entire profit of the plaintiffs per yard, in the manufacture and sale of carpets of the patented designs, and not merely the value which the designs contributed to the carpets. There was no evidence as to that value." The Supreme Court said: "Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure to obtain a purchaser, aside from the pattern or design; and to attribute in law the entire profit to the pattern, to the exclusion of the other merits, unless it is shown by evidence as a fact that the profit ought to be so attributed, not only violates the statutory rules of 'actual damages' and of 'profits to be accounted for,' but confounds all distinctions between cause and effect." *Dobson et al. v. Hartford Carpet Co.*, 114 U. S. 439.—*SUP. CT.* 1885.

51. "If the Patent Office, in view of the question of fees, grants a patent for an entire design, with a claim for that, and a claim for each one of various constituent members of it, as a separate design, we see no objection to it, leaving the novelty of each part and the validity of the patent open to contestation. The mere joinder of such claims in one grant does not, *per se*, invalidate the patent, or any particular claim, at the objection of a defendant."—*Ib.*

52. A claim for "a design for a carpet, substantially as shown," is a good form of claim in a design patent.—*Ib.*

53. Complainant's patented design was for a lace fabric having a fringe made of a series of stems connected to the fabric and not to each other, with loops at both sides of a central stem or rib along its entire extent. Thereof the court said: "The patent is not for a design for a nubia, but for a fringed lace fabric, and the novelty of the patented design appertains to the fringe and not to the rest of the fabric by the terms of the patent. Nubias with this fringe might appear to be the same as those of the patented fringe, if the fringe should not be observed as such; but observation of that would discover the difference readily." Thereupon defendants were held not to infringe. *Jennings et al. v. Kibbe et al.*, 24 Fed. Rep. 697.—*WHEELER*, 1885.

54. As to infringement of design patents, "it is enough if the resemblance is such as to deceive the ordinary observer." *Dreyfus v. Schneider*, 25 Fed. Rep. 481.—COLT, 1885.

55. The claim in a patent for a design for a carpet was: "The configuration of the design hereunto annexed when applied to carpeting." The design was illustrated by a photograph. It was contended that this form of claim was not sufficient. The court held it to be sufficient. *Dobson et al. v. Dorman et al.*, 118 U. S. 10.—SUP. CT. 1886.

56. The claim in a design patent was: "The configuration of the design hereunto annexed when applied to carpeting." Thereof the court said: "Undoubtedly the claim in this case covers the design as a whole and not any part of it, as a part, and it is to be tested as a whole as to novelty and infringement."—*Id.*

57. The patent in question being a design patent for a carpet, the reference to the master ordered an account to be taken of the profits of the defendants from infringing upon the exclusive right of the plaintiffs "by the manufacture, use, and sale of carpeting bearing said patented design," and of the additional damages suffered by the plaintiffs "by reason of said infringements." This was held to be a proper form of decree.—*Id.*

58. A patent for a design for a carpet being in question, and one dealer having testified that he thought it would be almost impossible for any one who had not seen the two carpets together to tell them apart, and another witness having testified that in his opinion not one customer in twenty-five would know the difference, and there being other testimony tending to show the same results—while there was evidence contradictory of this—the Supreme Court held that it could not, in the absence of ocular inspection, say that the Circuit Court erred in finding infringement.—*Id.*

59. "The plaintiff must show what profits or damages were attributable to the use of the infringing design."—*Id.*

60. The claim of a design patent was for "a new and ornamental design for a curtain and loop, consisting of an ornamental chain in connection with a curtain adapted to be gathered to the side of the window and be held by such chain, substantially as described." The design was illustrated by a photograph. The court said: "The patent is for any ornamental metallic chain used to loop curtains;" and the court further said, "the mere substitution of one material for another in the construction of, or for the purposes of an ornament, the ornament to

be of any approved form, cannot properly be patentable." The court held the patent void. *Post et al. v. T. C. Richards Hardware Co.*, 26 Fed. Rep. 618.—SHIPMAN, 1886.

61. The claim of a design patent was: "The design for a banner rod, herein shown and described, the same consisting of a conventional imitation of a straight twig with the bark on, and slanting by cut ends." Thereof the court said: "I have great doubt whether there is anything which shows genius, or which indicates the work of an inventive mind, and therefore whether there is anything patentable, in merely making a banner rod to imitate measurably a straight twig with the bark on. This natural and simple design for a banner rod would, I think, readily suggest itself to an upholsterer. There is so much reason to suppose that the section which relates to design patents demands the exercise of more genius than is exhibited in the patented design, that the motion should be denied." *Osborn v. Judd et al.*, 29 Fed. Rep. 96.—SHIPMAN, 1886.

62. The claim of the patent in suit was: "The design for an easel herein shown and described, the same consisting of the upright standards of an easel crossing each other near their upper ends, and representing the stems and flowers of the cat-tail plant or flag." Easels made of natural cat-tails crossing each other near the upper ends were old, in view of which the patented design was limited to the mode of crossing the standards described in the patent. In the respondent's design the standards were not crossed, but they were held together near the top by a band, from which point, by bending, they were spread out so as to present a fan-like appearance. Respondent was held not to infringe. *Crocker v. Cutter Tower Co.*, 29 Fed. Rep. 456.—COLT, 1886.

63. The claims of the design patent in suit were: "The design for a photographic album leaf, consisting of the roughened frame A, enclosing the pocket or pockets B, as shown and described. (2) The design for a photographic album leaf, consisting of the exterior frame C, the roughened frame A inside of the frame C, and the pocket or pockets B inside the roughened frame A, as shown and described." The court described the design as follows: "The frame A is a border of grained or roughened surface surrounding, for a certain distance, the pocket or place to hold pictures, and the frame C is a smooth border between A and the edges of the leaf. These borders have the effect of mats or frames for the picture. The drawings of the patent represent the pocket as

apparently raised above the surrounding surface, and the border C as raised above the frame A. The defendant sells albums having the leaves ornamented with boarders A and C, surrounding a pocket not raised, but even with the surface of the sheet. The pasteboard in his leaves extends nearly to the pocket, so that the border C is upon a level with A." Then the court said: "If the patent is limited to the design which the patentee made, and which is shown in the drawings, and which consists of an exterior plain, apparently elevated, border, enclosing a pebbled border, which encloses a pocket apparently raised, thus making apparently three mats or frames for the picture, it is a good design patent. Such a design has a pleasing effect which is peculiar to itself, seems to be novel, and has the necessary element of invention." *Meers v. Kelly*, 31 Fed. Rep. 153.—SHIPMAN, 1887.

64. The claims of the design patent in suit were: "(1) A design for a rubber mat, consisting of corrugations, depressions, or ridges in parallel lines, combined or arranged relatively, substantially as described, to produce variegated, kaleidoscopic, *moire*, stereoscopic or similar effects, substantially as set forth. (2) A design for a rubber mat, consisting of a series of parallel corrugations, depressions, or ridges, the lines of the said corrugations being deflected at one or more points, substantially as set forth. (3) A design for a rubber mat, consisting of a series of parallel corrugations, depressions, or ridges, arranged in sections, the general direction of the corrugations in one section making angles with or being deflected to meet those of the corrugations in the contiguous or other sections, substantially as described." Thereof the court said: "The patent is an attempt to secure to the patentee a monopoly of all ornamentation upon rubber mats by which variations of light and shade are produced by a series of ridges and depressions, without regard to any particular arrangement or characteristics of the lines except that they are to be parallel. Although there is an illustration in the drawing, and although each claim is for a design 'substantially as described,' the language of the specification is carefully expressed so as not to restrict the claims to the design shown in the drawings, but so that the first claim shall include every variety which can be produced by the arrangement of corrugations, depressions, or ridges in parallel lines; the second, all obtainable when, by the arrangement, the corrugations are deflected; and the third, all obtainable when, by the arrangement of the corrugations in sections, those of one section make an angle with those in the con-

tiguous or other sections." *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 30 Fed. Rep. 785.—WALLACE, 1887.

65. "It is not novelty which will sustain a patent to transfer to rubber, or to a rubber mat, an effect or an impression to the eye which has been produced upon other materials or articles by contrast or variation of light and shade. The design of this patent is not new, unless it embodies a new impression or effect produced by an arrangement or configuration of lines, which introduces new elements of color or form."—*Id.*

## DISCLAIMER.

### "DISCLAIMER" IN THE PATENT ACTS.

Act approved March 3d, 1837.

SECTION 7. *And be it further enacted*, That whenever any patentee shall have, through inadvertence, accident, or mistake, made his specification of claim too broad, claiming more than that of which he was the original or first inventor, some material or substantial part of the thing patented being truly and justly his own, any such patentee, his administrators, executors, and assigns, whether of the whole or of a sectional interest therein, may make a disclaimer of such parts of the thing patented as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent, which disclaimer shall be in writing, attested by one or more witnesses, and recorded in the Patent Office, on payment by the person disclaiming, in manner as other patent duties are required by law to be paid, of the sum of ten dollars. And such disclaimer shall thereafter be taken and considered as a part of the original specification, to the extent of the interest which shall be possessed in the patent or right secured thereby by the disclaimant and by those claiming by or under him subsequent to the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same.

SEC. 9. *And be it further enacted*, anything in the fifteenth section of the act to which this is additional to the contrary notwithstanding, That, whenever by mistake, accident, or inadvertence, and without any wilful default or intent to defraud or mislead the public, any patentee shall have in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented of which he was not the



first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be deemed good and valid for so much of the invention or discovery, and shall be truly and *bona fide* his own : *Provided*, it shall be a material or substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right, as aforesaid. And every such patentee, his executors, administrators, and assigns, whether of the whole or of a sectional interest therein, shall be entitled to maintain a suit at law or in equity on such patent for any infringement of such part of the invention or discovery as shall be *bona fide* his own, as aforesaid, notwithstanding the specification may embrace more than he shall have any legal right to claim. But in every such case in which a judgment or verdict shall be rendered for the plaintiff, he shall not be entitled to recover costs against the defendant, unless he shall have entered at the Patent Office, prior to the commencement of this suit, a disclaimer of all that part of the thing patented which was so claimed without right. *Provided, however*, That no person bringing any such suit shall be entitled to the benefits of the provisions contained in this section, who shall have unreasonably neglected or delayed to enter at the Patent Office a disclaimer, as aforesaid. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 54. *And be it further enacted*, That whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented ; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the duty required by law, make a disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent ; said disclaimer shall be in writing, attested by one or more witnesses, and recorded in the Patent Office, and it shall thereafter be considered as a part of the original specification to the extent of the interest possessed by the claimant and by those claiming under him after the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it.

SEC. 60. *And be it further enacted*, That whenever, through inadvertence, accident, or mistake, and without any wilful default or intent to defraud or mislead the public, a patentee shall have [in his specification] claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, as aforesaid, every such patentee, his executors, administrators, and assigns, whether of the whole or any special interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was *bona fide* his own, provided that it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the parts so claimed, without right as aforesaid, notwithstanding the specifications may embrace more than that of which the patentee was the original or first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff, no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit, nor shall he be entitled to the benefits of this section if he shall have unreasonably neglected or delayed to enter said disclaimer. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 793. When judgment or decree is rendered for the plaintiff or complainant, in any suit at law or in equity, for the infringement of a part of a patent in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented of which he was not the original and first inventor, no costs shall be recovered, unless the proper disclaimer, as provided by the patent laws, has been entered at the Patent Office before the suit was brought.

SEC. 4917. Whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented ; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the fee required by law, make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent. Such disclaimer shall be in writing, at-

tested by one or more witnesses, and recorded in the Patent Office; and it shall thereafter be considered as a part of the original specification to the extent of the interest possessed by the claimant and by those claiming under him, after the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it.

SEC. 4922. Whenever, through inadvertence, accident, or mistake, and without any wilful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was *bona fide* his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case, in which a judgment or decree shall be rendered for the plaintiff, no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer.

#### CASES.

1. A disclaimer in a patent is binding on the patentee. *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON and BALDWIN, 1831.

2. Section 7, of the act of 1837, Chapter 45, applies solely to suits pending when the disclaimer is filed. Section 9 applies solely to suits brought after the disclaimer is filed. *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

3. Disclaimers may cure mistakes of law as well as mistakes of fact.—*Id.*

4. By the court: "It does not seem to me that a court of equity ought to interfere to grant a perpetual injunction" where a disclaimer is necessary, "whatever might be the right and remedy at law, unless a disclaimer has been in fact filed at the Patent Office before the suit is brought."—*Id.*

5. "A disclaimer to be effectual, for all intents and purposes, under the act of 1837, Chapter 45, paragraphs 7 and 9, must be filed in the Patent Office before the suit is brought. If filed

during the pendency of the suit, the plaintiff will not be entitled to the benefit thereof in that suit. But if filed before the suit is brought, the plaintiff will be entitled to recover costs in that suit, if he should establish at the trial that the part of the invention not disclaimed has been infringed by the defendant. Where a disclaimer has been filed either before or after the suit is brought, the plaintiff will not be entitled to the benefit thereof if he has unreasonably neglected or delayed to enter the same in the Patent Office. But such an unreasonable neglect or delay will constitute a good defence and objection to the suit." *Reed v. Cutler et al.*, 1 Story, 590.—STORY, 1841.

6. The question whether a disclaimer is filed within a reasonable time is not a mere matter of law, but is to be judged with reference to all the circumstances in evidence. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

7. Where, in a disclaimer, the administrator, in whose name the patent was extended, expressly stated that he was the patentee and referred to the patent as showing his interest, this was held sufficient under the law upon that point. *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

8. A disclaimer under Section 7, of the act of 1837, should not only disclaim what is not new, but should state what is still claimed as new. *Lippencott v. Kelly*, 1 West. Law Jour. 513.—IRVIN, 1844.

9. An unreasonable neglect or delay to enter a disclaimer not only deprives the patentee of costs, but also of the right of action. *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

10. Section 14, of the act of July 4th, 1836, empowered the court to treble the damages. A disclaimer was filed after suit was brought. This was held not to interfere with the power of the court to increase damages. *Guyon v. Serrel et al.*, 1 Blatch. 245.—NELSON, 1847.

11. Where a disclaimer imports upon its face that the maker owns the whole patent, his interest is sufficiently stated. *Foot v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

12. If a disclaimer is entered at the Patent Office before a suit is instituted plaintiff recovers costs, but not if made during the progress of the suit. *Hall v. Wiles*, 2 Blatch. 197.—NELSON, 1851.

13. Where parts are non-essential and not introduced into the patent through wilful default or intent to defraud or mislead the public, the want of a disclaimer in regard to them affords no ground for invalidating the patent.—*Id.*

14. A properly filed disclaimer is proper matter to be submitted to a jury. *Silsby et al. v. Foote*, 14 Howard, 218.—*SUP. CT.* 1852.

15. A defendant may offer in evidence a disclaimer of the patent in suit, not to be used as a disclaimer, but as a confession prejudicing the rights of the complainants.—*Ib.*

16. "The law which requires and permits him (the patentee) to disclaim is not penal, but remedial. It is intended for the protection of the patentee as well as of the public, and ought not, therefore, to receive a construction that would restrict its operation within narrower limits than its words fairly import." *O'Reilly et al. v. Morse et al.*, 15 Howard, 62.—*SUP. CT.* 1853.

17. Whether a patent is illegal in part, and claims more than is sufficiently described and more than was invented, the patentee must in either case disclaim in order to save the portion to which he is entitled, and he is allowed to do so when the error was committed by mistake.—*Ib.*

18. Where a claim has received the sanction of the Patent Office and been held valid by the Circuit Court, the patentee is entitled to have a judgment of the Supreme Court on it before his delay to file a disclaimer becomes unreasonable.—*Ib.*

19. "If a patentee makes a claim which is not well founded, in the same patent with other claims which are well founded, he may disclaim within a reasonable time that which he has no right to claim, and then his patent will be good as to the residue—as good as if it had originally issued only for the claims which are valid. If he omits to make a disclaimer, but brings suit for the violation of his patent, and it satisfactorily appears upon the trial that he is entitled to be protected in a portion of the claims set up in his patent, but that he is not entitled to be protected in respect to another portion, he is still entitled to damages for the violation of the valid portion of his claims, the same as if all the claims were valid, so far as regards the mere right of recovery; but he gets no costs. That is the law. It has this qualification: If the jury are satisfied that there has been unreasonable negligence and delay on the part of the patentee in making a disclaimer as respects the invalid part of his patent, then the whole patent is inoperative, and the verdict must be for the defendants." *McCormick v. Seymour et al.*, 3 Blatch. 209.—*NELSON*, 1854.

20. Where a patentee neglects to file a needed disclaimer during both the original and extended terms of his patent, he unreasonably delays, and cannot prevail in an infringement suit.

*Winans v. New York & Erie R. R. Co.*, 1 Fish. P. C. 218.—*HALL*, 1856.

21. In the course of a trial at law, a question arose upon the true construction of a claim of the patent in suit, which was one of the issues in controversy. The Circuit Court found the claim valid, and gave the plaintiffs costs; the Supreme Court found the claim invalid, and refused the plaintiffs costs because no disclaimer had been filed. *Seymour et al. v. McCormick*, 19 Howard, 96.—*SUP. CT.* 1856.

22. Where a claim of a patent has been sustained by the Circuit Court but found invalid by the Supreme Court, the patentee is entitled to wait for this finding of the Supreme Court before filing a disclaimer, without being charged with unreasonable delay.—*Ib.*

23. Although the Circuit Court may find against the validity of a claim in a patent which has a plural number of claims, the patent owner may wait until the Supreme Court passes on that question before filing a disclaimer without the delay becoming unreasonable. *Silsby et al. v. Foote*, 20 Howard, 378.—*SUP. CT.* 1857.

24. The claim of the patent in suit was: "What I claim as my invention, and desire to secure by letters-patent, is the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to open and close a damper which governs the admission of air into a stove or other structure in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue." A disclaimer, as follows, was filed: "Your petitioner, therefore, hereby enters his disclaimer to so much of said claim as extends the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to any other use or purpose than that of regulating the heat of a stove, in which such rod shall be acted upon directly by the heat of the stove or the fire which it contains; which disclaimer is to operate to the extent of the interest of said letters-patent vested in your petitioner, who has paid ten dollars into the Treasury of the United States, agreeably to the requirements of the act of Congress in that case made and provided." It seems that such a disclaimer is a proper disclaimer.—*Ib.*

25. "A party may take out a patent for three or four claims, and . . . if he acts in perfect good faith, if he believes himself to be the inventor, and inadvertently, by accident or mistake, without any wilful intent to defraud, he embraces in his claim more than he is entitled to—in other words, claims things which are not new, it does not render his patent void; he is

enabled to bring his suit under Sections 7 and 9 of the statute of 1837, without first making any disclaimer. His patent is good for what is new and original." *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

26. What constitutes unreasonable delay in filing a disclaimer "is a question to be settled by the court, and not for the jury."—*Id.*

27. With reference to delay in filing a disclaimer, "the time, in reference to the question of delay, commences when the knowledge was brought home to the party that he was not the first inventor, or when it is declared by a court of competent jurisdiction to settle the question that he was not the first inventor; then it is that the time commences to run, and not until then."—*Id.*

28. If, during a trial, it appear that a claim is void for lack of novelty, and no disclaimer has been filed, plaintiffs are thereby deprived of costs.—*Id.*

29. "Inadvertence and error may occur as well in the disclaimer as in the claim, and . . . whenever the mistake occurs it may be cured by reissue." *Poppenheusen v. Falke et al.*, 4 Blatch. 493.—SHIPMAN, 1861.

30. Even a statement, in an original patent, that a part is old, or a disclaimer of a part, does not, it seems, necessarily prevent such part from being claimed in a reissued patent, though it would have that effect if made advisedly and not by inadvertence, accident, or mistake. *Hussey v. Bradley et al.*, 5 Blatch. 134.—HALL, 1863.

31. The defence of unreasonable neglect or delay in filing a disclaimer must be specifically set up in defendants' pleading. *Burden v. Corning et al.*, 2 Fish. P. C. 477.—HALL, 1864.

32. "Where a patent contains several claims, and the invention covered by one of them is not new or is absolutely void, the patentee may maintain an action for the infringement of the patent so far as it regards the valid claims, although he did not make a record of disclaimer of the invalid or void claim before the commencement of the action." *Carhart et al. v. Austin*, 2 Clifford, 528.—CLIFFORD, 1865.

33. Where the terms of a patent are too broad, but the difficulty is curable by disclaimer, "there may . . . be a decree for a perpetual injunction, each party to pay his own costs, without any actual previous disclaimer of record in the Patent Office." Accounting will not, however, be ordered until disclaimer is filed.—*Id.*

34. The claim in a patent was: "The forming of packing for pistons or stuffing-boxes of steam-engines, and for like purposes, out of

saturated canvas, so cut as that the thread or warp shall run in a diagonal direction from the line or centre of the roll of packing, and rolled into form, either in connection with the india-rubber core or other elastic material, or without, as herein set forth." A disclaimer was filed, "to that part of the claim which covers the packing therein described without a core, thereby causing the claim to include only the packing formed out of saturated canvas, so cut as that the thread or warp shall run in a diagonal direction from the line or centre of the roll of packing, and rolled into form in connection with and around an india-rubber core or one of other elastic material, meaning the said claim to include only the combination of an elastic core with saturated canvas having threads running in a diagonal direction, as described in said patent, wound around the same." Defendant contended that such a disclaimer could not take effect on a single claim. The court held it a good disclaimer. *Tuck v. Bramhall*, 6 Blatch. 95.—BLATCHFORD, 1868.

35. In the absence of unreasonable neglect or delay, a disclaimer may be filed during the pendency of a case, and the case proceed.—*Id.*

36. Disclaimer during suit takes away the right to costs.—*Id.*

37. A claim in complainants' patent was: "1. The employment or use of the deflecting plates E, E', one or both, placed at the sides of the saw, as herein shown, for the purpose of preventing the sawed stuff from bearing against the sides of the saw and expanding the saw kerf, and also for the purpose of allowing a thin veneer-saw to be stiffened by plates D, one or two, as desired." Subsequently to the grant of the patent certain owners under the patent entered their disclaimer "to that part of the first claim of the patent 'which covers the employment or use of the deflecting plate E' (the deflecting plate on the same side of the saw with the stiffening plate), 'at the side of the saw, thereby causing the said claim to include only the combination of the saw described with both of the deflecting plates E and E', when both of said deflecting plates are used at one and the same time, in the manner and for the purpose described in said patent." Thereof the court said: "The disclaimer of the use of only one deflecting plate with the saw, and the limitation thereby of the first claim to the use of two deflecting plates with the saw, was proper, and the disclaimer was in proper form." *Myers et al. v. Frame et al.*, 8 Blatch. 446.—BLATCHFORD, 1871.

38. Where, pending a trial, the necessity for

a disclaimer appears, decree will not be made until disclaimer is filed.—*Ib.*

39. A claim in complainant's patent was: "The use and application of glue, or glue composition in the tubing, substantially as described, for the purpose of making the flexible tubing gas-tight, whether of cloth, or rubber, or other gum." Pending trial, a disclaimer was filed to that part of the claim of the patent "which claims, as an improvement in flexible tubing for illuminating gas, the use and application of glue, thereby limiting the claim to the use and application of glue composition in the tubing, substantially as described, for the purpose of making the flexible tubing gas-tight, whether of cloth, rubber, or other gum." This was held to be a proper disclaimer. *Taylor v. Archer et al.*, 8 Blatch. 315.—BLATCHFORD, 1871.

40. "The mere fact that the plaintiffs have, since the trial and verdict, disclaimed one or more of the claims made in the patent, is not alone conclusive that the plaintiffs are not entitled to costs. If the verdict was rendered . . . upon all the claims, affirming their validity and the novelty of the invention claimed in each, then what the plaintiffs may have said or done, by disclaimer or otherwise, does not deprive them of the effect of the verdict; and so long as it remains in force, not set aside, it is conclusive between the parties. The fact of disclaimer is high evidence, in such case, that the verdict was wrong, and that the plaintiffs should only have recovered on the parts of the invention or patent therefor which are not disclaimed, and such evidence might warrant a new trial. But while such a verdict stands it is conclusive." *Peck et al. v. Frame et al.*, 5 Fish. P. C. 211.—WOODRUFF, 1871.

41. "A disclaimer is necessary only where the thing claimed without right is a material and substantial part of the machine invented."—*Ib.*

42. The patent in suit was for an elastic woven fabric specially adapted for forming gores for gaiter boots, and a claim thereof was "the corded fabric, substantially as hereinbefore described, in which the cords are elastic and held between the upper and under weft threads, and separated from each other by the interweaving of the upper and under weft threads with the warp threads in the spaces between the cords, and only there, substantially as above shown." A disclaimer was filed of "any fabric in which the weft threads are so interwoven with the warp threads that the former are not brought half way around each of said cords, so as to grip them in such a way as not to permit said elastic cords to slip between said weft threads in case said cords are

cut crosswise or bias." It seems that such a disclaimer is a proper disclaimer. *Smith v. Nichols*, 21 Wallace, 112.—SUP. CT. 1874.

43. A disclaimer may be filed after suit brought as well as before; the suit does not fall thereby.—*Ib.*

44. Where, of different claims in suit, a part are void and no disclaimer has been filed, costs cannot be recovered. *Bussey et al. v. Wager et al.*, 2 Banning & Arden, 229.—WALLACE, 1876.

45. "The disclaimer, when recorded, becomes a part of the original specification, and must be taken into account when construing the patent, and in ascertaining the rights of the parties to the suit, unless it appears that the effect of the disclaimer is to enlarge the nature of the invention and prejudice the rights of the respondents." *Dunbar et al. v. Myers et al.*, 94 U. S. 187.—SUP. CT. 1876.

46. In a pending suit, "where the effect of the disclaimer is to diminish the claims of the patent, without prejudicing the rights of the respondent, the suit may proceed, notwithstanding the disclaimer, it being held that the disclaimer under such circumstances does not affect the pending suit, except to limit and qualify the claims of the patent, and in respect to the question of unreasonable neglect or delay in filing the same."—*Ib.*

47. "Matters properly disclaimed cease to be part of the invention, and it follows that the construction of the patent must be the same as it would be if such matters had never been included in the description of the invention or the claims of the specification."—*Ib.*

48. For an example of a United States patent held to be affected by disclaimer contained in a foreign patent to the same inventor, see —. *Ashcroft v. Boston & Lowell Railroad Co.*, 97 U. S. 189.—SUP. CT. 1877.

49. As a condition of the extension of a patent, the Commissioner of Patents required a certain disclaimer, and it was made. Defendant contended that this was conclusive upon complainant. The court held otherwise. *Union Metallic Cartridge Co. v. U. S. Cartridge Co.*, 2 Banning & Arden, 593.—SHEPLEY, 1877.

50. It seems that, although an original patent may contain a disclaimer, yet the reissue thereof, omitting the disclaimer and covering the disclaimed matter, may be had. *American Shoe Tip Co. v. National Shoe-Toe Protector Co.*, 2 Banning & Arden, 551.—NIXON, 1877.

51. It seems that a disclaimer may properly be filed, erasing from the specification of a patent an alternative mode of applying the patent-

ed improvement. *Schillinger v. Gunther*, 14 Blatch. 152.—SHIPMAN, 1877.

52. Where a disclaimer in a patent has reference to a prior patent, that disclaimer is to be read in the light of the construction belonging to such prior patent. *Wonson v. Peterson et al.*, 3 Banning & Arden, 249.—SHEPLEY, 1878.

53. Where a patent has been granted under conditions of deliberate consideration, the patentee is warranted in refusing to disclaim until a court has passed upon the question of validity. *Burdett v. Estey et al.*, 15 Blatch. 349.—BLATCHFORD, 1878.

54. The correction of a mistake in the statement of a patent as to the effect of laying pavement in sections is the office of a reissue, and not of a disclaimer. *Schillinger v. Gunther*, 15 Blatch. 303.—BLATCHFORD, 1878.

55. It is proper to correct by disclaimer an unlawful claim introduced by reissue. *Schillinger v. Gunther*, 17 Blatch. 66.—BLATCHFORD, 1879.

56. "It is true that strictly Section 4917 contemplates only a disclaimer of some claim, or a part of a claim; it is not improper to eliminate or withdraw, by the same writing, the parts of the body of the specification on which the disclaimed claim, or part of a claim, is founded. The disclaimer is none the less disclaimer of a claim or a part of a claim because, in addition, it disclaims such parts of the body of the specification. The disclaimer being a proper one, in form and substance, it is, by the statute, to be, after its filing, 'considered as a part of the original specification.' The . . . specification is to be thereafter read as if the disclaimer were incorporated in it."—*Id.*

57. "No disclaimer can be allowed to be operative unless the unlawful claim was made through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention; nor can a plaintiff recover on a patent which claims anything not *bona fide* the patentee's, unless the claim to the thing not *bona fide* was made through inadvertence, accident, or mistake, and without any wilful default or intent to defraud or mislead the public."—*Id.*

58. A disclaimer disclaimed "combining a dead-beat and recoil escapement, except when the same is produced from flattened metal by bending it into the shape and for the purpose, substantially as described in the specification of said patent." It seems that such a disclaimer is proper. *Terry Clock Co. v. New Haven Clock Co.*, 4 Banning & Arden, 121.—SHIPMAN, 1879.

59. By the court: "As the plaintiff filed his disclaimer after suit brought, he would not ordinarily be entitled to any costs in the suit

(rev. stat. U. S., Section 4922). But in this case the disclaimer was not necessary to sustain the patent to the extent it is held valid, was inoperative, in the view taken of it, upon the patent, and has had no effect in maintaining the suit. Under the circumstances it does not come within the provision of the statute denying costs." *Sharp v. Tiff*, 18 Blatch. 132.—WHEELER, 1880.

60. A disclaimer in the body of a patent may embody an error in fact as to the prior art, which error makes against complainant; but "the courts have no right to disregard such a disclaimer." *Collins Co. v. L. Coes et al.*, 3 Fed. Rep. 225.—LOWELL, 1880.

61. Where interest on defendants' profits is allowable, it does not begin to run till after disclaimer filed, in that case where a disclaimer is necessary. *Burdett v. Estey et al.*, 19 Blatch. 1.—WHEELER, 1880.

62. "The provision is not that no costs shall be recovered until after disclaimer, but it is as extensive as the whole existence of the case, and prohibits the recovery of any costs at all in the case."—*Id.*

63. Complainant, the patentee, filed a disclaimer to his patent based upon a mistake, the mistake being that an article which he chanced to see was supposed by him to antedate his invention, the fact being that said article was really made by himself. The disclaimer was, however, given its full force by the court. *Root v. E. N. Welch M'fg Co.*, 17 Blatch. 478.—SHIPMAN, 1880.

64. By the court: "It is explicitly stated in the specification that both the processes which the plaintiff has united in a single process are old; and this must mean old at the date of his invention. He cannot now be heard to contradict this admission." *Moffitt v. Rogers et al.*, 8 Fed. Rep. 147.—LOWELL, 1881.

65. When, on a trial, a claim, among those sued on, is found invalid and the other or others infringed, a disclaimer of the invalid claim must be made before injunction and account will be ordered. *Atwater M'fg Co. et al. v. Beecher M'fg Co.*, 8 Fed. Rep. 608.—SHIPMAN, 1881.

66. By the court: "This patentee had no right, after having stated positively to the world and to the Patent Office that he did not claim the idea of mounting the rake-head upon the top of the carriage by a reissue, to claim this as an invention by himself." *Edgerton et al. v. Furst & Bradley M'fg Co. et al.*, 10 Bissell, 402.—BLODGETT, 1881.

67. From the statement of the case: "While the causes were pending in the court below, and

after the testimony in chief of the defendants had been taken, to wit, on October 26th, 1880, the patentee and the complainants filed in the Patent Office a disclaimer, disclaiming the word 'preferably' where inserted in the specification of the reissued patent, and also any process described and claimed by which meat is to be compressed into the packages in any other than a warm or heated condition. On the same day the patentee and complainants filed another disclaimer, whereby they disclaimed any interpretation or legal construction of the words of the specification of the reissued patent, broader than is conveyed by the words 'the meat is first cooked thoroughly by boiling it in water, so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity.' The effect of this disclaimer was to restore the claims of the reissued patent to what they were in the original patent, except that the claim of the original patent is limited by the second disclaimer to the packing of meat cooked by boiling." *Wilson Packing Co. v. Chicago Packing & Provision Co. et al.*, 105 U. S. 556.—SUP. CT. 1882.

68. When an original patent was applied for, a rejection was unlawfully declared, based upon a prior rejected application, and applicant disclaimed what was shown in such rejected application. He subsequently (four years afterward) reissued, omitting the disclaimer, and correspondingly broadening the claim. Reissue held unlawful. *Putnam v. Hutchinson*, 11 Bissell, 233.—BLOGGETT, 1882.

69. "One claim in a reissue may be void without necessarily invalidating the other claims. In such case it is proper to disclaim the void claim." *Tyler v. Galloway et al.*, 20 Blatch. 445.—SHIPMAN, 1882.

70. Where, on trial, a disclaimer is found necessary, it must be filed before interlocutory decree will issue. *Mathews v. Spaulding et al.*, 20 Blatch. 482.—WHEELER, 1882.

71. Where a prior structure virtually anticipates a patented structure, a disclaimer of the prior structure will not save the patent. *Coburn v. Schroeder et al.*, 22 O. G. 1538.—WHEELER, 1882.

72. Where a disclaimer is made necessary by the court's opinion, it must be filed before injunction and account will be ordered.—*Id.*

73. Complainants' patent was for "arranging a perforated fire-pot, with a grate bottom, within a circular stove, having provision for the admission of air below the point of suspension of said fire-pot, substantially as described." Complainants disclaimed "so much of the

claim as covers perforations or openings in the sides of the suspended fire-pot extending throughout the entire depth of its sides, and they limit such perforations or openings to substantially the lower half of the fire-pot;" and they stated that they claimed "a fire-pot suspended from its upper edge, with substantially the lower half of its sides containing perforations or openings." The court held that this was not a genuine disclaimer, but an attempt to effect what could only be effected by a reissue. *Hailes et al. v. Albany Stove Co.*, 21 Blatch. 271.—WALLACE, 1883.

74. By the court: "If the defendants have infringed the second or old claim, the plaintiffs, upon filing a disclaimer of the new one, are entitled to a decree with costs for the infringement of the old and valid claim; considering that the question of the validity of the new claim in the reissue is a question of law upon the face of the patent, and that its validity has been sanctioned by the Commissioner of Patents in granting a reissue and upheld by the Circuit Court, there has been no unreasonable delay in entering a disclaimer, for the plaintiffs were not bound to disclaim until after the judgment of this court upon the question." *Gage et al. v. Herring et al.*, 107 U. S. 640.—SUP. CT. 1883.

75. Where, in an action at law, a disclaimer which ought to be made is not made before the suit is brought, complainant cannot have costs. *Proctor v. Brill et al.*, 16 Fed. Rep. 791.—McKENNAN and BUTLER, 1883.

76. A disclaimer can add nothing to a patent. It has no office to make the patent cover anything, however clearly shown in the patent, which is not described and claimed as a part of the invention. And where the disclaimer struck out the word "broadly," and also the words "in any suitable manner as" in the description, and also the word "are" in the claim, the court said that these changes made the description and the claim cover, as a part of the globe holder, "the disk as a centre, with the arms riveted to it." Also that "the effect of the disclaimer is to change the invention covered by the patent from the arms to the centre. . . . Such changes pertain to reissues and not disclaimers." *White v. E. P. Gleason M'fg Co.*, 21 Blatch. 364.—WHEELER, 1883.

77. A United States patent cannot be affected by a disclaimer found in an English patent to the same inventor, nor by the claims found in a later American patent to the same inventor. *United Nickel Co. v. Melchior*, 17 Fed. Rep. 340.—BLOGGETT, 1883.

78. It is not a good objection to the grant of

a preliminary injunction that a disclaimer was not filed, as respects claims not in issue, before suit was brought. *Duff et al. v. Calkins*, 25 O. G. 601.—ACHESON, 1883.

79. Where a complainant abandons a claim in his reissued patent in suit because of its invalidity through undue expansion, and there is no hearing upon that claim, a disclaimer is not necessary before a decree, nor are costs to be denied. *Mundy v. Lidgerwood Mfg Co.*, 20 Fed. Rep. 191.—WHEELER, 1884.

80. "It is settled that a disclaimer need not be filed until the court has passed upon the contested claims." *Stutz v. Armstrong & Son*, 28 O. G. 367.—ACHESON, 1884.

81. The claim in a patent was: "3. In an electric lamp, the combination of the core or armature C and the clamp D, by means of which the carbon points are separated from each other as soon as an electrical current is established, and held asunder during the continuance of the current, and then permitted to come together as soon as the current ceases, substantially as and for the purpose specified." A disclaimer was to: "So much of such part of the invention described in said letters-patent, and coming within the general language of the third claim thereof, as may cover or include as elements thereof 'the core or armature C' and 'the clamp D,' excepting when the core or armature raises the clamp by a lifter secured to such core or armature, substantially as described in said patent." The court thereupon said: "The effect of the disclaimer is to disclaim Figure 6 from the patent, and to retain Figure 1, which was clearly described, and all whose mechanical features were pointed out, although the distinctive principle of the invention was neither known nor stated. The object of the disclaimer was to limit the patent to clamp D of Figure 1, with the elements necessarily connected therewith already specified in combination therewith." *Brush et al v. Condit et al.*, 22 Blatch. 246.—SHIPMAN, 1884.

82. "The defence of unreasonable neglect or delay in filing a disclaimer must be set up in the answer before it can be considered by the court." *Worden et al. v. Searls*, 21 Fed. Rep. 406.—NIXON, 1884.

83. The construction of a claim which will render a disclaimer altogether nugatory, must be essentially wrong, and cannot therefore be accepted. *Atlantic Grant Powder Co. v. Hulings*, 21 Fed. Rep. 519.—ACHESON, 1884.

84. "A disclaimer can be made only when something has been claimed of which the patentee was not the original or first inventor, and when it is intended to limit the claim in respect

to the thing so not originally or first invented. It is true that in so disclaiming or limiting a claim, descriptive matter, on which the disclaimed claim is based, may, as incidental, be erased in aid of, or as ancillary to the disclaimer." *Union Metallic Cartridge Co. v. U. S. Cartridge Co.*, 112 U. S. 624.—SUP. CT. 1884.

85. "After an extension has been obtained on the condition precedent of making . . . disclaimer, the disclaimer cannot be held inoperative as respects the extended term."—*Id.*

86. A disclaimer is operative as to recoveries both before and after it is filed.—*Id.*

87. Complainant joined in one patent different improvements applicable to trunks, and the court, before permitting a decree in complainant's favor, compelled complainant to file a disclaimer to some of the claims of the patent, on the ground that the different improvements could not be properly joined in one patent. *Sessions v. Romadka et al.*, 21 Fed. Rep. 124.—DYER, 1884.

88. "After the term of a patent has expired it is too late to file a disclaimer." *Vacuum Oil Co. v. Buffalo Lubricating Oil Co.*, 31 O. G. 918.—WALLACE, 1885.

89. It seems that there is no objection to be urged against reissuing a patent and narrowing the claim as compared with the original. Until the decision of the Supreme Court has made the necessity of a disclaimer clear, there is no legal obligation on the patentee to disclaim. *Mathews et al. v. Flower et al.*, 33 O. G. 887.—BROWN, 1885.

90. The claims in a patent were: "1. As a new article of manufacture, glassware composed of homogeneous stock comprising different colors blended into each other, substantially as described. 2. That improvement in the art of manufacturing articles of glass of homogeneous stock, and producing therein different colors, which consists in cooling the article and reheating parts of the same unequally, thereby producing the variations in color as stated." The patent owner filed a disclaimer in which he limited his claim to a "gold ruby compound." It was held that "this was a patent where a part could be properly disclaimed. It did not require the importation of anything new into the specification, but simply an elimination of a part of what was originally claimed." *Libby v. Mt. Washington Glass Co. et al.*, 26 Fed. Rep. 757.—COLT, 1885.

91. Pending suit on a patent, a disclaimer was filed, and motion for provisional injunction made. Defendants contended that a supplemental bill should have been filed and another motion



for provisional injunction made. The court sustained complainant's mode of procedure.—*Id.*

92. It turned out on the trial of a cause that a disclaimer should have been filed to one claim of the patent in issue. Before the case was tried in the Supreme Court the patent expired. The Supreme Court held: "That the decree below must be reversed as to the award of costs, and affirmed in all other respects, with interest until paid, at the same rate per annum that decrees bear in the courts of the State of New York, and the case be remanded to the Circuit Court with a direction to modify the decree accordingly. Each party will bear his own costs in this court, and one half of the expense of printing the record." *Yale Lock M'fg Co. v. Sargent*, 117 U. S. 537.—SUP. CT. 1886.

93. Where the validity of a claim has been called in question and doubted, but has never been judged invalid by a competent tribunal, nor acknowledged to be invalid by the owner, the state of facts is not such as to compel a disclaimer. *Hill v. Biddle et al.*, 27 Fed. Rep. 560.—BUTLER, 1886.

94. In a patent for a glass annealing furnace, the specification contained a disclaimer as follows: "I am aware that movable bars and fixed temporary rests for the glass have long been in public use to move sheets of glass through an annealing tunnel. Therefore I do not claim these." It appeared from the contents of the file wrapper that this disclaimer had been made in view of a prior British patent, and the disclaimer was construed in the light of that prior British patent. *Tondeur v. Stewart et al.*, 28 Fed. Rep. 561.—ACHESON, 1886.

95. In a suit for an infringement of a patent, decision was rendered just before the patent expired, finding one claim invalid and another infringed. The patent expired within a day. Defendant moved to dismiss the bill because a disclaimer had not been filed. The court refused the motion. *Kittle v. Hall et al.*, 30 Fed. Rep. 239.—WHEELER, 1887.

96. In a patent for a cash and parcel railway for stores, the claim was: "The combination of counters, desk, ways, and carriers, and appliances whereby each carrier is automatically driven along its way from the counter to the desk, and from the desk back to said counter, substantially as set forth." A disclaimer was filed limiting the scope of this claim: "To a combination of counters, desk, ways, and carriers, and appliances whereby the carriers are all automatically driven along one way, each from its counter to the desk, and automatically ar-

rested there, and all along another way from the desk back to the counters from which they were sent, and each only automatically arrested at the counter from which it was sent, substantially as set forth in the descriptive part of the specification of the patent." It was urged by the defence that one cannot by a disclaimer incorporate another element, namely, graduated stops, into his claim. The court said: "There is much force in this reasoning," but did not pass upon the question. *Lamson Cash Railway Co. v. Martin et al.*, 30 Fed. Rep. 824.—COLT, 1887.

97. Where objectionable features have been taken into a patent through reissue, it is proper to eliminate them by disclaimer. *Torvant v. Duluth Lumber Co.*, 30 Fed. Rep. 830.—NELSON, 1887.

98. Green's driven well patent contained the following: "I am aware that James Suggett's patent of March 29th, 1864, and I disclaim all that was secured to him therein." This was eliminated in the reissue, and the reissue was sustained. *Elmes v. Andrews et al.*, 122 U. S. 40.—SUP. CT. 1887.

## DOUBLE USE.

[Comprised under "Invention—Insufficiency of."]

## DRAWING.

### CASES.

1. "The drawing may be referred to for the purpose of aiding the specification, which would otherwise be imperfect." *Burrall v. Jewett*, 2 Paige, 134.—WALWORTH, 1830.

2. The specification, the patent, the drawing, and the model, are all to be taken as parts of the description. *Whiting et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON and BALDWIN, 1831.

3. "The drawings are to be treated as part of the written specification, and may be referred to to show the nature and character and extent of the claim, as well as to compose a part of the description." *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

4. The drawings of the patent need not necessarily be referred to in the specification. *Emerson v. Hogg et al.*, 2 Blatch. 1.—BETTS, 1845.

5. The court may look to the whole specification, and also to the drawings, for the explanation of anything obscure. *Hogg et al. v. Emerson*, 11 Howard, 587.—SUP. CT. 1850.

6. "Section 6 of the act of 1837, that 'the applicant shall be held to furnish duplicate

drawings,' though directory in its terms, is not a condition." *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—KANE, 1851.

7. "The drawings are a part of the description of the thing patented, and are to be considered in connection with the specification." *Foss et al. v. Herbert*, 1 Bissell, 121.—DRUMMOND, 1856.

8. Drawings are to be considered part and parcel of the specification. *Judson v. Moore et al.*, 1 Bond, 285.—LEAVITT, 1860.

9. "It is not necessary, in order to make a patent valid, that the patentee should so make the drawings in his patent that they could be used for working drawings, or that a machine made in accordance with the exact scale of the drawings, which accompany the patent in the Patent Office, . . . should be an operative machine." *Am. H. & L. S. & D. M. Co. v. Am. T. & M. Co. et al.*, 1 Holmes, 503.—SHEPLEY, 1870.

10. "It is necessary . . . that the patentee should so describe his invention that a mechanic skilled in the art to which that invention relates would be able, by the aid of the description and drawings of the patent, to embody that invention in a practical, operative, efficient, and effectual form. That is all that is necessary, and, therefore, if, . . . upon a critical examination of these drawings, . . . there are some slight differences in distance or in proportion, which, if exactly carried out upon the same scale, in a machine constructed according to the patent, would require modification in order to make the machine operative, that does not affect the question."—*Id.*

11. "The drawings are no doubt a part of the description of the thing patented, but they must be considered in connection with the specifications. Where the invention patented consists . . . of a combination of old elements to produce a new result, mere matters of adjustment of the individual elements are not limited or controlled by the drawings, unless: 1. They are expressly so limited by the specifications as well; or, 2. Such limitation and control are necessary to maintain the integrity of the specifications, taken as a whole, or of some essential part or parts thereof; or, 3. Such limitation and control are essential to produce the result claimed." *Hamilton v. Ives et al.*, 6 Fish. P. C. 244.—LONGYEAR, 1873.

12. "The drawing could and should be looked at, if necessary, in order to explain an ambiguous or doubtful specification, and to make the invention capable of being understood and used. But it cannot supply an entire want of any part of

a specification or claim in a suit upon a patent, although it might afford ground for a reissue covering the part shown by it." *Tinker v. Wilber's E. M. & R. M'fg Co.*, 1 Fed. Rep. 138.—WHEELER, 1880.

13. A change in the drawings—in a reissued patent—not warranted by the model or the original drawings, though "morally objectionable," is not illegal unless such change affect the claim. *Pearl et al. v. Appleton Co. et al.*, 3 Fed. Rep. 153.—LOWELL, 1880.

14. By the court: "To understand these patents it is necessary to examine the drawings in connection with, and as a part of, the specification, and to rely upon them alone, to some extent, to ascertain the exact form and position of some of the parts." *Banker v. Bostwick et al.*, 3 Fed. Rep. 517.—WHEELER, 1880.

15. The model accompanying the application for patent being destroyed, a court will not permit amendment of the patent drawing except upon very clear evidence of mistake. *Royer v. Russell & Co.*, 9 Fed. Rep. 696.—WALKER, 1881.

16. In the drawings of a patent on a grain separator, the deflector was shown so near the shaker that it could not operate if so made in practice. The court held the device to be "inoperative and without value."—*Id.*

## EMPLOYER AND EMPLOYÉ.

### CASES.

1. Where an inventor, while working for another, developed an invention at the expense of such other, and allowed such other freely to use it, this state of facts was held to constitute a license to use the invention during the life of the patent. *McClurg et al. v. Kingland et al.*, 1 Howard, 202.—SUP. CT. 1843.

2. If a person employed in the manufactory of another, and while receiving wages, makes experiments at the expense of his employer, constructs the article invented, and permits his employer to use it, no compensation for the use being paid or demanded, and then obtains a patent, these facts would justify the presumption of a license to use the invention. *Slemmers' Appeal*, 58 Pa. St. 155.—SHERWOOD, 1858.

3. A man stipulated to engage in the service of a company and devote himself to making improvements in paper-folding machines, and that all improvements and inventions made or discovered by him should be the property of the company, and that he would take all proper steps for the purpose of procuring patents for

such improvements. During this employment this man made a new machine, but it was abandoned as an unsuccessful experiment. After this employment ceased, the man made a machine for the like purpose, which was successful, and took a patent therefor. This patent was held not to be the property of the company. *Appleton v. Bacon et al.*, 2 Black, 699.—*SUP. CT.* 1862.

4. "Where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they, in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of him who discovered the improved principle, and may be embodied in his patent as a part of his invention. Suggestions from another, made during the progress of such experiments, in order that they may be sufficient to defeat a patent subsequently issued, must have embraced the plan of the improvement, and must have furnished such information to the person to whom the communication was made, that it would have enabled an ordinary mechanic, without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation. Persons employed, as much as employers, are entitled to their own independent inventions; but where the employer has conceived the plan of an invention, and is engaged in experiments to perfect it, no suggestions from an employé, not amounting to a new method of arrangement, which, in itself, is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. But where the suggestions go to make up a complete and perfected machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belonged to another." *Agarwal Co. v. Jordan*, 7 Wall. 583.—*SUP. CT.* 1868.

5. The patent in question was for sewing-machines. Complainant had worked for the defendant corporation, experimented with its tools, stock, and materials, and thereby produced the improvement in question. In defendant's factory he had made five thousand sewing-machines on contract, having the improvement, his special tools going to the corporation at the end of the contract. It was held that this state of facts created a license to the defendant corpora-

tion. *Chabot v. Am. Buttonhole & Overseaming Co.*, 6 Fish. P. C. 71.—*McKENNAN*, 1872.

6. "Persons employed as much as employers, are entitled to their own independent inventions." *Union Paper Collar Co. v. Van Deusen et al.*, 23 Wall. 580.—*SUP. CT.* 1874.

7. In the absence of a specific contract to that effect, the employer is not entitled to the patented inventions of the employé. *Green v. Willard Improved Barrel Co.*, 1 Mo. App. 202.—*BAKEWELL*, 1876.

8. Where an inventor, working for another, puts the invention into use in the factory of that other before patent granted, he gives that other a special license to continue such use after patent granted. *Magoun v. New England Glass Co.*, 3 Banning & Arden, 114.—*SHEPLEY*, 1877.

9. One Wilkins, hired one Spafford, for twenty-five hundred dollars a year, under an engagement that Wilkins was to have the exclusive benefit of Spafford's services in making machinery and improvements in Wilkins's premises, and that Wilkins was to have the exclusive benefit of Spafford's inventive faculties and all such inventions as Spafford should make during the term of service. Certain inventions were made and patented while Spafford was "experimenting;" they were made in Wilkins' shops, with his machinery, tools, and at his expense, at a cost variously estimated at from twenty-one to thirty thousand dollars. The court held that Wilkins was "entitled to an exclusive license for the use of these machines during the existence of the patents, and any extensions, renewals, or reissues of the same." *Wilkins v. Spafford*. 3 Banning & Arden, 274.—*SHEPLEY*, 1878.

10. Complainant being about to start a factory for the manufacture of dry-goods, employed one Howard as a machinist. Various trifling inventions made by Howard were patented by him and assigned to complainant. Two patents were issued in complainant's name for Howard's inventions, for contrivances applicable to sewing-machines generally, being for improved mechanisms for operating such machines. It was no part of the original employment of Howard to invent machinery for general use, but only in the factory of complainant. Declarations of complainant were proved to the effect that he was to pay the expenses of obtaining the patents for one half interest in them, and was to assign the other half to Howard whenever he wanted it. It was held that Howard had an equitable title to one half of the two patents before mentioned. *Whiting v. Graves et al.*, 3 Banning & Arden, 222.—*SHEPLEY*, 1878.

11. Where an ordinary employé, not hired to

invent, makes and patents an invention during his employment, at the expense of the employer, such an employer does not thereby acquire a title to the patent. If such state of facts creates a license, such a license is personal, not transferable, and in case licensee were a corporation the right would die with the dissolution of the corporation. *Hapgood et al. v. Hewitt*, 11 Bissell, 184.—GRESHAM, 1882.

12. By the court: "The justice or injustice of the respondent taxing the salt company if he proposes to do so, for the use of a process disclosed by experiments made at its request and expense, with its materials, while in its employ, we cannot enter upon." *Damon et al. v. Eastwick*, 22 O. G. 1709.—BUTLER, 1882.

13. By the court: "If the workman, by using the tools and time and money of his employer, with his consent, makes an invention and applies it in his employer's business, the employer may continue to use it. If the improvement is a process, it has been held that the infringer may continue to practice the process for the whole period of the patent. . . . But, if the invention pertains to a machine, it is understood that only the specific machine or machines which have been so made are licensed." *Wade v. Metcalf et al.*, 16 Fed. Rep. 130.—LOWELL, 1883.

14. Where it appears that the complainant patentee had been in defendant's employ, and while there had put in use, for defendant's business, the patented articles for which the suit was brought, it was held that the circumstances created a license, from complainant to defendant, to use those identical articles so long as they should last. *Barry v. Crane Bros. M'fg Co.*, 22 Fed. Rep. 396.—BLODGETT, 1884.

15. The complainant and patentee had previously worked for the defendant corporation. He made the invention in the time and with the tools and materials of the defendant corporation, and defendant put it in use at his desire. This state of facts was held to create a license not terminating with his employment. *Jenks v. Langdon Mills et al.*, 27 Fed. Rep. 622.—COLT, 1886.

16. A bill in equity was filed to compel the specific performance by the defendant, of certain contracts between him and the complainant, wherein defendant undertook to produce certain improved machinery to embody inventions made, without details or specification as to form, material, structure, principle, or mode of operation of the proposed machines, all of these matters being left wholly to the judgment and discretion of the defendant. Thereof the court said: "Courts of Chancery will not entertain bills to compel the specific performance of contracts for

personal services." Complainant urged that at least defendant might be required to show and exhibit to complainant the plans and drawings of said machines heretofore prepared by him, and make disclosure and discovery of the principle and structure of machines already built. The court decided in the negative on both points. *Wollensack v. Briggs*, 37 O. G. 339.—BAILEY, 1886.

17. An inventor went to work for another party for a year, agreeing "to devote all his time and energy during the said period, in superintending the manufacturing department of said business, as well as in the buying and selling of goods belonging to said business." The inventor's duties were not otherwise specified, but the duties he had been accustomed to perform embraced the preparation of new designs, many hundreds of which he had prepared for such party, and for some of which he had obtained patents. During this employment he invented a patentable design and patented it, and left the employment of the company. The court held that the facts constituted a license or special privilege to the defendant to use the invention. *Hermann v. Hermann*, 37 O. G. 892.—BROWN, 1886.

18. A corporation manufacturing ploughs and other agricultural implements, hired a superintendent who agreed to use his knowledge and skill in devising and making improvements in the ploughs manufactured by the corporation, and in getting up and perfecting ploughs and other agricultural implements adapted to the trade. While employed by the corporation he invented and built a new sulky plough. He did this in regular working hours. The workmen upon it were paid by the corporation, and the materials were purchased by the corporation. After the superintendent's connection with the corporation ceased he applied for and took a patent on this plough. It was held that the superintendent was not expressly required by his contract to exercise his inventive faculties for his employer, that whatever right the employer had to the invention was a naked license to make and sell, which right was not transferable, and was extinguished by the subsequent dissolution of the corporation. *Hapgood et al. v. Hewitt*, 37 O. G. 1247.—SUP. CT. 1886.

## EQUIVALENT—CHEMICAL.

### CASES.

1. The inventor of a new compound may properly specify substitutes for the different in-

redients, and thereby cover their use in the compound. *Ryan et al. v. Goodwin et al.*, 3 Sumner, 514.—STORY, 1839.

2. After a chemical discovery has been made and patented, it is easy to find chemicals of different names which will answer the purpose of the invention, but the use thereof is an infringement. *Goodyear v. Central Railroad of New Jersey*, 2 Wall. Jr., 356.—GRIER, 1853.

3. "An equivalent of any substance is another substance having similar properties and producing substantially the same effect." *Mathews v. Skates et al.*, 1 Fish, P. C. 602.—JONES, 1860.

4. Complainant's patent was for "producing smooth and glossy surfaces upon the hard compound of caoutchouc and other vulcanized gums, by means of the use of oil or other equivalent substance applied to the surface of the prepared gum, and the plates of metal or moulds, substantially as therein described." Defendants used for this purpose spirits of turpentine, with a small quantity of rubber dissolved in it. Defendants were held to infringe. *Poppenhusen v. Faulke et al.*, 5 Blatch. 46.—SHIPMAN, 1862.

5. "This term 'equivalent,' when speaking of machines, has a certain definite meaning; but when used with regard to the chemical action of such fluids as can be discovered only by experiment it also means *equally good*." *Tyler v. Boston*, 7 Wall. 327.—SUP. CT. 1868.

6. "By . . . substitution of chemical equivalents, patents may as well be infringed as by mechanical equivalents. When a new composition of matter or process of manufacture is invented and patented, it is easy for the chemist, with the aid of the specification in the inventor's patent, to suggest changes in the process by the substitution of chemical equivalents which may produce similar or better results. It does not necessarily follow that such a use of chemical equivalents would not infringe the patent, even if in some respects they were improvements on the original process patented." *Woodward v. Morrison et al.*, 1 Holmes, 124.—SHEPLEY, 1872.

7. For the purpose of manufacturing a preserved and innocuous bookbinders' paste, chloride of sodium and chloride of zinc are equivalents.—*Id.*

8. In a composition for covering steam boilers and the like, asbestos and whitewash are the equivalents of lime-putty, and clay is also the equivalent of lime-putty. *U. S. & Foreign Salamander Felting Co. v. Merrimac M'fg Co.*, 2 Banning & Arden, 167.—SHEPLEY, 1875.

9. "Since the leading case of *Crane v. Price*, 1 Web. P. C. 409, it has not been considered

safe to invoke the ordinary doctrine of equivalents in construing patents for new manufactures or compositions of matter." *Rumford Chemical Works v. Hecker*, 2 Banning & Arden, 351.—NIXON, 1876.

10. Complainant's patent was for a marine paint composed of oxide of copper, an earthy or mineral base, and a vehicle or medium. Defendants used in their paint sulphuret of antimony, an earthy or mineral matter which dissolves in water more slowly than the oxide of copper; defendants used it in combination with oxide of copper and a suitable vehicle or medium. Defendants were held to infringe. *Wonson v. Peterson et al.*, 3 Banning & Arden, 249.—SHEPLEY, 1878.

11. "Vulcanite and soft rubber are different things, having different properties, and are in no sense equivalents." *Clarke v. Johnson*, 16 Blatch. 495.—BENEDICT, 1879.

12. A compound of nitro-glycerine, paper stock, and saltpetre, and also a compound of nitro-glycerine, sawdust, charcoal, and saltpetre (defendants' mixtures) are each the equivalents of a compound of nitro-glycerine and infusorial earth (complainant's mixture). *Atlantic Giant Powder Co. v. Dittmar Powder M'fg Co. et al.*, 17 Blatch. 531.—BLATCHFORD, 1880.

13. Complainant stated that in his improvement in bleaching xyloidine he used "any of the well-known means, preferring a solution of chlorine, or a solution of chloride of lime or soda." Defendant used permanganate of potash, which was a known bleaching agent. *Held*, to be an equivalent and an infringement. *Spill v. Celluloid M'fg Co.*, 18 Blatch. 190.—BLATCHFORD, 1880.

14. A patent for a packing material composed of forty per cent and over of refractory matter, held together by a skeleton of soft rubber, is not infringed by a packing which consists of refractory matter held together by a skeleton of vulcanite, the latter having advantages in use not found in the former. The difference in action is proof of substantial difference in the compounds. *Clarke v. Johnson*, 18 Blatch. 450.—BENEDICT, 1880.

15. Complainant's patent was for "the employment of finely powdered flint, quartz, or feldspar, mixed with oil or other fluent substance," as a wood filler. A prior patent (defendants') was for "the use of silicious marl or infusorial earth for the purpose of filling and polishing wood." Powdered rotten-stone and the like had been previously used for the same purpose. Defendants infringed the first-mentioned patent, and attempted to justify under the

second, showing that the materials mentioned in both patents were chemically alike. Complainant's material had the advantages of being non-absorbent, and of being angular in its particles. *Held*, that complainant's patent was not anticipated by defendants'. *Bridgeport Wood Finishing Co. v. Hooper et al.*, 18 Blatch. 459.—SHIPMAN, 1880.

16. Complainant had patent for a process of producing bronze color on iron, and for the product, the process being to clean the casting from sand and scale, then coat it with oil or oil varnish, and subject to high heat. In a prior suit, on the merits, complainant had not claimed that his patent covered the case where the iron and oil were not both oxidized. Defendants made articles by first oxidizing the iron, then varnishing, and heating to a less degree than would oxidize the varnish. A provisional injunction had been granted in the present suit. Motion for attachment for contempt of court in violating the injunction denied. *Tucker v. Burditt et al.*, 5 Fed. Rep. 808.—LOWELL, 1880; *Tucker v. Corbin*, 5 Fed. Rep. 810.—SHIPMAN, 1880.

17. Complainant coated cast iron with as thin a coat of oil (or oil varnish) as was practically possible, and then subjected the article to a high heat, which, acting on the iron and oil jointly, produced a hard bronze-colored surface. A thicker coat of oil varnish baked on at a heat of 420° Fahrenheit was old. Defendants first oxidized the iron at a heat of 480°, and then baked on a tolerably thick coat of copal varnish at 300°. Defendants held not to infringe. *Tucker v. Sargent & Co.*, 19 Blatch. 538.—SHIPMAN, 1881.

18. Complainant's patent being limited to that alcohol which is spirits of wine, the use of methyl alcohol, which is wood alcohol, is not an infringement. *Spill v. Celluloid M'fg Co.*, 10 Fed. Rep. 290.—BLATCHFORD, 1882.

19. Where the constituents of two medical compounds are the same, and they are combined to produce the same results upon the same principle, they are substantially the same compounds, although the proportions vary slightly. *New York Phar. Ass'n v. Tilden et al.*, 21 Blatch. 190.—WALLACE, 1883.

20. The claim of the patent in suit was: "I claim as my invention (1) the sulpho-conjugated compound of rosaniline, possessing the properties specified, as a new article of manufacture; (2) the method herein specified of manufacturing the within-described sulpho-conjugated compound of rosaniline, substantially as set forth." The claim of another patent was: "What I claim as new, and desire to secure by letters-

patent, is, (1) as a new article of manufacture, the dye-stuff or red coloring matter having the characteristics above set forth; (2) the within-described process for producing a new dye-stuff or red coloring matter, by the action of crystallizable sulphuric acid, commonly called 'anhydrous sulphuric acid,' or 'fuchsine,' substantially in the manner set forth." These were held to be for the same thing. *Holliday et al. v. Pickhardt et al.*, 29 Fed. Rep. 853.—WALLACE, 1887.

21. Complainant coated cast iron with as thin a coat of oil (or oil varnish) as was practically possible, and then subjected the article to a high heat, which, acting in the iron and oil jointly, produced a hard bronze-colored surface. A thicker coat of oil varnish baked on at a heat of 420° Fahrenheit was old. Defendants first oxidized the iron at a heat of 480° and then baked on a tolerably thick coat of copal varnish at 300°. Defendants held not to infringe. *Plummer Adm'r v. Sargent et al.*, 120 U. S. 442.—SUP. CT. 1887.

## EQUIVALENT—MECHANICAL.

### CASES.

1. The jury, it may be inferred, found defendants' bell, suspended by a coiled spring from a cross-bar uniting two uprights, not to be the equivalent of plaintiff's bell, attached by a horizontal bar to a vertical upright. *Parks v. Little et al.*, 3 Wash. 196.—WASH. 1813.

2. "If the same effects are produced by the same mode of operation, the principles of each are the same." *Whittemore et al. v. Cutler*, 1 Gall. 478.—STORY, 1813.

3. The material question is, whether the given effect is produced substantially by the same mode of operation and the same combinations of power in both machines. *Odison v. Winkley*, 2 Gall. 51.—STORY, 1814.

4. A lever of the second order, bearing a friction roller operating against an incline to close a gripping jaw, is the same in substance as a lever of the first order operating through a toggle-joint to close a gripping jaw. *Gray et al. v. James et al.*, 1 Peters's C. C. 394.—WASH. 1817.

5. "Where the machines are substantially the same, and operate in the same manner to produce the same result, they must be in principle the same." Difference of degree in result is not a difference in result.—*Id.*

6. The jury found, it may be inferred, that a round barrel pump, with butterfly valves of oval shape, connected in the centre and resting

on a rim, is not substantially the same as a square barrel pump, with butterfly valves of triangular shape, connected in the centre and resting on the sides of the pump. *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

7. "Different combinations of mechanical parts to effect the same purposes" do not constitute substantial identity.—*Id.*

8. Mere change in form and proportion are not change in substance. *Pettibone v. Der-ringer*, 4 Wash. 215.—WASH. 1818.

9. "If the two machines . . . operate in the same manner to produce the same result—though they may differ in form, proportion, and utility—they are the same in principle." *Evans v. Eaton*, 3 Wash. 443.—WASH. 1818.

10. "The different mechanical powers are not one and the same power; . . . a motion which is communicated by a screw is not communicated in the same way as that by a lever, a wheel, a wedge, or a pulley." *Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

11. Principle means not "an elementary truth or power," but "the peculiar structure or constituent parts."—*Id.*

12. A screw is not substantially the same thing as a rack and pinion.—*Id.*

13. The jury found, it may be inferred, that printing with *steel* plate is substantially the same thing as printing with *copper* plate. *Kneass v. Schuylkill Bank*, 4 Wash. 9.—WASH. 1820.

14. The safest guide in making the distinction between change in form and change in principle, is first to ascertain what is the result to be obtained; whatever is essential to that object, independent of mere form or proportions, may be considered as the principle. *Treadwell et al. v. Bladen*, 4 Wash. 703.—WASH. 1827.

15. It seems that the inventor of a machine may specify equivalents for the parts and thereby cover them. *Ryan et al. v. Goodwin et al.*, 3 Sumner, 514.—STORY, 1839.

16. "Where a similar effect is produced by a combination of the mechanical powers, though the machines may be somewhat different in their structure, in principle they are the same." *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

17. The revolving cutter of the Woodworth patented planer was of equal diameter throughout. Another party substituted a cone-shaped cutter. The two things were held to be substantially the same. *Van Hook v. Pendleton et al.*, 1 Blatch. 187.—BETTS, 1846.

18. In Woodworth's patented planer, friction rollers were used for the double purpose of propelling the boards and of pressing them down

upon the carriage. In defendant's machine the rollers were omitted, and the boards were pressed down upon a moving carriage by means of a screw and spring. Defendant's device was held in substance the same as complainant's. *Gibson v. Harris*, 1 Blatch. 167.—NELSON, 1846.

19. In Blanchard's lathe the lateral motion was produced by a screw; in defendant's machine, by a wheel and axle. In Blanchard's machine the cutter wheel and friction wheel had a lateral motion, while in defendant's machine the pattern and the rough material had the lateral motion. The two machines were thrown in and out of gear in a different manner. In Blanchard's machine the axes of motion of the cutter wheel and the raw material were parallel, while in defendant's machine they were not. In Blanchard's machine the form of the periphery of the friction wheel and that of the cutter wheel were the same, while in defendant's machine they were different. The two machines were held to be substantially the same. *Blanchard's Gunstock Turning Factory v. Warner*, 1 Blatch. 258.—NELSON, 1848.

20. Where, in a car wheel the plates connecting the tire and the hub are made convex, to allow contraction in cooling in the process of casting, any other form reaching the same end is substantially the same thing. *Many v. Jagger et al.*, 1 Blatch. 372.—NELSON, 1848.

21. "The word 'principle,' as applied to mechanics, is where two machines or things are made to operate substantially in the same way so as to produce a similar result, they are considered the same in principle. As where any of the mechanical powers, the lever, the screw, the wheel, etc., are used to accomplish certain purposes, the same powers being used in a somewhat different form to do the same thing, will not be a difference in principle. Whether the mechanical instruments be larger or smaller, whether their action be horizontal or vertical, the principle is the same." *Roberts et al. v. Ward et al.*, 4 McLean, 565.—MCLEAN, 1849.

22. "By equivalent in machinery is usually meant the substitution of merely one mechanical power for another, or one obvious and customary mode for another of effecting a like result." *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

23. Where complainant's device cannot be made to do that which is done by defendants' device, it would seem that the two are not equivalents, and defendants do not infringe.—*Id.*

24. A machine while at rest may appear not to be the same as another machine, but its prod-

uct, when in motion, may be conclusive of identity. *Sloat v. Patton*, 1 Fish. P. C. 154.—KANE, 1852.

25. "There are many devices in construction that can be made by a skilful mechanic, differing very much from each other in appearance, but which, in the eye of the patent law, are regarded as identical. For instance, an inventor, in the construction of his machine, desires a given power in order to give practical operation and effect to his discovery. One mechanic may furnish the power by means of a lever, another by means of a screw—two very different instruments—yet, so far as the use of the instruments and so far as their purpose to furnish power is concerned, they are regarded simply as mechanical equivalents, and the use of one in one machine does not distinguish that machine from a machine in which the other is found. So, too, a given power may be obtained by a spring, or by a weight, or by a pulley—apparently very different devices. Yet, as they are used for the same purpose and to accomplish the same end in machinery, they are regarded substantially as identical." *Iatham et al. v. Le Roy et al.*, 2 Blatch. 474.—NELSON, 1852.

26. "There are mechanical equivalents by the use of which . . . whole features may be changed and a great departure made from the apparent principle and combination of the machine, and yet it may operate well." *Blanchard v. Beers et al.*, 2 Blatch. 411.—NELSON, 1852.

26a. The doctrine respecting the use of mechanical equivalents is not confined to those elements which are strictly known as such in the science of mechanics. *Foster v. Moore*, 1 Curtis's C. C. 279.—CURTIS, 1852.

27. "Where two devices are capable each of doing the same thing and in substantially the same way, they must be equivalents of each other; and when one has been used the other is not patentable." *Broughton, Enos, In re*, 1 MacArthur's P. C. 278.—MORSELL, 1854.

28. "The rule on the subject of mechanical equivalents . . . is, that 'the identity of purpose, and not of form or name, is the true criterion in judging of similarity or dissimilarity of two pieces of mechanism;' or 'whether one thing is a mechanical equivalent of another,' is a matter of fact to be judged on the testimony of experts or on an inspection of the machines; and, in the language of the books, it is an inference to be drawn from all the circumstances of the case, by attending to the consideration whether the contrivance used by the one party is used for the same purpose, performs the same duties, or is applicable to the same object

as the contrivance used by the other party."—*Ib.*

29. "A rod is the known equivalent of an endless chain, in machinery, where it can be used for the same purpose and with like effect." *Spain et al. v. Gamble et al.*, 1 MacArthur's P. C. 358.—MORSELL, 1855.

30. "By the abuse of this doctrine of mechanical equivalents, experts can demonstrate every machine which effects a certain purpose to be substantially the same with every other which effects the same purpose." *Sickles et al. v. Gloucester M'fg Co.*, 3 Wall. Jr. 196.—GRIER, 1856.

31. The fact that one device is weighted with levers and the other with springs makes no difference. *Foss et al. v. Herbert*, 1 Bissell, 121.—DRUMMOND, 1856.

32. Although plaintiffs' patented device may show a roller for holding down the material operated upon, and although defendant may substitute a spring therefor and thereby get additional advantages, yet, if the spring performs the function of the roller, so far forth it is an infringement.—*Ib.*

33. "Equivalents are to be known by an inference to be drawn from all the circumstances of the case, by attending to the consideration whether the contrivance used by the appellant is used for the same general purpose, performs the same kind of duties, or is applicable to the same object as the contrivance used by the patentee." *Nutting, M., In re*, 1 MacArthur's P. C. 455.—MORSELL, 1856.

34. "Substantial identity is such an arrangement of mechanism as performs the same service and produces the same effect in substantially the same way. It is identity of principle." *Page v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

35. "Mechanical equivalents . . . are frequently resorted to in order to disguise the true character of the machine, and to conceal an infringement by changing the form of a machine, while its principle, its spirit, and its substance are retained." *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

36. "It is not enough, in order to show that one mechanical device is the equivalent of another, that it accomplishes the same result; that it produces the same effect, unless the effect is produced by substantially the same mode of operation. In other words, the ultimate end and object of a machine may be to produce a fabric or manufacture of a certain kind, and it may well appear, in the progress of invention, that several different inventors may have invented different



machines, producing the fabric or that manufacture by entirely different modes of operation.”—*Ib.*

37. “Mechanical equivalents are spoken of as different from equivalents that merely produce the same result. A mechanical equivalent, . . . as generally understood, is where the one may be adopted instead of the other by a person skilled in the art, from his knowledge of the art.” *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

38. “There may be equivalents in producing the same results, each of which is an independent matter of invention, and in that sense they are mechanical equivalents. . . Suppose, in early days, the problem was to get water from a well to the surface of the earth. One man takes a rope made of grass and draws up a pail of water; another would see that, as a mechanical equivalent, a rope of hemp would accomplish the same result. But suppose another person comes, and for the first time invents a pump. That is equivalent in the result of bringing the water to the surface of the ground; in that respect it is equivalent, in producing the result, to hauling it up by a rope, but is not mechanically equivalent; it brings into operation . . . very different powers and forces, and would require invention to introduce it.”—*Ib.*

39. “If a person has an invention in which he is called upon, by the patent law, to make a full and clear description of the thing he has invented, if another person looking at that can, from his knowledge of the subject, pass to the other thing that is used, without any invention, then the one is substantially the same as the other. It is not that every unskilled person shall see how they pass; but what is required is, that it shall be so described that those skilled and competent in the art, those who understand it, shall be able (not that an ingenious man can, seeing the new machine, sit down and find something else afterward, perhaps aided in some degree by that in inventing something that is not there, but whether, with a competent knowledge of his art, he will be able), by looking at that with care and examining it, to see that it may be done in a different mode, in a different manner, and it is done in that different mode or that different manner by the use of the knowledge which he has in the art.”—*Ib.*

40. “A mechanical equivalent is a device which performs substantially the same office with the thing described in substantially the same way.” *Conover v. Rapp*, 4 Fish. P. C. 57.—INGERSOLL, 1859.

41. If an element of a patented machine be

eliminated and a mechanical equivalent substituted therefor, the substantial identity of the machine is not changed.—*Ib.*

42. Where a patent is granted for a combination made of several elements, it covers and embraces known equivalents of each of the elements.—*Ib.*

43. “Where a party has discovered a result, as well as the machinery which produces it, he has the right to invoke the doctrine of equivalents in reference to infringers. Where he discovered a function that is new for the first time, and discovers a machine that is new, too, he has a right to invoke the doctrine of equivalents to protect himself.” *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

44. Complainant’s sewing-machine had a shuttle. In respondent’s sewing-machine the office of the shuttle was performed by the lower needle with an auxiliary hook; and defendant’s device was held to be a mechanical equivalent of the shuttle. *Howe v. Williams*, 2 Clifford, 245.—CLIFFORD, 1863.

45. The surface of a table and the side of a shuttle-box, when employed as holding surfaces, are equivalent devices, the difference being merely formal, resulting from a substitution of a vertical for a horizontal position.—*Ib.*

46. “These abstract phrases, ‘substantial identity,’ ‘equivalent,’ ‘mode of operation,’ etc., are often used in such a vague and equivocal manner that they mystify and lead many to absurd conclusions, which will not distinguish between things that differ. That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used by one are, therefore, mere equivalents for those of the other.” *Burr v. Duryee*, 1 Wallace, 531.—SUP. CT. 1863.

47. A mechanical equivalent is that which “a mechanic of ordinary skill, in the construction of similar machinery, and having the plaintiff’s specification and machine before him, could substitute in the place of the mechanism described, without expensive experiments, and without the exercise of his inventive faculties.” *Burden v. Corning et al.*, 2 Fish. P. C. 477.—HALL, 1864.

48. Fastening with metal clasps is not equivalent to fastening with glue or cement. *Doughty v. West et al.*, 2 Fish. P. C. 553.—SHIPMAN, 1865.

49. “The doctrine of equivalents should be critically scanned where there may be a difference in relation to two machines which, in some respects, operate by equivalent devices, and in other respects do not, to ascertain whether one has become a practical machine while the other

has not." *Sayles v. Chicago & N. W. R. R. Co.*, 1 Bissell, 468.—DRUMMOND, 1865.

50. "This question of identity . . . does not depend upon the appearance or form of the two structures claimed to be identical. It depends simply on the question whether they are the same in their mode and principle of operation, and whether one is a mechanical equivalent of the other. For it is obvious that there may be two machines very dissimilar in structure and appearance, which yet act upon precisely the same mechanical principles." *Blanchard et al. v. Puttman et al.*, 2 Bond, 85.—LEAVITT, 1867.

51. "Technical equivalents do not belong to a mere combination of old elements. Such a combination is regarded merely as an improvement upon what was before known, and which, without such new combination, would have belonged to the public. Inventors of such improvements, if their rights are secured by letters-patent, may treat all others as infringers who make, use, or vend to others to be used, any and every subsequent combination of those elements not substantially different; and no such subsequent combination is substantially different merely because the person constructing the machine under it employs a different device for one of the elements, provided such device was, at the date of the first patent, a well-known substitute for the omitted element." *Sands v. Wardell et al.*, 3 Clifford, 277.—CLIFFORD and CLARK, 1869.

52. Where a combination is made up of old elements, "the doctrine of mechanical equivalents does not apply." *Crompton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.

53. In a patent for a wire hoop for hat-brims, the ends of the hoop were described as joined by a ferrule. Defendant soldered these ends together, and such soldering was held to be a mechanical equivalent of the ferrule. *Mallory et al. v. White*, 8 Blatch. 552.—BLATCHFORD, 1871.

54. "When, in mechanics, one device does a particular thing or accomplishes a particular result, every other device *known and used* in mechanics, which skillful and experienced workmen know will produce the same result or do the same particular thing, is a known mechanical substitute for the first device mentioned for doing the same thing or accomplishing the same result, although the first device may never have been detached from its work, and the second one put in its place. It is sufficient to constitute known mechanical substitutes, that when a skillful mechanic sees one device doing a particular thing that he knows the other devices, whose

uses he is acquainted with, will do the same thing." *Carter et al. v. Barker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

55. Springs and set screws for adjusting the pressure of wringer-rolls are mechanical equivalents for wedges used for the same purpose. *Bailey Washing & Wringing Machine Co. v. Lincoln et al.*, 4 Fish. P. C. 379.—LOWELL, 1871.

56. "The mere substitution of a mechanical equivalent or equivalents for one or more of the elements constituting the combinations and organizations . . . claimed, or any merely formal or fraudulently evasive change in the parts or arrangement embraced in the claim, would not relieve a party from liability as an infringer." *Taylor v. Garretson et al.*, 9 Blatch. 156.—HALL, 1871.

57. "If the ingredient substituted for the one withdrawn was a newly discovered one, or even an old one performing some new function, and was not known at the date of the plaintiff's patent as a proper substitute for the ingredient withdrawn, it would avoid an infringement as a new combination or a newly discovered ingredient substituted for the one omitted; or even an old one performing a new function, not known at the date of the plaintiff's patent as a proper substitute for the one withdrawn, would not be an equivalent for the ingredient omitted within the meaning of the patent law; nor could it be successfully claimed as such by the plaintiff in order to support the charge of infringement. Such an alteration is not a mere formal alteration, as the difference between the two improvements is such that the new combination would be the proper subject for a patent, and consequently would avoid the charge of infringement in a case like the one supposed by the court." *Gould v. Rees*, 15 Wall. 187.—SUP. CT. 1872.

58. "*Bona fide* inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements; by which is meant, that a patentee, in such a case, may substitute another ingredient for any one of the ingredients of his invention, if the ingredient substituted performs the same function as the one omitted, and was well known at the date of his patent as a proper substitute for the one omitted in the patented combination. Apply that rule, and it is clear that an alteration in the patented combination which merely substitutes another old ingredient for one of the ingredients in the patented combination is an infringement of the patent, if the substitute performs the same function and was well known at the date of the patent as a proper substitute for the omitted ingredient; but the rule is otherwise, if the ingredi-

ent substituted was a new one, or performing a substantially different function, or was not well known at the date of the plaintiff's patent as a proper substitute for the one omitted from his patented combination."—*Id.*

59. "It is not always enough to prove that two combinations or elements are equivalent, to show that such element of the combination in one may be regarded under some circumstances as the equivalent of the corresponding element in the other, when the elements are separately considered. If the mechanical combination of the members of the two machines be such that the action and mode of operation differ in the two machines, then one is something more than a mere mechanical equivalent for the other." *Blake et al. v. Rawson*, 1 Holmes, 200.—SHEP-LEY, 1872.

60. "A device is not less an equivalent of another merely because, superadded to all the functions of such other, it may perform a further office. Still less does it fail to be the equivalent of another because, beside all the functions of such other, it performs some one of the offices more effectively or better, so long as it performs them in substantially the same way and uses substantially the same means." *Wheeler, Jr., v. Clipper Mower & Reaper Co.*, 10 Blatch. 181.—WOODRUFF, 1872.

61. "A device which, both mechanically and practically, performs the same precise office of another device in substantially the same manner," is not "any less an equivalent of the latter because it also performs another office or offices by reason of a difference in its mechanical construction." *Sareen v. Hall et al.*, 9 Blatch. 524.—WOODRUFF, 1872.

62. "In many organizations of machinery it would be true that the one might be a mere mechanical equivalent of the other, where the same result would be produced by substantially the same operation." *Child v. Boston & Fair Haven Iron Works Co.*, 1 Holmes, 303.—SHEPLEY, 1873.

63. "The substantial equivalent of a device is the same as the device itself—that is, if the patent mentions a specific mode of effecting a prescribed result, the substitution of any one or more mechanical equivalents for those specially mentioned will none the less work an infringement. The object sought by the modes of effecting the same substantially as stated in the patentee's specifications is covered by the patent, and whoever adopts the patentee's plan and works out the same result by merely substituting for one or more mechanical devices their mechanical equivalents or devices, is just as guilty of an infringement as if he copied the

patentee's device in all its parts." *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

64. In complainant's patented stone-breaker, one jaw was fixed and the other movable, its motion being produced by a revolving shaft, an iron connecting rod and a crank, the return motion being secured by spiral springs. In defendant's machine a water cylinder and piston was substituted for the revolving crank. The devices were held to be equivalents. *Blake v. Robertson et al.*, 11 Blatch. 237.—HUNT, 1873.

65. To hold a nut stationary and have a screw move endwise thereon by rotation is the mechanical equivalent of holding the screw stationary and having the nut move endwise of the screw by rotating it upon the screw. *King v. Louisville Cement Co.*, 6 Fish. P. C. 336.—BAL-LARD, 1873.

66. In fluting-machines, a rack and pinion is the mere equivalent of a screw for the purpose of adjusting one of the rolls. *Knox et al. v. Loweree et al.*, 1 Banning & Arden, 589.—NIXON, 1874.

67. By a mechanical equivalent in a case of combination "is meant that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent securing the invention as a proper substitute for the one omitted in the patented combination." *Gill v. Wells*, 22 Wall. 1.—SUP. CT. 1874.

68. "It is an axiom in mathematics and mechanics, and a self-evident truth of universal application, that the same causes produce the same results. If, therefore, . . . two inventions are substantially the same in fact, whatever may be claimed by either party in effect, in contemplation of patent law they are one as a necessary and legal consequence. The subsequent invention . . . must yield to the prior patent." *Merrill, R. S., In re*, 1 MacArthur, 301.—CARTTER, 1874.

69. Winding a rope around a drum, and passing the rope around a series of pulleys to the free ends of which ropes counterpoise weights are attached, are equivalent means of winding up a rope to which a weight is attached. *Tufts et al. v. Boston Machine Co.*, 1 Holmes, 459.—SHEPLEY, 1875.

70. "Mechanical equivalents are not those merely which produce the same result. 'A mechanical equivalent, . . . as generally understood, is where the one may be adopted instead of the other, by a person skilled in the art, from his knowledge of the art.'" *Smith et al. v. Marshall et al.*, 2 Banning & Arden, 371.—McKENNAN, 1876.

71. "The substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, and shape." *Union Paper Bag Machine Co. et al. v. Murphy et al.*, 97 U. S. 120.—SUP. CT. 1877.

72. The patent in suit being for a harvester, a mere hook used by defendants was held to be the mechanical equivalent of the swivel-joint in the patent. *Graham v. Gammon et al.*, 7 Bissell, 490.—BLODGETT, 1877.

73. In complainant's patented skate clamp the backward and forward movement was given by a screw, and in defendant's skates by a lever cam. The two devices were held to be mechanical equivalents. *Turrell v. Speath*, 3 Banning & Arden, 458.—NIXON, 1878.

74. A single perforated cylinder may be the substantial mechanical equivalent of two perforated cylinders to regulate the flow of air to the exterior of the flame of a lamp. *Williams v. Rome, Watertown & Ogdensburg R. R. Co.*, 15 Blatch. 200.—BLATCHFORD, 1878.

75. "Pressure in a machine may be produced by a spring or by a weight; and where that is so, the one is a mechanical equivalent of the other. Cases arise also where a rod and endless chain will produce the same effect in a machine; and where that is so, the constructor, in operating under a patent, may substitute the one for the other, and still claim the protection which the patent confers. Exactly the same function in certain cases may be accomplished by a lever or a screw, and where that is so, the substitution of the one for the other cannot be regarded as invention." *Imheuser v. Buerk*, 101 U. S. 647.—SUP. CT. 1879.

76. A spring construed the expressions "insoluble india-rubber" and "gutta-percha" to mean one and the same thing. *Colgate v. Gold & Stock Telegraph Co.*, 16 Blatch. 503.—BLATCHFORD, 1879.

77. A spring attached to the rear end of an electro-magnet armature lever, and having a set screw to regulate its tension (defendant's device), is the mechanical equivalent of a weight which is a nut moving on a screw thread cut on the rear end of such a lever (complainants' device). *Page et al. v. Holmes Burglar Alarm Tel. Co.*, 17 Blatch. 484.—BLATCHFORD, 1880.

78. Complainants' bolt for window catches had a plain round stem at the rear end reciprocating in a round hole in the rear end of the case which held the bolt. Defendants used a stem

which did not pass out of the rear end of the case, but was furnished with short, radial arms extending to and reciprocating upon the inside of the case. Defendants' stem was held to be a newly discovered substitute, and therefore not an equivalent. *Babcock et al. v. Judd et al.*, 1 Fed. Rep. 408.—SHIPMAN, 1880.

79. Complainant's patented knitting-machine "consisted of a stationary needle cylinder grooved to hold the needles in a vertical position. Around this was a rotary cylinder, with a portion of its periphery formed with a projection on which the heels of the needles rested. To this cylinder were attached the actuating cams, which operated on the heels or butts of the needles, and which accomplished the knitting by the alternate elevation and depression of the needles." As to one of defendant's machines, he testified that it differed from complainant's in that, "instead of the swing cam, he used a curved piece of metal secured to the cylinder, the ends of which projected above the needle head;" and as to the other, "he used the swing cam similar to the Leech" (an earlier) "machine;" but, instead of employing the butts of the needle to lift the end of the swing cam up to free the latch, the yarn carrier had been adapted to effect the same object; and to throw down the swing cam, a simple weight had been attached to the end thereof." . . . "It is quite obvious that these changes are merely equivalents of the complainant's devices." *Bickford v. Laporte*, 2 Fed. Rep. 214.—NIXON, 1880.

80. For a comparison of equivalent constructions in the matter of the manufacture of rubber boots and shoes—double extension gore flap—see —. *Evory et al. v. Candee et al.*, 2 Fed. Rep. 542.—SHIPMAN, 1880.

81. The subject-matter of the compared patents was a joint for flat-sided cans. Covell's, by which it was sought to anticipate complainant's, showed the joint as an open gutter, relying upon the solder for the strength of the joint. Complainant's patent showed the sides of the gutter closed together upon the lap from the next plate, giving strength to the joint aside from the solder. *Held*, that the two were different in kind, and complainant's patent sustained. *Banker v. Bostwick et al.*, 3 Fed. Rep. 517.—WHEELER, 1880.

82. One element of complainant's patented combination in water-works apparatus was a piston acted upon by the pressure of water in the mains to shut off the motive power and slacken the pumps. In defendant's apparatus the increasing pressure in the main decreased the amount of water pumped, by acting upon

a valve which opened and closed a duct leading from one end of the pump cylinder to the other, so that the water passed back and forth through said duct instead of onward out of the pump. Said the judge: "The means are the same, the result is the same, and the mode is different only in form." *Holly v. Vergennes*, 18 Blatch. 327.—WHEELER, 1880.

83. For different but equivalent constructions in pumps, see —. *Adair v. Thayer*, 17 Blatch. 468.—WHEELER, 1880.

84. For a comparison of hydraulic elevator machinery, resulting in finding the two systems not mechanical equivalents, see —. *Stebbins Hy. El. M'fg Co. et al. v. Stebbins*, 4 Fed. Rep. 445.—BLATCHFORD, 1880.

85. "Action by weight in one case and by spring in another are equivalent actions." *Potter et al. v. Stewart*, 18 Blatch. 561.—BLATCHFORD, 1881.

86. In complainant's patented machine for heading cartridge shells, a die carried a shell against a bunter and headed it. In defendant's machine the bunter moved against the fixed die. Held to be an infringement. *Union Mt. Cartridge Co. v. U. S. Cartridge Co.*, 7 Fed. Rep. 344.—LOWELL, 1881.

87. A spring and a weight are mechanical equivalents. *Consolidated Safety-Valve Co. v. Crosley Steam Gauge & Valve Co.*, 7 Fed. Rep. 768.—LOWELL, 1881.

88. Where two or more rollers had been needed to accomplish a given result, a single roller that does the work better is not the mechanical equivalent of the earlier structures. *Cote et al. v. Moffitt*, 8 Fed. Rep. 152.—LOWELL, 1881.

89. In complainant's patented device for bracket sewing-machines, an elastic lever was used to relieve against the action of the thumb-screw. Defendants used a rigid lever in connection with a coil spring. Held that defendants used well-known equivalents and infringed. *Singer M'fg Co. v. Henry Stewart M'fg Co. et al.*, 8 Fed. Rep. 920.—WHEELER, 1881.

90. By the court: "For some purposes, in considering questions arising on letters-patent, bent lugs and riveted pins may be the equivalents of each other; but, in considering the question of novelty of the plaintiff's loops, riveted pins are not the equivalents of the bent lugs." *Crandall v. Walters et al.*, 20 Blatch. 97.—BLATCHFORD, 1881.

91. "A majority of patents granted in modern times are for such inventions" (combinations), "and they are none the less entitled to protection, and none the less valuable on this account. . . . Such a machine is infringed whenever an-

other employs substantially the same combination, in plan and elements, operating in the same manner and producing substantially the same result. . . . The doctrine of equivalents, with slight modification, applies with as much force to such an invention as to any other. . . . The old elements from which one individual has drawn are open to all. It is the peculiar combination which one has effected that another shall not copy." *Dederick v. Cassell et al.*, 9 Fed. Rep. 306.—BUTLER, 1881.

92. "For a case of infringement arrived at by finding defendant's devices—which were 'unlike in form' to complainant's—mechanical equivalents for complainant's," see —. *Graham v. Geneva Lake Crawford M'fg Co.*, 11 Fed. Rep. 138.—DYER, 1880.

93. Although springs and weights are ordinarily mechanical equivalents, yet where a weight will not perform the desired functions as well as a spring, the weight is not the equivalent of the spring. *Cross v. Mackinnon*, 20 Blatch. 395.—WHEELER, 1882.

94. By the court: "The right of complainant to change the form of construction from that shown in his patent, and substitute a well-known equivalent for it, is fully established." *Putnam v. Hutchinson*, 11 Bissell, 233.—BLODGETT, 1882.

95. For example of mechanical equivalents in loom mechanisms, see —. *Webster Loom Co. v. Higgins et al.*, 105 U. S. 580.—SUP. CT. 1882.

96. In a machine for making buckle levers, the substitution of one spring for two springs, and locating it upon a mandrel instead of upon the dies, is an immaterial variation so far as the question of infringement is concerned. *Sprague v. Smith & Griggs M'fg Co.*, 12 Fed. Rep. 721.—SHIPMAN, 1882.

97. A ratchet mechanism used as a feed and a feed-screw are mechanical equivalents. *Aram et al. v. Matine Wagon Co.*, 16 Fed. Rep. 236.—BLODGETT, 1883.

98. Where complainant attained the adjustability of his windmill, with reference to the force of the wind by a weight, and defendants attained the same end by a spring, defendants were held to infringe. *Eclipse Windmill Co. v. May et al.*, 17 Fed. Rep. 344.—BLODGETT, 1883.

99. For an example of nailing machine mechanisms held to be mechanical equivalents, see —. *Dunham v. Kimball et al.*, 17 Fed. Rep. 810.—LOWELL, 1883.

100. Where the claim in a patent on a drive screw specified a "conoidal point," and defendant had a straight taper at this place, the court said: "The straight taper would, with the en-

larged base, be the equivalent of the oval taper for separating the fibres of the wood to admit the threads, and this change is merely colorable." *Fetter et al. v. Newhall*, 21 Blatch. 445.—WHEELER, 1883.

101. Complainant's waxing machine and roller took up the melted wax and spread it upon the paper. In defendants' machine the paper was carried through the bath of melted wax. Defendants' process was held to be the mechanical equivalent of complainant's. *Hammerschlag M'fg Co. v. Wood et al.*, 25 O. G. 700.—LOWELL, 1883.

102. "It is well settled that immaterial changes or the substitution of mechanical equivalents will not relieve a party from the charge of infringement." *Brighton v. Wilson*, 18 Fed. Rep. 378.—COLT, 1883.

103. Where, in a patented combination, the defendant uses, as a substitute for one of the elements, a different part performing the same function, which is an equivalent therefor, he is an infringer. *Child v. B. & F. H. Iron Works*, 19 Fed. Rep. 258.—LOWELL, 1884.

104. For an example of a defendant held an infringer who used complainant's patented combination, substituting an equivalent for one element thereof, see —. *Mundy v. Lidgerwood M'fg Co.*, 20 Fed. Rep. 114.—WHEELER, 1884.

105. For instance of mechanical equivalents in mowing machines, see —. *Hussey M'fg Co. v. Wm. Deering & Co. et al.*, 20 Fed. Rep. 785.—ACHESON, 1884.

106. For an example of mechanical equivalents in trunk-fasteners, see —. *Sessions v. Romadka et al.*, 21 Fed. Rep. 124.—DYER, 1884.

107. "It has never been held that an equivalent known at the date of the invention could be used without infringing the patent." *Kuhl v. Mueller et al.*, 21 Fed. Rep. 510.—SAGE, 1884.

108. For an example of mechanical equivalents in cultivators, see —. *Brown M'fg Co. v. Buford et al.*, 21 Fed. Rep. 714.—BLODGETT, 1884.

109. "Where one patented combination is asserted to be an infringement of another, a device in one, to be an equivalent of a device in the other, must perform the same functions." *Roswell et al. v. Lindsay et al.*, 113 U. S. 97.—SUP. CT. 1885.

110. "An equivalent must perform the same function in substantially the same manner as the part for which it is substituted." *Gage v. Kellogg et al.*, 23 Fed. Rep. 891.—COXE, 1885.

111. "A mechanical equivalent, as generally understood, is where one may be adopted instead of the other by a skilful mechanic accustomed

to machinery, with a competent knowledge of mechanical powers. If such a man, seeing a new machine, and having a full description of the thing invented, can, by examining it with care, see that the required thing can be done in a different mode, and it is done in that different mode by the knowledge which he has of his business, he has not produced a new invention, nor one substantially different from the original." *May v. County of Fond du Lac*, 27 Fed. Rep. 691.—DYER, 1886.

112. Belt gearing is a well-known and exact equivalent for a cog arrangement. *Cohansey Glass M'fg Co. v. Wharton*, 23 Fed. Rep. 189.—BUTLER, 1886.

113. Using a rod to operate the spring-locking bolt of a window transom is the mechanical equivalent of a cord and pulley used for the same purpose. *Wollensack v. Reiher*, 28 Fed. Rep. 424.—BLODGETT, 1886.

114. A piston packing consisting of two disks, one of which has a conical projection and the other a conical recess therein, is a mechanical equivalent of a piston packing consisting of two disks, one having a convex projection and the other a concave recess fitting thereon. *United States Metallic Packing Co. v. Tripp*, 31 Fed. Rep. 350.—COLT, 1887.

## ESTOPPEL.

### CASES.

1. "Grant of a subsequent patent for an invention is an estoppel to the patentee to set up any prior grant for the same invention."

*Query.* Can such a subsequent valid patent be granted? *Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

2. A prior existing patent estops a second patent for the same thing. *Morris v. Huntington*, 1 Paine, 348.—THOMPSON, 1824.

3. Where a licensee recognizes the validity of a patent in a license which by its terms is terminated at a certain time, in an action based on acts done after the termination of the license, the licensee is not estopped from denying the patentee's right. *Rice v. Hotchkiss*, 16 Connecticut, 409.—WILLIAMS, 1844.

4. Where A, knowing that B makes pretensions to be the inventor of a thing, yet buys an interest in C's patent for that thing, he is estopped from claiming that B is the inventor as against C. *Parkhurst v. Kinsman et al.*, 1 Blatch. 488.—NELSON, 1849.

5. "Where a man has been silent when in conscience he ought to have spoken, he will be

debarred from speaking when conscience requires him to be silent." *McCormick v. Howard*, 1 MacArthur's P. C. 238.—MORSELL, 1853.

6. Where a licensee has made and sold patented machines under a licensor and for his account, the licensee is estopped from alleging the invalidity of the patent as a reason why he should not account to the licensor. *Kinsman et al. v. Parkhurst*, 18 Howard, 289.—SUP. CT. 1855.

7. Where a licensee agrees with a licensor to work an invention under a royalty, and at the time of the agreement the licensee knows of an outstanding claim against the validity of the patented improvement of the other party, the licensee cannot purchase such an outstanding claim and set it up against the licensor when the licensor seeks to recover his royalty.—*Id.*

8. A party purchased a right under a patent, covenanting "to receive it as good and available to all intents and purposes, and that the transfer should not be liable for any objection for any supposed defect in the combination of said letters-patent if such supposed defect or objection should at any time arise." It was held that the vendee was estopped from alleging the invalidity of the patent. *Heilner v. Battin*, 27 Pa. State, 517.—WOODWARD, 1856.

9. A patentee is not estopped from showing that the patent is a nullity. *King v. Gedney*, 20 Law Rep. 631.—MORSELL, 1857.

10. "Corporations as well as individuals can be estopped from denying that they have done certain acts, when they had the corporate power to do such acts. They have the power to waive rights and conditions in their favor, to transfer rights and privileges, and to assent to such transfer by others; and, therefore, they can be estopped from saying that they have not done so." *New England Car Spring Co. v. N. India-Rubber Co. et al.*, 4 Blatch. 1.—INGERSOLL, 1857.

11. "Practical acquiescence in the claim of another to a patent is both an estoppel against and abandonment by him who thus acts." *Carroll v. Gambrell et al.*, 1 MacArthur's P. C. 581.—MORSELL, 1858.

12. Where a license strictly construed required the consent of a third person, which had not been given, he who stood in the relation of a licensor who had accepted royalties was held to be estopped from setting up such lack of assent. *Bloomer v. Gilpin et al.*, 4 Fish. P. C. 50.—LEAVITT, 1859.

13. Complainant sued his licensees as infringers. Complainant contended that the defendants were estopped from denying the validity of the patent by the recitals in the contract. The

court held otherwise, saying: "The respondents affirm the contract, and claim its protection; it is the complainant who seeks to nullify it. How it could be declared void by one party and yet estop the other has not been explained." *Burr v. Duryee et al.*, 2 Fish. P. C. 275.—GRIER, 1862.

14. "Recitals in a deed can estop no one but parties or privies who are claiming under or against it, in a controversy founded on its covenants."—*Id.*

15. A licensee of a patented machine may purchase and use any other machine, and if such other machine be claimed to be an infringement by the licensor, the licensee may defend himself by any plea that any other person might use.—*Id.*

16. In an action for the recovery of a license fee, defendant sought to attack the patent, but the court held that the defendant was not able to do this. *Birdsall v. Perego*, 5 Blatch. 251.—HALL, 1865.

17. "As . . ." to "the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, where the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future action between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment involved its consideration and determination, it will not be conclusive." *Packet Co. v. Sickles*, 5 Wall. 580.—SUP. CT. 1866.

18. If complainants would have a former suit operate as an estoppel, it must be set up in the pleadings. *Blandy et al. v. Griffith et al.*, 3 Fish. P. C. 609.—SWAYNE, 1869.

19. Where, in making a contract of license, the licensee produces a model of the machine proposed to be made under the license, the licensee is estopped from denying that the machine comes within the patent to which the license appertains. *Eureka Co. v. Bailey Co.*, 11 Wallace, 488.—SUP. CT. 1870.

20. Where A, an inventor, describes his invention to B, and, believing B has described it to C, hears C describe the same, A is not thereby estopped from setting up his claim. *Rail-road Co. v. Dubois*, 12 Wall. 47.—SUP. CT. 1870.

21. A prior decided suit between the same parties is an estoppel upon the same patent. *Dubois v. Phila., Wilmington & Baltimore R. R. Co.*, 5 Fish. P. C. 208.—GILES, 1871.

22. By the court: "Nor is this supposed estoppel invigorated by the fact that invasion of the patentee's rights has been widespread, and that all who may be found in that category may be held liable accordingly. Whoever reaped where he did not sow wrongfully appropriates what belongs to another, and equity will not stay the hand of the rightful owner of the harvest against him." *M'Millen et al. v. Barclay et al.*, 3 Pittsb. 377.—MCKENNAN, 1871.

23. If defendants appropriated complainant's invention "without consulting him, and he was passive when he knew it, because he was powerless to prevent them, he is not estopped from asserting his right when in a condition to enforce it."—*Id.*

24. Where an applicant for a patent acquiesces in a rejection made by the Patent Office, he is afterward estopped thereby. *Dennis v. Cross et al.*, 3 Bissell, 389.—BLODGETT, 1872.

25. If there is any fraud in the procurement of an extension, it does not lie with the patentee or his assigns to take advantage of that fraud. *Rugles v. Eddy et al.*, 10 Blatch. 52.—WOODRUFF, 1872.

26. Mistake of law furnishes no ground for escaping the force of the covenants in a license; and, although the term of the license has expired, the recitals and covenants in it bind and estop the licensee. *Wooster v. Taylor et al.*, 12 Blatch. 384.—BLATCHFORD, 1874.

27. In an interference proceeding between two patentees in a federal court, the defendants are not estopped by a statement made by their assignor to the Patent Office respecting the date of the invention. *Union Paper-Bag Machine Co. v. Crane et al.*, 1 Holmes, 429.—LOWELL, 1874.

28. "It is well settled that, where the suit is upon a license or upon a contract, which license or contract contains covenants on the part of the defendants by which they admit the validity of the plaintiff's patent, and agree to maintain it by suits or legal proceedings, and there has been an enjoyment of the license by the defendants, they are estopped from denying the truth of their admissions, unless it shall be

averred, by cross-bill or answer, that such agreement was obtained by fraud, surprise, or imposition." *Magic Ruffle Co. v. Elm City Co.*, 13 Blatch. 151.—SHIPMAN, 1875.

29. A party holding an assignment under a patent cannot maintain a right thereunder against another party equitably entitled to such assignment, when the first party took his assignment with knowledge of the second party's rights. *Newell et al. v. West et al.*, 13 Blatch. 114.—WALLACE, 1875.

30. "Where an invention is assigned before it is patented, the assignor is estopped, upon obtaining the patent, from setting up any adverse title (*Herbert v. Adams*, 4 Mason, 15); and the doctrine applies with equal force where he has agreed to assign, because in such case the purchaser, upon tender of the purchase price, becomes the equitable owner of the patent."—*Id.*

31. "The general rule is, that all matters which have been once determined by judicial authority cannot be again drawn into controversy as between the parties and privies to the decision. The parties, with some exceptions not necessary here to be stated, are named in the record. They have their day in court, are interested in the property or matters involved in the litigation, and have the right to give direction and control in the proceedings. There must be an end to strife, and where a person has been summoned to appear, or voluntarily appears, and has the opportunity to maintain or deny the issue presented by the pleadings in a cause, he is ever afterward estopped from controverting the truth of the facts directly decided." *Consolidated Fruit Jar Co. v. Whitney et al.*, 2 Banning & Arden, 30.—NIXON, 1875.

32. "It may be said, generally, that privies are those who are partakers or have an interest in any action or thing. The term privy denoting mutual and successive relationship to the same rights of property, privies to a suit are those who are represented by the parties and claim under them. The principle on which they are bound by the proceedings is, that they are identified with the parties in interest; and where such identity exists they are concluded by the result."—*Id.*

33. "An important qualification must be stated in regard to the estoppel of privies by a judgment or decree against those with whom they are in privy. In order to bind them as privies to the judgment, their succession to the rights of property affected by it should occur after the judgment; or, if the law *lis pendens* is invoked, after the summons or subpoena. . . . One that has acquired his title previously must



be made a party to the proceedings if he is to be bound by the result."—*Ib.*

34. By "the law of *lis pendens*," the service of summons "is constructive notice of the pendency of the suit only to those who have acquired some title or interest in the property involved in the litigation from and under the parties to the suit, or some of them, since the suit was commenced. It is not applied, as may be inferred from the phrase itself, to parties whose rights were acquired before the suit was instituted against the grantors or vendors under whom they claim."—*Ib.*

35. Suit for infringement was brought against A April 11th, 1873. B the title acquired from A in February, 1873. In April B conveyed all his rights to C. In July B was brought in as a party to the suit. The defendants claimed under the party C, and it was held that there was no legal obligation upon C to take notice of a suit pending against other parties, and that he was not estopped by the decree in another suit from maintaining the validity of his title.—*Ib.*

36. So long as a licensee continues to work under his license he is estopped from denying the validity of the patent. *Marsh v. Dodge*, 4 Hun, 278.—GILBERT, 1875.

37. After a question has once been determined in court between two parties, each is estopped from contesting the same matter in another court thereafter. *Consolidated Fruit Jar Co. v. Whitney et al.*, 2 Banning & Arden, 375.—NIXON, 1876.

38. Certain parties joined in conveying to a joint-stock corporation yet to be formed certain patents and other property. The defendants contended that such an agreement to convey property to a corporation yet to be formed was invalid. The court held that the principal, if not the only office of the agreement was, to indicate the intention of the parties in the formation of a new company, and to show that the owner of the patents and those holding under him were estopped from claiming certain property which said defendants had agreed, for a valuable consideration, to convey to the new company.—*Ib.*

39. A, the assignee of a patent, sold to B the exclusive right to the use of the patented machines in the State of Ohio. B then assumed to buy the patented machines of A, for use during the extended term. A subsequently held the extended term for a short time. B, being sued for infringement during the extended term, contended that the complainants, who claimed through A, were estopped from proceeding against B. It was held that B's purchase from

A was in fraud of complainants' rights, and that B could not use the machines during the extended term. *Union Paper Bag Machine Co. et al. v. Nixon et al.*, 1 Flippin, 491.—EMMONS and SWING, 1876.

40. One Mann began suit against one Wright and another defendant. Pending suit Mann died, and the suit was revived by the executor. A decree that the patent was valid and defendants had infringed was made, and the case was referred to a master. After entry of the decree, the present bill was filed against the defendant Wright and his co-defendant, who, since said trial, had been engaged in the infringing manufacture. The present complainant had purchased the right to this patent from Mann's administrator. It was held that the present complainant was in full privity to the former decree, that the defendant Wright was also a privy thereto and bound thereby, and also that the other defendant, Wright's present partner, was so far in privity with the former case, by his partnership relation to Wright, that he was also bound by said decree. *Dayton v. Wright et al.*, 2 Banning & Arden, 449.—BLDGERT, 1876.

41. Where A sues B under an original patent and fails, then reissues his patent and again sues B, A is not estopped from prosecuting the latter suit. *Pickering et al. v. Phillips et al.*, 4 Cliff, 383.—CLIFFORD, 1876.

42. "A judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that the several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Russell v. Place et al.*, 94 U. S. 606.—SUP. CT. 1876.

43. A commenced action at law against B for infringement of patent. The case went against B by default, because A and B had agreed that A should buy B's stock, and B should stop the manufacture. Subsequently B again began to manufacture, and A sued B, in equity, for infringement. Thereupon the court said: "Such

an agreement, made with full knowledge of the facts and not under duress, and with no evidence that it was unconscientious or unreasonable, a court of equity will enforce." *Brooks v. Morehouse*, 3 Banning & Arden, 229.—SHEP-LEY, 1878.

44. A court of equity will not ordinarily "entertain jurisdiction of a matter which a person has had an opportunity of litigating in another court, and which had there been decided against him, unless it appears that circumstances beyond his control prevented his making the defence or trying the question."—*Id.*

45. Complainants' patent prior to suit had been in interference in the Patent Office, and the opposing party had prevailed. This was held not to estop complainants from proceeding. *Perry et al. v. Starrett*, 3 Banning & Arden, 485.—WHEELER, 1878.

46. In prosecuting the extension of a patent, the patentee was required to disclaim several claims of the patent. After the extension he procured substantially the same claims by reissue. The Supreme Court held these reissued claims invalid, and the patentee estopped by his disclaimer from securing these claims. *Leggett et al. v. Avery et al.*, 101 U. S. 256.—SUP. CT. 1879.

47. A license recited that "Whereas, letters-patent of the United States dated the 6th day of November, 1866, numbered 59,375, were lawfully granted," etc. Then, after authorizing the licensors to revoke the license upon non-payment of the royalty, the license provided that such revocation should not impair "the effect of the admission of the validity of said letters-patent or reissue, or of the novelty, utility, and practicability of the said invention." It was held that the licensee had admitted the validity of the licensed patent, and that unless the recitals were introduced by fraud, imposition, mistake, or accident, the licensee could not deny their truth in an action for license fees which had accrued before the revocation of the license. *Evory et al. v. Candee et al.*, 17 Blatch. 200.—SHIPMAN, 1879.

48. A patentee who holds out to the world that, whoever buys a structure for putting his improvement in practice from another party shall have a right to practise the improvement, is estopped from proceeding against such purchasers as infringers. *Downton v. Yaeger Milling Co.*, 3 McCrary, 414.—DILLON, 1879.

49. As to when a licensee may and when he may not defend against a suit for compensation for the use of a patent, on the ground of the invalidity of the patent, see —. *Morse Arms*

*Mfg Co. v. United States*, 16 Nott & Hopkins' C. C. 296.—DAVIS, 1880.

50. It seems that acquiescence by a patent owner in the embodiment of the invention in a machine estops him from claiming the use of the machine to be wrongful. *Downton v. Yaeger Milling Co.*, 1 McCrary, 26.—TREAT, 1880.

51. An inventor and patentee who has been worsted in an interference on his patent is not, in the absence of bad faith on his part, estopped by his patent or by the interference from contesting the novelty of the patented invention. *Greenwood v. Bracher*, 1 Fed. Rep. 856.—NIXON, 1880.

52. Webb's application for patent on coffee mill was put into interference with Shepard's application, and priority was awarded to Shepard, whereupon Webb disclaimed the improvement in issue and took a patent for another claim. Shepard assigned his patent to complainant. Webb had assigned to Landers, Frary & Clark. The judge said: "The complainant's counsel contend that the defendants, who are the vendees of Landers, Frary & Clark, are privies to the interference and bound by the adjudication. . . To this proposition I assent so far as the question of priority of invention is concerned. But the decision does not preclude the defendants from contesting the right of the complainant" on the ground of lack of novelty. *Peck, Stowe & Wilcox Co. v. Lindsay et al.*, 2 Fed. Rep. 688.—ACHESON, 1880.

53. A license taken by defendant, giving it permission to sell goods on hand when the patent issued, is "rather in the nature of a compromise to save trouble than a deliberate acknowledgment of the validity of the patent." *White v. Harris & Sons Mfg Co.*, 3 Fed. Rep. 161.—LOWELL, 1880.

54. By the court: "Upon a motion like the present, when the defendant is the original inventor of the plaintiff's machine, upon whose application the patent was issued, and when the patent was sold to the plaintiff under the circumstances stated in the moving papers, no injustice will be done by refusing to permit the defendant to be heard to dispute the novelty or utility of the invention described in the patent." *Onderdonk v. Fanning et al.*, 4 Fed. Rep. 148.—BENEDICT, 1880.

55. In an infringement suit an issue was priority of invention. The victor afterward brought suit to have the opposing patent cancelled, and put in evidence the record in the infringement suit. It was held that such record was proper evidence, and concluded the defendant on the question of priority of invention. *U. S. & Foreign Salamander Felling Co. v. As-*

*bestos Felting Co.*, 18 Blatch. 312.—BLATCHFORD, 1880.

56. After the defendants have submitted to a decree *pro confesso* they cannot, in a second suit on the patent, attack the validity of the patent. *Roemer v. Newman et al.*, 19 Fed. Rep. 98.—NIXON, 1880.

57. When infringing defendants are licensees, and in the license are estopped from setting up the defences relied upon, provisional injunction will issue. *McKay, Trustee, v. McKnight et al.*, 5 Fed. Rep. 593.—NIXON, 1881.

58. Where a wife sees her husband apply for patent on an improvement, and sees him negotiate with others as to the patent, all without objection, a patent issued to her subsequently for the same improvement is void. Her conduct created an estoppel. *National Feather Duster Co. v. Hibbard*, 11 Bissell, 76.—BLODGETT, 1881.

59. A claim made in an application for a patent was rejected by the primary examiner, but allowed by the examiners-in-chief. On request of the primary examiner, applicant filed a new application with two claims. There was nothing in this state of facts estopping the patentee from setting up the claim afterward obtained in a reissue. *Yale Lock Mfg Co. et al. v. Norwich Nat. Bank*, 19 Blatch. 123.—SHIPMAN, 1881.

60. Where parties combine to defend a suit for infringement of patent brought against one of their number, and contribute to the expenses of that defence, they are all bound by the decision of that suit. *Miller et al. v. Liggett & Myer Tobacco Co.*, 2 McCrary, 375.—MCCRARY, 1881.

61. "No one can doubt that if a patentee obtains a patent on his solemn admission of certain facts, he shall never after be permitted to controvert them. This is *Leggett v. Avery*." *Union Mt. Cartridge Co. v. U. S. Cartridge Co.*, 7 Fed. Rep. 344.—LOWELL, 1881.

62. In his reissue application a patentee inserted a description of a modified form of his machine not found in the original patent. The court required him to disclaim this part of his description as a condition precedent to granting the reissue. This action was held not to be an estoppel preventing complainant from proceeding against one who used such modified form of the machine.—*Id.*

63. The mere taking of a license under a patent, there being no covenants, etc., as to validity of the patent, does not estop the licensee from denying the validity of the patent in a suit against the licensee.—*Nat. Mfg Co. v. Meyers*, 7 Fed. Rep. 355.—IRVING, 1881.

64. By the court: "It is explicitly stated in the specification that both the processes which the plaintiff has united in a single process are old; and this must mean old at the date of his invention. He cannot now be heard to contradict this admission." *Moffitt v. Rogers et al.*, 8 Fed. Rep. 147.—LOWELL, 1881.

65. A party who settles an infringement matter by selling his patents to the complainant cannot afterward be allowed—no new facts appearing—to dispute the validity of the patents so sold. *Consolidated Middlings Purifier Co. v. Guilder*, 3 McCrary, 186.—NELSON, 1881.

66. The fact that defendants formerly had a license from complainant under his patent, and put the patent stamp on their goods, does not estop them from contesting the patent, or the question of infringement. *Blatherwick v. Carey et al.*, 10 Bissell, 494.—BLODGETT, 1881.

67. By the court: "This patentee had no right, after having stated positively to the world and to the Patent Office that he did not claim the idea of mounting the rake-head upon the top of the carriage, by a reissue to claim this as an element of invention by himself." *Edgerton et al. v. Furst & Bradley Mfg Co. et al.*, 10 Bissell, 402.—BLODGETT, 1881.

68. By the court: "It has been several times decided by the Supreme Court that disclaimers, qualifications, and limitations imposed upon a patentee by the Patent Office are forever binding upon him if he chooses to accept a patent containing them. Not only are third persons likely to be misled to their injury by any subsequent enlargement by reissue or by a broad construction of claims thus intended to be limited, but these qualifications are conditions precedent without which there would have been no grant at all, and, of course, the grant must be taken as it is given." *N. Y. Belting & Packing Co. et al. v. Sibbey*, 15 Fed. Rep. 386.—LOWELL, 1883.

69. Where amendments made to claims in the Patent Office are simply for the purpose of curing crude and inartificial language, such amendments do not operate as estoppels. *Aram et al. v. Maline Wagon Co.*, 16 Fed. Rep. 286.—BLODGETT, 1883.

70. By the court: "While the defeated party to an interference is not estopped in another action from raising the question of want of novelty in the invention, yet if he had knowledge of the condition of the art at the time of his application, which the testimony here discloses, a want of novelty in the invention must be clearly apparent or a preliminary injunction will be granted. . . . In such a case it has been held that where

there is a want of good faith, the court will grant injunction." *Smith v. Halkyard et al.*, 23 O. G. 1833.—COLT, 1833.

71. What is called equitable estoppel—that is, estopped by contract—is, in this country at least, as valid a defence at law as in equity. *Concord v. Norton et al.*, 16 Fed. Rep. 477.—LOWELL, 1833.

72. Complainant notified defendants that defendants were infringing complainant's patent, and made threat of suit on thirty days' grace. Defendants answered that they should test the validity of the patent. Some years afterward complainant brought suit. This delay of complainant's was held not to amount to an estoppel.—*Id.*

73. By the court: "The more commonly expressed and therefore presumably better judicial opinion is to the effect that, when the license has been revoked by the plaintiff and the bill treats the defendant as a naked infringer, he is at liberty to avail himself of any defence ordinarily open to any defendant who is charged with infringement." *Wooster v. Singer M'g Co.*, 23 O. G. 2513.—SHIPMAN, 1833.

74. By the court: "The question of priority having been determined in favor of complainants, in that proceeding (a Patent Office interference) it is *res adjudicata* as between the parties to it." Defence of want of novelty is still open to defendants. *Shuler et al. v. Davis et al.*, 16 Fed. Rep. 564.—WALLACE, 1833.

75. Where a patentee modifies his claim at the instance of the Patent Office, he is bound by such action, and estopped from claiming to the contrary thereafter. *Dodds v. Stoddard et al.*, 24 O. G. 799.—SAGE, 1833.

76. Where defendants, in a written agreement between the parties, have admitted the validity of complainant's patent, they are estopped from denying that validity. *Eclipse Windmill Co. v. May et al.*, 17 Fed. Rep. 344.—BLODGETT, 1833.

77. One Curran took patents for improvements in lumber-driers, and conveyed the same to defendant for the State of Wisconsin. Curran and the other complainants subsequently bought patents covering the lumber-driers which defendant properly made under the Curran patents, and brought suit against defendant for infringement of these patents last acquired by Curran and the other complainants. It was held that Curran's assignment of his own patent to defendant estopped him from claiming that defendant's devices were infringements of the later-acquired patents, and also served as a license under the later-acquired patents. *Curran et al. v. Burdsall*, 27 O. G. 1319.—BLODGETT, 1833.

78. "A patentee cannot sell his rights to another and then buy or obtain control of an older patent, and through such older patent dispossess his assign of the full benefit of what he has purchased."—*Id.*

79. Where the grantee of a patent sues the patentee for infringement, "it would probably not lie in the mouth of . . . the defendant, who was the original patentee, . . . to deny their validity." *Burdsall v. Curran et al.*, 27 O. G. 1320.—BLODGETT, 1833.

80. "In order to constitute the former judgment or decree a bar, it must appear that the point in issue was judicially determined after a hearing, and upon consideration of the merits." *Keller et al. v. Stolzenbach et al.*, 27 O. G. 209.—ACHESON, 1884.

81. Complainants sued defendant under a patent granted for the invention of one Clark. Defendant had previously prevailed, upon his own patent, in a suit against one King, in which suit defendant's patent had been held valid as against the prior Clark patent. The present complainants were King's principal witnesses, and purchased the present patent in suit from King. Present complainants held to be in privity with King, and estopped from prosecuting the present case by the proceedings in the former case. *Pennington et al. v. Hunt*, 20 Fed. Rep. 195.—NIXON, 1884.

82. Where complainants bring suit for infringement of a patent owned by them, and defendant shows that he is operating under a prior patent conveyed to him by one or more of the complainants, the latter—at least those concerned in selling the prior patent to defendant—are estopped from claiming that defendant infringes the patent in suit, and the bill must be dismissed. *Rumsey et al. v. Buck*, 20 Fed. Rep. 697.—TREAT, 1884.

83. Complainant contended that defendant was estopped from contesting the validity of complainant's patent, because the maker of the articles used by defendant had confessed and acknowledged the validity of complainant's patents in a license. It seems that, in order to make such a contention available, it must be suggested in the bill of complaint, and that it must be shown that respondent was a party to such a written agreement. *Baltimore Car Wheel Co. v. North Baltimore Passenger Railway Co.*, 21 Fed. Rep. 47.—MORRIS, 1884.

84. Where a complainant sues its licensee as an infringer, defendant is not estopped from denying the validity of the patent by recitals in the license.—*Id.*

85. By the court: "An estoppel cannot arise

unless it grows out of a transaction to which the person estopped is a party or privy, and I do not understand that one who may purchase from a licensee of the patentee can, from that fact alone, be held bound by the license or its recitals, or that it establishes any contractual relations between such a purchaser and the patentee."—*Ib.*

86. Where complainant, in procuring a patent, describes a certain feature in the original specification, but afterward erases it therefrom, "such omission must be held to be either an abandonment of its use to the public or an irrevocable declaration" that such omitted thing was not the patentee's invention. *Atlantic Giant Powder Co. v. Hulings*, 21 Fed. Rep. 519.—ACHESON, 1884.

87. Where a person sells a patent to another, he will not afterward be permitted to deny the validity of that patent. *Underwood v. Warren et al.*, 21 Fed. Rep. 573.—TREAT, 1884.

88. It is no longer open to doubt that a licensee, holding under a license containing acknowledgments of the validity of complainant's patent and the like, is estopped from denying the validity of the patent; and it is about as well settled that so long as defendant continues to manufacture and sell during the life of the license, defendant must pay royalties. *Washburn & Moen M'fg Co. v. Cincinnati Barbed Wire Fence Co.*, 22 Fed. Rep. 712.—SAGE, 1884.

89. Defendants, while in complainant's employ, took a patent on electric clocks and assigned same to complainant. A modification of such clock was made while in complainant's employ, and represented by them to be within the patent. After leaving the employ they attempted to make and sell a particular kind of clock, and the court granted a provisional injunction, notwithstanding the patent was recent and had never been litigated. Defendants held to be estopped from denying validity and infringement. *Time Tel. Co. v. Carey et al.*, 22 Blatch. 34.—WALLACE, 1884.

90. "After an extension has been obtained on the condition precedent of making . . . disclaimer, the disclaimer cannot be held inoperative as respects the extended term." *Union Metallic Cartridge Co. v. U. S. Cartridge Co.*, 112 U. S. 624.—SUP. CT. 1884.

91. A disclaimer is operative as to recoveries both before and after it is filed.—*Ib.*

92. A Patent Office adjudication, in an interference proceeding, "is a sufficient adjudication upon the patentability of the invention and the right of the successful party to a patent for it, to lay the foundation for a preliminary injunc-

tion against the losing parties and privies to prevent infringement of the patent; and neither alleged anticipation of the invention by others known to them while they were seeking to obtain a patent for it themselves, nor their own, will avail them to prevent the injunction." *Celluloid M'fg Co. et al. v. Chrolithion Collar & Cuff Co. et al.*, 32 O. G. 383.—WHEELER, 1885.

93. It is admitted that he who assigns away a patent for a valuable consideration is estopped from denying the validity of that patent; and, in absence of contrary facts shown, the presumption is that the conveyance was for a consideration. *Parker, Trustee, v. McKee et al.*, 32 O. G. 137.—WHEELER, 1885.

94. There is nothing in the action of the Commissioner of Patents in rejecting an application which operates as an estoppel, or is *res adjudicata* upon the patentee, in the absence of the patentee's acquiescence in such rejection. *Matthews et al. v. Flower et al.*, 33 O. G. 887.—BROWN, 1885.

95. For one inventor and applicant to ask another patentee to disclaim in favor of the former does not create an estoppel as against the former.—*Ib.*

96. Where a patentee is forced by the proceedings in the Patent Office to take a limited claim, he cannot afterward have that claim construed more liberally than its terms. *Phoenix Castor Co. v. Spiegel*, 26 Fed. Rep. 272.—WOODS, 1886.

97. "Where an applicant, to cover a new combination, is compelled, by the rejection of his application by the Patent Office, to narrow his claim by the introduction of a new element, he cannot broaden his claim by dropping the element which he was compelled to include in order to secure his patent." *Shepard et al. v. Carrigan*, 116 U. S. R. 593.—SUP. CT. 1886.

98. "If an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he is bound by it. If dissatisfied with the decision rejecting his application, he should pursue his remedy by appeal."—*Ib.*

99. Complainant brought suit in one of the circuits against defendant. Defendant suffered a decree *pro confesso*, and a perpetual injunction was issued and served. Complainant afterward brought suit upon the same patent in another circuit for subsequent infringements. Complainant desired to have the former decree made an estoppel. The court held that it was not an estoppel, saying that the former decree was interlocutory in form, that its estoppel nature was doubtful, and that such doubts are to be resolved against him in whose favor the estoppel makes.

*Roemer v. Newman*, 26 Fed. Rep. 332.—COXE, 1886.

100. "When a claim has been examined and rejected by the Commissioner, the rejection acquiesced in by the patentee or his solicitor, and the patent issued without the claim, there is no inadvertence, accident, or mistake which entitles the patentee to a reissue." *Boland v. Thompson*, 23 Blatch. 440.—COXE, 1886.

101. "There is no fair question but that a licensee under a patent is estopped to deny its validity on any question arising out of that relation between the parties. . . . It does not follow that he will be always estopped because he has stood in the relation. When he stands out from under the license, and claims nothing from it, and does nothing more under it, with full knowledge to the licensor of his position, he would appear to be at as full liberty to contest the patent as any one." *Brown v. Lapham et al.*, 23 Blatch. 475.—WHEELER, 1886.

102. Where an applicant for a patent, being rejected upon a prior rejected application, acquiesces in the rejection, he is estopped thereby, and his patent is to be construed thereby. *Blades v. Rand, McNally & Co.*, 27 Fed. Rep. 93.—BLODGETT, 1886.

103. Where a party takes a license in which he agrees to the validity of the patents, he is estopped from denying their validity so long as the license is in force. *Pope Mfg Co. v. Owsley*, 27 Fed. Rep. 100.—BLODGETT, 1886.

104. In an equity action for infringement, defendant's pleas set out that at a former time, in an action between the assignors of the present complainant and this present defendant, a decree was entered dismissing the bill on the merits, and defendant contended that this was an adjudication and estoppel against the present bill. Complainant in the present bill set up its patent and alleged that the present defendant had been making articles which were infringements of its patent. The court held the former action not to be an estoppel, because it was not certain, and because the decision in the former case might have gone upon the ground that the prior defendant was making none of the articles patented. *Steam Gauge & Lantern Co. v. Meyrose*, 27 Fed. Rep. 213.—BROWN, 1886.

105. A defendant who is complainant's assignor is estopped from denying the validity of complainant's patent. *Alabastine Co. v. Payne*, 27 Fed. Rep. 559.—COXE, 1886.

106. Where defendants are owners of territory under the patent in suit, have done a good business under it, and represent the patent as valid, they may not be estopped from denying its

validity; but that defence comes from them with a very poor grace. *Hobbie et al. v. Smith et al.*, 27 Fed. Rep. 656.—COXE, 1886.

107. A suit was brought by the *Am. Bell Telephone Co. et al.*, in the Circuit Court for the Eastern District of Louisiana, against the *N. I. Telephone Co. et al.*, for infringement of the Bell Telephone patent. The Bell Telephone Co. had previously sued licensees of the N. I. Telephone Co. in the Circuit Court for the Western District of Pennsylvania; the N. I. Telephone Co. assumed and conducted all the defence, but at a certain point abandoned the defence. The N. I. Telephone Co. was held bound and estopped by the decree in the Pennsylvania District. *Am. B. Telephone Co. et al. v. N. I. Telephone Co. et al.*, 27 Fed. Rep. 663; *per curiam*, 1886.

108. Two joint patentees gave to their selling agent a paper not intended to be an assignment, but possibly capable of that construction. A defendant, who was sued, took the conveyance of the agent's rights after suit brought. Complainants were held not to be estopped from showing the true nature of the paper. *Kearney et al. v. Lehigh Valley R. R. Co.*, 27 Fed. Rep. 699.—NIXON, 1886.

109. Patentees are bound by concessions and amendments which they make in their applications for patents. *Roemer v. Peddie et al.*, 27 Fed. Rep. 702.—WHEELER, 1886.

110. An inventor who has assigned his patent to complainant is estopped from claiming that he was not the first inventor. *Am. Paper Barrel Co. v. Laraway*, 28 Fed. Rep. 141.—SHIPMAN, 1886.

111. "The case would be an exceptional one where a party who has prevailed upon one issue or defence in a litigation is estopped from setting up a different defence in a subsequent suit brought by his adversary. Such a case might exist where the defence in the second suit is so inconsistent with that asserted in the first that both could not be true, or where the defence in the first suit was of a character to induce the plaintiff to change his ground of action, and bring a second suit." *Holliday et al. v. Pickhard et al.*, 29 Fed. Rep. 853.—WALLACE, 1887.

112. "It is not true, as a general proposition, that a party, by putting forward one defence in a litigation, is precluded from asserting another against his adversary in a subsequent suit between them; nor can the general proposition be maintained that a contest in the Patent Office upon the question of priority of invention will forever foreclose the defeated applicant for a

patent from assailing the validity of the patent upon other grounds."—*Id.*

113. By the court: "The only claim in the reissue is for a combination not claimed in or covered by the original patent, and hence is not for the same invention described in the latter. Can this defect be corrected by a reissue? The claim in the reissue was before the Commissioner, and its allowance urged by the patentee through his solicitor, but was not allowed, being omitted at his instance, and it was thereupon stricken out by the Commissioner. The patent was issued without this claim, and was accepted in this form; but a week or two after its issue, was surrendered by the patentee and a reissue asked for, which was ultimately granted in its present form. Under these circumstances, we regard this case as clearly within the case of *Liggett v. Avery*, 101 U. S. 256." *Domson v. Lees*, 30 Fed. Rep. 635, *per curiam*, 1887.

114. One Curran was a patentee. One Birdsall owned an undivided half under the original patent for the State of Wisconsin. Then Curran took a reissue, and afterward Birdsall acquired the other half of the patent for Wisconsin. Birdsall sued Curran as an infringer. It was held that Curran was estopped from denying the validity of the patent. *Birdsall v. Curran et al.*, 31 Fed. Rep. 918.—BLONGETT, 1887.

115. Defendant sought to have complainant estopped by reason of the proceedings in the Patent Office pending the application for the patent in suit. Complainant's expert testified without objection that he was familiar with the history of the original patent, that the Patent Office requested a selection to be made from the two claims of the application, because they stated precisely the same invention, and such selection was made. The court held that there was no estoppel. *Ewart M'g Co. v. Bridgeport Malleable Iron Co.*, 31 Fed. Rep. 149.—SHIPMAN, 1887.

116. In an application for a patent a correspondence between the Office and the applicant, which does not eventuate in any modification of complainant's claims, does not amount to an estoppel. *Wirt v. Brown*, 32 Fed. Rep. 283.—BENEDICT, 1887.

## EVIDENCE.

### "EVIDENCE" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 2. (Provides as to specifications of patents that "certified copies thereof shall be competent evidence in all courts, and before all

jurisdictions, where any matter or thing touching or concerning such patent, right, or privilege shall come in question.")

SEC. 6. (Provides that "patents or specifications shall be *prima facie* evidence that the said patentee or patentees was or were the first and true inventor or inventors, discoverer or discoverers, of the things so specified, and that the same is truly specified; . . .") [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 3. (Provides as to patents that "certified copies thereof shall be competent evidence in all courts where any matter or thing touching said patent right shall come in question.") [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 4. *And be it further enacted*, That the said Commissioner shall cause a seal to be made and provided for the said office, with such device as the President of the United States shall approve; and copies of any records, books, papers, or drawings belonging to the said office, under the signature of the said Commissioner, or when the office shall be vacant under the signature of the chief clerk, with the said seal affixed, shall be competent evidence in all cases in which the original records, books, papers, or drawings could be evidence. And any person making application therefor may have certified copies of the records, drawings, and other papers deposited in said office, on paying for the written copies under the sum of ten cents for every page of one hundred words, and for copies of drawings the reasonable cost of making the same. [Repealed July 8th, 1870.]

Act approved March 3d, 1837.

(This act provides for renewing and replacing papers; and models destroyed in the fire which burned the Patent Office, December 15th, 1836.)

Act approved March 2d, 1861.

SEC. 15. *And be it further enacted*, That printed copies of the letters-patent of the United States, with the seal of the Patent Office affixed thereto, and certified and signed by the Commissioner of Patents, shall be legal evidence of the contents of said letters-patent in all cases. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 12. *And be it further enacted*, That the Commissioner shall cause a seal to be provided for said office, with such device as the President may approve, with which all records of papers issued from said office, to be used in evidence, shall be authenticated.

SEC. 57. *And be it further enacted*, That written or printed copies of any records, books, or

drawings belonging to the Patent Office, and of letters-patent under the signature of the Commissioner or acting Commissioner, with the seal of the office affixed, shall be competent evidence in all cases wherein the originals could be evidence, and any person making application therefor, and paying the fee required by law, shall have certified copies thereof. And copies of the specifications and drawings of foreign letters-patent, certified in like manner, shall be *prima facie* evidence of the fact of the granting of such foreign letters-patent, and of the date and contents thereof. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 478. The seal heretofore provided for the Patent Office shall be the seal of the office, with which letters-patent shall be authenticated.

SEC. 490. The Commissioner of Patents is authorized to have printed, from time to time, for gratuitous distribution, not to exceed one hundred and fifty copies of the complete specifications and drawings of each patent hereafter issued, together with suitable indexes, one copy to be placed for free public inspection in each capitol of each State and Territory, one for the like purpose in the clerk's office of the district court of each judicial district of the United States, except when such offices are located in State or Territorial capitols, and one in the Library of Congress, which copies shall be certified under the hand of the Commissioner and seal of the Patent Office, and shall not be taken from the depositories for any other purpose than to be used as evidence.

SEC. 491. The Commissioner of Patents is authorized to have printed such additional numbers of copies of specifications and drawings certified as provided in the preceding section, at a price not to exceed the contract price for such drawings, for sale, as may be warranted by the actual demand for the same; and he is also authorized to furnish a complete set of such specifications and drawings to any public library which will pay for binding the same into volumes to correspond with those in the Patent Office, and for the transportation of the same, and which shall also provide for proper custody for the same, with convenient access for the public thereto, under such regulations as the Commissioner shall deem reasonable.

SEC. 892. Written or printed copies of any records, books, papers, or drawings belonging to the Patent Office, and of letters-patent authenticated by the seal, and certified by the Commissioner or acting Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making ap-

plication therefor, and paying the fees required by law, shall have certified copies thereof.

SEC. 893. Copies of the specifications and drawings of foreign letters-patent, certified as provided in the preceding section, shall be *prima facie* evidence, and of the date and contents thereof.

SEC. 894. The printed copies of the specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerk's offices of the district courts, shall, when certified by him, and authenticated by the seal of his office, be received in all courts as evidences of all matters therein contained.

#### CASES.

1. A witness cannot be examined as to a third machine, in order to test the correctness of his testimony as to the similarity or dissimilarity of the machines of the plaintiff and defendant. *Odiorne v. Winkley*, 2 Gall. 51.—STORY, 1814.

2. It is a presumption of law that where a patent has been obtained, every subsequent patentee of a similar machine has knowledge thereof.—*Id.*

3. It is a presumption of fact that every patentee ascertains whether any one else has acquired the prior right.—*Id.*

4. The purchase of a license under plaintiff's patent proves nothing relative to the issue of disputed novelty. Evidence rejected. *Evans v. Eaton*, 1 Peters's C. C. 322.—WASH. 1816.

5. In the proceeding for repeal of patent—authorized by Section 10, Chapter 11, Act approved February 21st, 1793—the burden of proof is on the plaintiff. *Stearns v. Barrett*, 1 Mason, 153.—STORY, 1816.

6. Whether the objection of want of utility can be put in evidence under the general issue may well be doubted. *Gray et al. v. James et al.*, 1 Peters's C. C. 394.—WASH. 1817.

7. A patent is to be considered merely *prima facie* evidence of a very slight nature as to novelty and utility. (The law at this time required no examination on these points in granting a patent.) *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

8. Certified copies of the patentee's letters to the patent-granting authority, containing application and specifications, are admissible in evidence. *Pettibone v. Derringer*, 4 Wash. 215.—WASH. 1818.

9. Testimony as to when inventor made declaration to witness, of having made the inven-



tion, is admissible; this in plaintiff's behalf. *Evans v. Hettick*, 3 Wash. 408.—WASH. 1818.

10. That a witness, for defendant, is a contributor to a common fund for paying witness's expenses, does not disqualify him. Neither is he disqualified because he uses a machine like defendant's.—*Id.*

11. A witness cannot be asked whether another party—apparently adversely interested—offered to take a license, until the party is shown to have some machine for the purpose in question.—*Id.*

12. A deposition cannot be rejected after it is once read without objection.—*Id.*

13. A witness for defendant is not incapacitated because he uses one of the alleged infringing machines. *Evans v. Eaton*, 3 Wash. 443.—WASH. 1818.

14. The opinion of skilful witnesses whether the principles of two machines are the same, is competent evidence. *Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

15. The testimony of experts is but matter of opinion, "and its weight must be judged by all the other circumstances of the case."—*Id.*

16. Evidence that alleged prior users had taken licenses from the plaintiff is admissible in plaintiff's behalf. *Evans v. Eaton*, 3 Wheat. 454.—SUP. CT. 1818.

17. Under a plea of general issue, without notice of special matter, defendant may give the patent act in evidence, also alienage, also a license, also that the patent has no specification, also that the specification is insufficient in description, also that the patent covers more than the invention, also that the invention is not defined and pointed out, also that the suggestions of the petition are not recited in the patent, but not the defences enumerated in Section 6 of the act. (Referring to the act of February 21st, 1793.) *Kneass v. Schuykill Bank*, 4 Wash. 9.—WASH. 1820.

18. It is incumbent on the plaintiff to prove infringement when the plea denies it. *Dixon v. Mayer*, 4 Wash. 68.—WASH. 1821.

19. The testimony of persons conversant with the art as to resemblances or differences is entitled to great, but not conclusive, weight.—*Id.*

20. It is perfectly clear that a person having an interest only in the question, and not in the event of the suit—though liable to a like action—is a competent witness. *Evans v. Eaton*, 7 Wheat. 356.—SUP. CT. 1822.

21. The verdict in a suit against one party cannot be given in evidence in suit against another party. The other party "would be entitled to contest every step in the cause."—*Id.*

22. A deposition taken under state practice, but not under "positive rules of law or the rules of the Circuit Court," is objectionable.—*Id.*

23. A witness is not disqualified because he is sued for infringement of the same patent. *Evans v. Hettick*, 7 Wheat. 453.—SUP. CT. 1822.

24. A witness cannot be asked whether another party, apparently interested adversely to the plaintiff, took a license from plaintiff.—*Id.*

25. An objectionable deposition allowed to be read without objection, cannot afterward be thrown out.—*Id.*

26. That a person is subject to fits or derangement does not disqualify him from testifying. A question put to another witness as to such derangement was properly ruled out.—*Id.*

27. A patent is *prima facie* evidence, and no more, of the right of the patentee to the subject patented. *Pennock et al. v. Dialogue*, 4 Wash. 538.—WASH. 1825.

28. Testimony that plaintiffs at a certain time made a specimen of the afterward patented thing, the like of which witness had never known of, is evidence toward establishing invention by plaintiffs at that time.—*Id.*

29. A rival patentee is an admissible witness for the defence to show prior use. His interest is in the question merely, not in the event of the suit. *Treadwell et al. v. Bladen*, 4 Wash. 703.—WASH. 1827.

30. Upon no question do experts disagree oftener than on the question as to whether a difference is in form or in principle.—*Id.*

31. Upon an exception to the charge of the court the evidence forms no proper part of the record. *Pennock et al. v. Dialogue*, 2 Peters's C. C. 1.—SUP. CT. 1829.

32. Defendant is not entitled to put in affidavits in answer to plaintiff's rebuttal affidavits. *Ames v. Howard*, 1 Sumner, 482.—STORY, 1833.

33. "The burden of proving the previous invention, knowledge, or use of the thing patented, is on the defendants." *Whitney et al. v. Enmet et al.*, 1 Bald. 303.—HOPKINSON and BALDWIN, 1831.

34. An exemplified copy of a patent is admissible in evidence. *Peck v. Farrington*, 9 Wend. N. Y. 44.—SAVAGE, 1832.

35. The jury are to judge from the models and from the evidence whether the two machines differ in principle. "Nothing is more common than for persons skilled in the structure of machines to disagree in regard to the principles of them." *Smith v. Pearce et al.*, 2 McLean, 176.—MCLEAN, 1840.

36. Evidence that the defendants' structure

is better than the plaintiffs', is inadmissible, and not to be considered except so far as it goes to show substantial difference. *Alden et al. v. Dewey et al.*, 1 Story, 336.—STORY, 1840.

37. The patentee's oath of invention counterbalances the oath of a single witness that he communicated the invention to the patentee.—*Id.*

38. The patent is *prima facie* evidence of novelty and utility.—*Id.*

39. Where a defendant would show prior use in evidence, he must, in pleading, set up the witnesses having knowledge. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Peters's C. C. 448.—SUP. CT. 1840.

40. A patent is granted upon evidence, and proofs laid before a public officer upon which he decides, and the grant of the patent is *prima facie* evidence that the proofs have been regularly made and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs. It is not necessary for the patent to contain any recitals that the prerequisites to the grant have been duly complied with.—*Id.*

41. In a suit at law for infringement of a patent, the plaintiff is confined to giving evidence of the making, constructing, or using the invention in violation of his patent right. *Eastman v. Bodfish*, 1 Story, 528.—STORY, 1841.

42. "It is incumbent on those who seek to show that the examination of a witness has been improperly rejected to establish their right to have the evidence admitted." *Philadelphia & Trenton R. R. Co. v. Stimpson*, 14 Peters's C. C. 448.—SUP. CT. 1840.

43. "It is incumbent upon those who insist upon the right to put . . . questions to a witness to establish that right beyond any reasonable doubt, for the very purpose stated by them ; and they are not afterward at liberty to desert that purpose, and to show the pertinency or relevancy of the evidence for any other purpose not then suggested."—*Id.*

44. "A party has no right to cross-examine any witness except as to the facts and circumstances connected with his direct examination. If he wishes to examine him to other matters he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause."—*Id.*

45. "Parol evidence, bearing upon written contracts and papers, ought not to be admitted without the production of such written contracts or papers."—*Id.*

46. The declarations of an inventor, giving description and details of his invention, are admissible in evidence.—*Id.*

47. The circuit courts are vested with large discretion in the regulation of their practice, including the admission or exclusion of evidence, and where they act within their discretion that decision is not reviewable in the Supreme Court.—*Id.*

48. The burden is upon the plaintiffs to show an infringement of their rights. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

49. "It is one of the rules in law that no man can be a witness in his own cause, unless competent by statute, or by being called upon by the opposing party to answer upon oath, as in cases in equity and admiralty jurisdiction, etc." *Arnold v. Bishop et al.*, 1 MacArthur's P. C. 27.—CRANCH, 1841.

50. Certified copies of patents, and parts of patents, are admissible in evidence. *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

51. Certified copies of recorded assignments are admissible in evidence.—*Id.*

52. Where a rule of court requires that an objection to a deposition shall be indorsed thereon before the beginning of the trial, and if the rule is not complied with, the depositions will be received in evidence.—*Id.*

53. Where a previous owner in a patent has assigned away that interest, he has no interest in the case that can affect his competency as a witness.—*Id.*

54. "Great respect is due to the opinions of professional men on matters which relate to their professions. On such subjects, and such subjects only, are the opinions of witnesses received as evidence. This rule applies as strongly to mechanics as to any other profession or business."—*Id.*

55. Doubts as to whether a prior patent exhibits the device of the patent in suit, are fatal to the defence on that point.—*Id.*

56. Doubts upon the question of infringement are to be decided in favor of the defendants.—*Id.*

57. The record of a suit in equity between the same parties in another circuit court, wherein the court had directed an issue upon the same points now in controversy, and the jury had found a verdict upon these points in favor of defendants, but no other proceedings were had upon the verdict, and no hearing was had upon the merits of the case by the court, and the plaintiff, by the leave of the court, was allowed to dismiss his own bill without any final hearing thereon, is not admissible in evidence. *Allen v. Blunt et al.*, 3 Story, 742.—STORY, 1845.

58. Artisans skilled in the trade to which the patented improvement appertains, are proper

witnesses upon the question whether a specification is sufficient to work by. Persons who, though not practical artisans, are thoroughly conversant with the subject of mechanics, as a science, are proper expert witnesses. "The very highest witnesses to ascertain and verify the novelty of an invention, and their identity or diversity, or diversity of mechanical apparatus, and contrivances and equivalents, are beyond all question, all other circumstances being equal, scientific mechanics."—*Ib.*

59. A certified copy of a restored drawing, under the act of 1837, is admissible in evidence. *Emerson v. Hogg et al.*, 2 Blatch. 1.—*BETTS*, 1845.

60. "There must be in the bill allegations broad enough to cover any evidence offered before it becomes admissible." *Nesmith et al. v. Calvert et al.*, 1 Woodbury & Minott, 34.—*WOODBURY*, 1845.

61. Where a defendant's answer is under oath, and denies any novelty whatever in the patent, the affirmative, in order to be proved, requires the testimony of more than one witness. *Hovey v. Stevens*, 1 Woodbury & Minott, 290.—*WOODBURY*, 1846.

62. "Something more must be produced than the evidence of a single witness to overcome an answer under oath, and responsive to the bill." *Woodworth et al. v. Hall et al.*, 1 Woodbury & Minott, 248.—*WOODBURY*, 1846.

63. A copy of a patent certified by the Commissioner is proper evidence of the original record.—*Ib.*

64. Where a patent issues to an administrator, that is sufficient evidence of the grant of administration, and it is not competent for a court to further inquire into the matter.—*Ib.*

65. Where there is no notice or plea authorizing defendants to show a want of novelty in the invention, evidence given under that head will be disregarded. *Root v. Ball et al.*, 4 McLean, 177.—*MCLEAN*, 1846.

66. *Query.* Whether a letter from the Commissioner of Patents acknowledging the receipt of an application for a patent is or not evidence as to the making of such application? *Allen v. Blunt et al.*, 2 Woodbury & Minott, 121.—*WOODBURY*, 1846.

67. Where a party claims notice given to another party by letter, the letter must be shown to have been received.—*Ib.*

68. A former verdict in a prior suit between the same parties is not admissible in evidence, unless the case be prosecuted to judgment and decree.—*Ib.*

69. "No presumptions are to be made in aid

of evidence taken contrary to common law principles." A deposition taken during a session of the court, although at a distance of more than one hundred miles, whether with or without notice, is inadmissible.—*Ib.*

70. After a complainant has made out a *prima facie* case, the burden of proof is on the defendants to support the defence which they attempt to maintain.—*Ib.*

71. At the trial of an infringement case based upon an original patent, the court cannot consider a new specification filed in the Patent Office preparatory to a reissue. *Hovey v. Stevens*, 3 Woodbury & Minott, 17.—*WOODBURY*, 1846.

71a. Where a defendant's answer is under oath, and denies any novelty whatever in the patent, the affirmative, in order to be proved, requires the testimony of more than one witness. *Hovey v. Stevens*, 1 W. & M. 290.—*WOODBURY*, 1846.

72. A patent is, *prima facie*, valid. *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—*WOODBURY*, 1848.

73. It is for the defendants to make out their defence.—*Ib.*

74. Parties are bound by admission of facts, unless made under a mistake, but not by admission of law.—*Ib.*

75. For a statement, at length, of the procedure and principles of taking testimony in equity cases, see —. *Van Hook v. Pendleton et al.*, 2 Blatch. 85.—*BETTS*, 1848.

76. "It is an elementary doctrine in the practice of all courts that parties shall take advantage of irregularities at the first opportunity after acquiring knowledge of them, or be deemed to have waived all objections to them."—*Ib.*

77. Where a party has chosen not to cross-examine at a regular time, and in the regular way, he cannot afterward have the witness recalled for that purpose.—*Ib.*

78. A person interested in a patent for a certain territory, is a competent witness in a suit where that patent is in issue in some other territory. *Buck et al. v. Hermance*, 1 Blatch. 322.—*NELSON*, 1848.

79. A verdict in a patent suit is not admissible in evidence on a trial at law or in equity, on the merits, between different parties.—*Ib.*

80. A verdict in a patent suit is admissible in evidence in a suit between different parties upon a patent, on a motion for provisional injunction.—*Ib.*

81. A party who had an interest in a patent assigned that interest away, reserving to himself one manufacturing right thereafter to be located. In a suit on the patent, defendants sought

to prove, by the declarations of the party first mentioned, the worthlessness of the patented device. The evidence was held inadmissible. *Many v. Jagger et al.*, 1 Blatch. 372.—NELSON, 1848.

82. Defendants, in their notice of defences, had given notice of A as having had prior knowledge of the patented thing. They called B as a witness under this allegation. B was held admissible.—*Ib.*

83. "The assignment of a patent in whole or in part is authorized by act of Congress, and it is required to be recorded in the Patent Office." After an assignment has been recorded a duly authenticated copy of it is *prima facie* evidence at least. *Parker v. Haworth*, 4 McLean, 370.—MCLEAN, 1848.

84. "The patent itself is to be taken as *prima facie* evidence of the novelty and usefulness of the invention specified in it." *Wilson v. Barnum*, 1 Wallace, Jr 347.—KANE, 1849.

85. The fact that a patent has for twenty years withstood the attacks upon it, is a strong proof of its genuineness. *Parker v. Hulme*, 7 West. L. J. 417.—KANE, 1849.

86. Evidence as to occurrences of ancient date is always to be viewed with distrust, and this without in any manner impeaching the credibility of the witnesses.—*Ib.*

87. Letters-patent are *prima facie* evidence of their own novelty and utility. *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

88. The burden of proof is on the defendants when they contest the validity of complainant's patent.—*Ib.*

89. To get a disclaimer in evidence, the original or a certified copy must be produced. *Footte v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

90. The issue of a patent is presumptive proof of novelty and utility in the patented thing, and the burden of proof is on defendant to overcome this presumption. *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

91. "On the question of infringement the burden of proof is with the plaintiff."—*Ib.*

92. The statements of a witness of the declarations of another person, as to what that other person had previously done in the way of making an invention, are admissible in evidence. *Wilson v. Simpson et al.*, 9 Howard, 109.—SUP. CT. 1850.

93. Where plaintiff sets up and tries to prove a certain kind of contract, it is admissible for the defendant to prove another kind of contract with reference to the same thing. *W. A. & G. Steam Packet Co. v. Sickles*, 10 Howard, 419.—SUP. CT. 1850.

94. The issue of a patent is presumptive evidence that the inventor was the prior inventor. *Pitts v. Hall*, 2 Blatch. 230.—NELSON, 1851.

95. A properly filed disclaimer may be submitted to a jury. *Silsby et al. v. Foote*, 14 Howard, 218.—SUP. CT. 1852.

96. A defendant may have offered in evidence a disclaimer of the patent in suit, not to be used as a disclaimer, but as a confession prejudicing the rights of the complainants.—*Ib.*

97. "From a principle of necessity the party is allowed by his own oath, addressed to the court, to prove the fact of a lost paper, if lost out of his own custody, and not destroyed by fraud, the existence and details of such paper being proved by other testimony." *Yearsley v. Brookfield et al.*, 1 MacArthur's P. C. 193.—MORSELL, 1853.

98. Although a person may be only a nominal party to an interference, his testimony is not admissible in evidence.—*Ib.*

99. In a Patent Office interference a witness who is interested in the result of the contest is not competent. *Cressler v. Custer*, 1 MacArthur's P. C. 216.—MORSELL, 1853.

100. "The maxim *falsus in uno, falsus in omnibus*. . . can only apply where there is a wilful, corrupt falsehood in one particular, amounting to perjury; in which case all the other testimony of the witness is to be rejected. It has no application to a case of mistake. The most honest witness may not be found correct in some particulars, and if those particulars are immaterial, they should not discredit him in material matters." *Marshall v. Mee*, 1 MacArthur's P. C. 229.—DUNLOP, 1853.

101. The defendant may offer his patent in evidence. *Corning et al. v. Burden*, 15 Howard, 252.—SUP. CT. 1853.

102. The defendants' patent is *prima facie* evidence that they have the exclusive right to make what is shown and claimed therein. *American Pin Company v. Oakville Co. et al.*, 3 Blatch. 190.—INGERSOLL, 1854.

103. "Where a part of a statement is used, the whole of the contemporaneous statement should be received." *Broughton, Enor, in re*, 1 MacArthur's P. C. 278.—MORSELL, 1854.

104. The wife of a party to a Patent Office interference is not competent as a witness in her husband's behalf. *Nicholas v. Harris*, 1 MacArthur's P. C. 302.—MORSELL, 1854.

105. In a Patent Office interference the partner of one of the parties is a competent party to take evidence.—*Ib.*

106. In a contest over the question of priority of invention, the declarations of a party thereto

describing the invention, are admissible in evidence. *Richardson v. Hicks*, 1 MacArthur's P. C. 335.—MORSELL, 1854.

107. "The party's conversations and declarations stating that he had made the invention, and describing its details and explaining its operations, are properly to be deemed an assertion of his right, at that time, as an inventor to the extent of the facts and details which he then makes known."—*Id.*

108. A charge of infringement, in a declaration that is not denied by defendant, is to stand as admitted. *Parker v. Banker*, 6 McLean, 631.—MCLEAN, 1855.

109. Parol testimony is not admissible to prove the date of an application for patent. *Wayne v. Winter et al.*, 6 McLean, 344.—MCLEAN, 1855.

110. "Verbal descriptions, without drawing or model, must be considered admissible for the purpose of proving priority of invention." *Stephens et al. v. Sulisbury*, 1 MacArthur's P. C. 379.—MORSELL, 1855.

111. Where a nice point is to be established, it is a very loose way of describing a prior machine to say that it is like one produced in evidence. *Carter et al. v. Carter et al.*, 1 MacArthur's P. C. 388.—MORSELL, 1855.

112. "The general rule certainly is, that where the parties are not the same, either identical or in privity, the evidence is not admissible, because there is no mutuality, and the new parties would not have had an opportunity of cross-examination. But where new parties, applicants for the same invention, may be allowed to come in and have a proceeding adapted to the new condition of things, the rule of evidence which will be applicable resembles more a proceeding in chancery than otherwise. It will be received only on the terms of being subject to the testimony which either of the parties have previously taken in the case."—*Id.*

113. Written memoranda and letters cannot be considered as evidence of themselves, although they may be used to refresh the memory of a witness. *Jones v. Wetherill*, 1 MacArthur's P. C. 409.—MORSELL, 1855.

114. The issue of a patent is *prima facie* evidence of novelty, and extension is still stronger evidence thereof. *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILLSON, 1856.

115. "It has happened . . . that the party producing a witness has to rub the rust off his recollection of many things, and more especially dates, and in doing this he may leave marks which did not exist before." *Sickles et al. v. Gloucester M'f'g Co.*, 3 Wall. Jr. 196.—GRIER, 1856.

116. "The patent itself is *prima facie* evidence of the novelty and utility of the invention patented. The issuing of the patent is also *prima facie* evidence that the specification, when delivered, was accompanied by drawings and written references thereto, as then required by statute." *Winans v. N. Y. & Erie R. R. Co.*, 1 Fish. P. C. 213.—HALL, 1856.

117. Certified copies of patents and drawings are admissible in evidence.—*Id.*

118. "There is a legal presumption in favor of the originality of a patented invention or discovery arising from the patent. . . . And in the absence of evidence to negative this presumption it will be sufficient to sustain the patent." *Wayne v. Holmes*, 1 Bond, 27.—LEAVITT, 1856.

119. Where an interest in a patent is conveyed under an instrument in writing, no appurtenant warranty can be proved by parol testimony. *McClure v. Jeffry*, 8 Indiana, 79.—DAVISON, 1856.

120. "*Deposition* is a general expression, embracing all written evidence verified by oath, and thus includes *affidavits*; but, in legal language, a distinction is maintained, in Courts of Law and Chancery, between *depositions* and *affidavits*. A *deposition* is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an *affidavit* is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is going to be used." "Congress recognizes a distinction between the two methods of proof, by conferring authority on particular officers to take *affidavits* and *depositions*." "The Supreme Court, in its rules, uses the terms '*affidavits*' and '*depositions*' as convertible expressions." "In its equity rules, it marks the distinction more precisely." "In its rules in equity, it includes under the description of *depositions*, affidavits offered to support the bill or the defence, in injunction cases." *Stimpson et al. v. Brooks*, 3 Blatch. 456.—BETTS, 1856.

121. In an accounting before a master under Rule 77 prescribed by the Supreme Court, a complainant has a right, without special notice, to call and examine defendants, and obtain from them, in that mode, evidence in support of the claims made by complainant upon the reference; but respondents have no right in that manner to put in evidence in support of their own case. *Foot v. Silsby et al.*, 3 Blatch. 507.—HALL, 1856.

122. "If one witness were positively to swear that he saw or heard a fact, and another were merely to swear that he was present, but did not

see nor hear it, and the witnesses were equally faithful, the general principle would in ordinary cases create a preponderance in favor of the affirmative. But this rule is to be understood as consistent with this explanation: That the principle supposes that the positive can be reconciled with the negative without violence and constraint. Evidence of a negative nature may, under particular circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question whether, under the particular circumstances, the negative testimony can be attributed to inattention, error, or the defect of memory." *Cornell v. Hyatt*, 1 MacArthur's P. C. 423.—MORSELL, 1856.

123. "A witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim—*falsus in uno, falsus in omnibus*." Again: "If there be reason to suppose that his perjury or pervarication is the result of subornation, it affords a reasonable ground in a doubtful case for suspecting the testimony of other witnesses adduced by the same party." *Wellman v. Blood*, 1 MacArthur's P. C. 432.—MORSELL, 1856.

124. "The general rule is, that, in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed, and more especially where there has been a part execution of the contract." *Hartshorn et al. v. Day*, 19 Howard, 211.—SUP. CT. 1856.

125. "The patent, when produced in evidence, whether it be an original or a reissued one, is *prima facie* evidence that the thing granted was new and useful, and that the patentee was the inventor or discoverer thereof." *Serrell v. Collins et al.*, 4 Blatch. 61.—INGERSOLL, 1857.

126. Complainant does not, by allowing the defendant to be examined as a witness, preclude himself from taking a decree against the defendant. *Jenkins v. Greenwald*, 1 Bond, 126.—LEAVITT, 1857.

127. Allegations, in plaintiff's affidavits, that defendant does not deny, are admitted. *Sickles v. Mitchell*, 3 Blatch. 548.—INGERSOLL, 1857.

128. Where a witness was the real party in interest until a very short time before he was examined, his testimony is not admissible. *Hill v. Dunklee*, 1 MacArthur's P. C. 475.—MORSELL, 1857.

129. "It is both irregular and suspicious to call a witness twice to the same point; and this is not allowed except for cause." "After a

witness has been examined in chief, and cross-examined, it might protract the proceeding interminably, and it would open a door for practising with suborning the witnesses, to the perversion of the ends of justice. The re-examination ought, therefore, to be confined to a reaffirmance of the facts already stated, and in explanation of the facts stated by the witness upon cross-examination."—*Id.*

130. "The oath of the party is to be considered in the character of *prima facie* evidence of the novelty of the invention." *Wagner, J. Z. A., in re*, 1 MacArthur's P. C. 510.—MORSELL, 1857.

131. By the court: "The patent is *prima facie* evidence that the several grants of right contained in it were valid, that the several things, methods, and devices granted were new, that they were useful, that they required invention, and that they were the invention of Wilson. And this *prima facie* evidence must have full effect, unless it is rebutted by countervailing evidence." *Potter et al. v. Holland*, 4 Blatch. 238.—INGERSOLL, 1858.

132. A patent is '*prima facie* evidence of the right of the plaintiff to all that is contained in it, giving it its true and proper construction.' *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

133. "The burden of proof is upon the plaintiff to show that there has been an infringement."—*Id.*

134. The introduction in evidence of a patent carries the date of invention back only to the date of filing the application for that patent.—*Id.*

135. "When an application is made for a patent, it is submitted to the Commissioner of Patents; his skill and judgment are brought to bear upon the subject, and when he grants the patent it is *prima facie* evidence that the means granted are new, and produce a useful result. That evidence, of itself, is sufficient for a court or jury to determine the question of novelty and usefulness, unless there be counteracting evidence introduced to rebut that *prima facie* evidence which the patent thus affords." *Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co.*, 3 Fish. P. C. 43.—INGERSOLL, 1858.

136. A deposition taken on interrogatories was objected to because the witness had not annexed to it a copy of a former deposition, which, he admitted, he had seen and used to refresh his memory. The objection was overruled, because, under the rules of practice, the party objecting "had full time and opportunity to move for an examination of the deposition or a re-exam-

ination of the witness." *Winans v. New York & Erie R. R.*, 21 Howard, 88.—SUP. CT. 1858.

137. "There is a kind of evidence which is entitled to the highest credibility, and that is the machines themselves, as shown by the models, and which, like figures, cannot lie." *Morris v. Barrett et al.*, 1 Bond, 254.—LEAVITT, 1859.

138. "The act of Congress requires . . . that notice of the special matter to be offered in evidence at the trial shall be in writing, and be given to the plaintiff or his attorney more than thirty days before the trial. . . . Compliance with this provision, on the part of the defendant, being a condition precedent to his right to introduce such special matter under the general issue, it necessarily follows that he may give the requisite notice without any leave or order from the court, and for the same reason, if he afterward discovers that the first notice served is defective, or not sufficiently comprehensive to admit his defence, he may give another, to remedy the defect or supply the deficiency, subject to the same condition, that it must be in writing, several more than thirty days before the trial. Having given the notice, as required by the act of Congress, the defendant, at the trial, may proceed to prove the facts therein set forth by any legal and competent testimony. For that purpose he may call and examine witnesses upon the stand, or he may introduce any deposition that has been legally taken in the cause. Under those circumstances, depositions taken before the notice was served, as well as those taken afterward, are equally admissible, provided the statements of the deponents are applicable to the matters thus put in issue between the parties." *Teese et al. v. Huntington et al.*, 23 Howard, 2.—SUP. CT. 1859.

139. In attempting to impeach a witness, another witness was asked, "What is the reputation of the witness for moral character?" The question was held admissible.—*Ib.*

140. In attempting to impeach a witness, evidence as to his character at a remote time is not admissible.—*Ib.*

141. A certified copy of the record of an assignment is admissible in evidence.—*Ib.*

142. The burden of proof is upon the plaintiffs to establish infringement. *Cahoon et al. v. Ring*, 1 Clifford, 592.—CLIFFORD, 1859.

143. A Patent Office clerk, whose employment therein consists chiefly in making examinations in relation to assignments and other records of value in the Office, is as competent to prove what documents were in the Office as the head of the bureau would have been. *Sone v. Palmer*, 28 Mo. 539.—RICHARDSON, 1859.

144. "By the general rules of the law, the parties to a suit, being interested in the event, are not competent to testify in their own favor." "State laws furnish the rules of evidence in the federal tribunals in civil cases at common law, subject to the exception specified in the Judiciary Act." "But the Chancery jurisdiction, practice, and rules of evidence in the circuit courts of the United States, are the same in all the states, and no state statute upon the subject has been adopted by any law of Congress, unless that construction be given to the provision of the Judiciary Act." "The parties to a suit in equity, under the existing legislation of Congress, are not competent witnesses." *Blanchard v. Sprague*, 1 Clifford, 288.—CLIFFORD, 1859.

145. "The object of notice is to bring the adverse party before the examining officer, and to give him the opportunity to cross-examine the witnesses. But if the adverse party voluntarily comes, and is present at the examination, and cross-examines, notice and proof of service of it are of no account. The substance is obtained, and they are mere form, technically, and nothing more." *Gibbs v. Ellithorp*, 1 MacArthur's P. C. 702.—DUNLOP, 1859.

146. "It is clearly error for the court, in its instruction to the jury, to assume a material fact as proved, of which there is no evidence in the case." *Chaffee v. Boston Belting Co.*, 22 Howard, 217.—SUP. CT. 1859.

147. In an action at law for infringing a patent for a governor valve, a witness was asked, with reference to a prior mechanism, "What change would have to have been made in order to permit this valve to be actuated by a governor?" The question was not admitted. *Judson v. Cope et al.*, 1 Bond, 327.—LEAVITT, 1860.

148. It is not admissible in evidence to ask a witness how a certain prior device resembles defendants' device.—*Ib.*

149. Where the utility of plaintiff's patented device has not been directly attacked in defendants' evidence, but the novelty has, plaintiff in rebuttal may offer proof to show the superior utility of his device over the prior device as applicable to the question of novelty.—*Ib.*

150. "Similarity in the structure, appearance, and effect of two things, is presumptive evidence of their being made in the same way." *Matthews v. Skates et al.*, 1 Fish. P. C. 602.—JONES, 1860.

151. In considering whether a prior patent anticipates the patent in suit, the model appurtenant to the application for the prior patent is admissible in evidence. *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

152. Testimony to alleged facts occurring many

years in the past "is not of the most reliable character; there is strong danger that what actually did occur, or what was actually said, may fade away from the memory, and that a man may confuse words with thoughts, and yet honestly state his belief as to what actually did occur." *Judson v. Moore et al.*, 1 Bond, 285.—LEAVITT, 1860.

153. "When plaintiff alleges that defendant uses a certain machine, which he describes, and defendant does not disprove or deny, it is an admission that he uses such a machine." *Ely v. Monson & Brimfield M'fg Co.*, 4 Fish. P. C. 64.—SPRAGUE, 1860.

154. Where a witness, after a lapse of twenty-one years, undertakes to describe a machine from memory, it is hazardous to take the recollection as satisfactory.—*Ib.*

155. The defendant, in pleading prior use, pleaded it as of a certain date, and the court below refused to allow the defendant to give evidence of prior use of a prior date. It was held that evidence of prior use at a prior date was admissible. *Phillips v. Page*, 24 Howard, 164.—SUP. CT. 1860.

156. Section 34 of the Judiciary Act of September 24th, 1789, provided that the laws of the several states, with the exceptions there stated, shall be regarded as rules of decision in trial at common law, in the courts of the United States. "This section has been construed to include the rules of evidence prescribed by the laws of the state in all civil cases at common law not within the exceptions therein mentioned." *Vance v. Campbell et al.*, 1 Black, 427.—SUP. CT. 1861.

157. In an action at law in a federal court, wherever by the laws of the State parties to the suit are competent witnesses, they are also competent in the federal courts. *Hausknecht v. Claypool et al.*, 1 Black, 431.—SUP. CT. 1861.

158. A patent is *prima facie* evidence that the patentee is the original and first inventor of what he describes as his invention, "and when taken in connection with his original application is *prima facie* evidence that the invention was made at the time the application was filed." Presumptions are in favor of a plaintiff to that extent, but when he proposes to show that his invention was of a date prior to his application, he takes the burden upon himself. *Johnson v. Root*, 2 Clifford, 108.—CLIFFORD, 1862.

159. In cases at law where parties are competent witnesses under the local law, they are competent witnesses in the federal courts.—*Ib.*

160. The burden of proof is upon the complainant to show infringement by defendant.

*Hayden v. Suffolk M'fg Co.*, 4 Fish. P. C. 86.—SPRAGUE, 1862.

161. Section 23 of the Judiciary Act of September 24th, 1789, [stat. at large], is in these words: "That the laws of the several states, except where the treaties or statutes of the United States shall otherwise require or provide, shall be regarded as 'rules of decision' in trials at common law in the courts of the United States, in cases where they apply." "The natural import of the words used in the act of Congress includes the laws in relation to evidence." *Wright v. Bales*, 2 Black, 535.—SUP. CT. 1862.

162. "Power to grant letters-patent is conferred by law upon the Commissioner of Patents, and when that power is lawfully exercised, and patent has been duly granted, it is *prima facie* evidence that the patentee is the original and first inventor of that which is therein described and secured to him as his invention." *White et al. v. Allen*, 2 Clifford, 224.—CLIFFORD, 1863.

163. "It would be subversive of all sound practice, and tend largely to defeat the ends of justice, if the court should refuse to accept a fact as settled which is distinctly alleged in the bill and admitted in the answer." *Jones et al. v. Moorhead*, 1 Wall. 155.—SUP. CT. 1863.

164. Such an admission as that just mentioned "need go no further than its terms necessarily imply."—*Ib.*

165. Record of proof of citizenship cannot, as a matter of right, be given in evidence after the argument has commenced in an equity cause. *Stanthorp et al. v. Humiston*, 4 Fish. P. C. 107.—HALL, 1864.

166. "Witnesses are presumed to speak the truth, but experience shows that they are often in error, and that sometimes they are false, and the rule is, that whenever their truthfulness is called in question, the jury are to judge of their credibility under the instructions of the court." *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

167. "Mistake as to dates is a frequent occurrence, even with honest witnesses, and where it satisfactorily appears that it was but an unintentional error, the fact that such a mistake was made is not entitled to much weight as affecting the credit of the witness."—*Ib.*

168. On the question of prior use, doubts as to credibility of defendant's witnesses are to be resolved in plaintiff's favor.—*Ib.*

169. The presumption of novelty and utility attached to a patent, in the absence of the original application, extends no farther back than the date of the patent.—*Ib.*



170. Stamping the date of complainant's patent upon defendants' goods under a license, is evidence that defendants' goods come within the scope of complainant's patent. *Jones v. Van-kirk et al.*, 2 Fish. P. C. 586.—GRIER, 1865.

171. The presumption of novelty and utility attaching to a patent in the absence of the original application for the patent, extends back only to the date of the letters-patent, and in no case does it extend farther back than to the time of filing the original application. *Wing v. Richardson*, 2 Clifford, 449.—CLIFFORD, 1865.

172. The recollections of a witness "after the lapse of sixteen years, are quite too indistinct and uncertain to set up a lost machine to defeat a valuable improvement and deprive a meritorious inventor of the fruits of his toil and labor." —*Ib.*

173. "We have constantly to bear in mind, in weighing the testimony of witnesses who speak of circumstances occurring many years ago, the liability to mistake the particular year, unless they have some evidence of a documentary character or otherwise, or some leading fact, in relation to which there can be no error, upon which they may rely to show the particular time." *Styles v. Chicago & Northwestern R. R. Co.*, 1 Bissell, 468.—DRUMMOND, 1865.

174. "Letters-patent are granted by public authority, and when issued, and regular in form, the presumption is that the power was rightly exercised, and he who alleges the contrary must prove it." *Dental Vulcanite Co. v. Wetherbee*, 2 Clifford, 555.—CLIFFORD, 1866.

175. "Models are oftentimes the very best evidence that can be adduced. There is nothing, perhaps, more satisfactory upon questions involving the identity of several mechanical structures than the exhibition of the machines or accurate models of them. They are silent witnesses, but they are usually very reliable." *Blanchard et al. v. Puttman et al.*, 2 Bond, 85.—LEAVITT, 1867.

176. "The emanation of a patent from the proper authorities of the Government, affords a presumption that the invention patented is new, and original with the patentee. This presumption arises from the fact that all patents must be issued with certain formalities, and that the officers charged with the administration of the patent laws are required very astutely to investigate every claim. The applicant is, moreover, obliged to swear that he is the original inventor of that for which he asks a patent; and it is only upon a compliance with these requisitions of law that the Commissioner of Patents is authorized to make the grant." —*Ib.*

177. Where defendants have a patent for the devices they use, that creates a presumption that their device is different from the complainants' patented device.—*Ib.*

178. "There is no kind of testimony that is more reliable in regard to the true character of a machine than an accurate model. It is a witness that cannot lie." *Swift et al. v. Whisen et al.*, 2 Bond, 115.—LEAVITT, 1867.

179. The evidence of lack of novelty "must be strong and conclusive to justify a judgment setting aside a patent for want of novelty." *Goodyear et al. v. Honsinger*, 2 Bissell, 1.—DRUMMOND, 1867.

180. Evidence introduced for the purpose of showing the state of the art cannot, in the absence of proper pleading, be used to antedate the patent in suit. *Middletown Tool Co. v. Judd et al.*, 3 Fish. P. C. 141.—SHIPMAN, 1867.

181. A certified copy of the specification of a patent is not admissible in evidence. The copy should include the whole patent. *Davis v. Gray*, 17 Ohio St. 330.—BRINKERHOFF, 1867.

182. Where the bill of complaint explicitly charged infringement, and one witness for complainants explicitly testified thereto, and there were corroborating circumstances, infringement was held to be established. *Goodyear et al. v. Berry*, 2 Bond, 189.—LEAVITT, 1868.

183. "The issuing of the patent by the proper officer, and the production of it in the courts, is *prima facie* evidence of the utility and novelty of the invention." *Haselden v. Ogden*, 3 Fish. P. C. 378.—SHERMAN, 1868.

184. "Infringement is an affirmative allegation made by the complainant, and the burden of proving it is upon him, unless it is admitted in the answer." *Agawam Co. v. Jordan*, 7 Wall. 583.—SUP. CT. 1868.

185. Where defendant is specifically interrogated in the bill as to infringement "evasive answers, under such circumstances, if not positively equivalent to admissions, afford strong presumptive evidence against the respondent." —*Ib.*

186. Letters-patent were granted to Thomas Blanchard, December 18th, 1849, for an improvement in bending wood, and the patent was duly extended; then suit for infringement being brought, defendant pleaded the general issue, without any notice of any special defence. "Defendant offered in evidence the reissued patent granted to one John C. Morris, dated May 22d, 1832, as the foundation of the introduction of evidence to show that the machine or machines which he was suing were constructed by him under a license from the patentee in

that patent, and in accordance with the specification and claims of that patent as reissued." The court said: "Such evidence was inadmissible for the purpose for which it was offered, and should have been excluded, as the novelty of the invention was not open, and because it presented, on the question of infringement, an immaterial issue not involved in the pleadings, and because the evidence was well calculated to mislead the jury by withdrawing their attention from the real subject-matter in controversy." *Blanchard v. Putnam*, 8 Wall. 420.—SUP. CT. 1869.

187. "Whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, 'he shall state, in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used,' and if he does not comply with that requirement no such evidence can be received under the general issue."—*Ib.*

188. Compliance with the provision as to notice of special defence "being a condition precedent to the right of the defendant to introduce such evidence, under the general issue, it necessarily follows that the *onus probandi* is on him to show that the required notice was given to the plaintiff thirty days before the trial, and if he fails to do so he cannot introduce any evidence to controvert the novelty of the patent."—*Ib.*

189. "In equity the proofs and allegations must correspond. The examination of the case by the court is confined to the issues made by the pleadings. Proofs without the requisite allegations are as unavailing as such allegations would be without the proofs requisite to support them." *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

190. Respondents put in evidence, as to prior use, not set up in the answer. Complainant did not object until the hearing. Evidence admitted on the ground of objection waived. *Brown v. Hall et al.*, 6 Blatch. 401.—BLATCHFORD, 1869.

191. "An objection to testimony which does not state the ground of objection is not a legal or valid objection."—*Ib.*

192. Defences set up in the answer will not be examined, where the burden of proof is upon the respondents, unless some proof is introduced in their support. *Cook v. Howard et al.*, 4 Fish. P. C. 269.—CLIFFORD, 1870.

193. "Want of novelty being set up by the respondents, the burden is upon them to prove the allegation, as the *prima facie* presumption is the other way."—*Ib.*

194. "Issued by public authority, as letters-patent are, they are presumed to secure to the patentee the exclusive right which they purport to grant, and where the answer is silent upon the subject, or where the respondent introduces no proof to establish the opposite theory, the complainant may safely repose upon that presumption, without offering any evidence to confirm it." *Hudson v. Draper et al.*, 4 Cliff. 178.—CLIFFORD, 1870.

195. "The letters-patent of the defendant are admitted in evidence on the question of novelty as entitled to some weight, where the evidence is nicely balanced, but it is quite incorrect to suppose that a patent subsequent in date can have the effect as evidence to overcome the *prima facie* presumption otherwise afforded by the introduction of one of prior date, that the patentee was the original and first inventor of what is therein described as an improvement." *Goodyear Dental Vulcanite Co. et al. v. Gardner*, 3 Clifford, 408.—CLIFFORD, 1870.

196. "Where the invention or inventions are embodied in a machine, the question of infringement is best determined by a comparison of the machine made by the respondent with the machine described in the complainant's patent or patents, where more than one is embraced in the same suit." *Seymour v. Osborn*, 11 Wall. 516.—SUP. CT. 1870.

197. Evidence as to the state of the art may be introduced without notice in the answer, but it is only considered by the court in construing the patent, and not in determining whether the patentee was the first inventor. *Railroad Co. v. Dubois*, 12 Wall. 47.—SUP. CT. 1870.

198. Models of machines, when rightly comprehended, afford very persuasive evidence. *Carter et al. v. Baker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

199. Where the evidence as to a fact in dispute [as, for instance, the character of a prior machine] is in the possession of one of the parties, and he does not produce it, the presumption is strongly against the claim made by such non-producer. *Bailey Washing & Wringing Mach. Co. v. Lincoln et al.*, 4 Fish. P. C. 379.—LOWELL, 1871.

200. Doubts are to be resolved against the party on whom the burden rests. *M'Millin et al. v. Barclay et al.*, 3 Pittsb. 377.—MCKENNAN, 1871.

201. An averment of mental unsoundness on the part of the patentee, in defendants' answer, unsupported by any proof, does not require any consideration. *Jordan v. Wallace et al.*, 1 Pa. Leg. Gaz. Rep. 854.—MCKENNAN, 1871.

202. Where defendant contents himself with

attacking the correctness of a model produced by complainants as representing defendant's machine, and withholds the evidence which is clearly in defendant's possession as to the character of that machine, the act of the defendant makes against him on the question in dispute. *Union Paper-Bag Machine Co. et al. v. Binney*, 5 Fish. P. C. 166.—LOWELL, 1871.

203. On the question of the novelty of the patent in suit, a prior patent, claimed to be for the same thing, is admissible in evidence. *Tucker v. Spalding*, 13 Wall. 453.—SUP. CT. 1871.

204. A prior patent cannot be used to anticipate the later patent in suit in the absence of proper allegation in the answer. *Am. Saddle Co. v. Hogg*, 1 Holmes, 133.—SHEPLEY, 1872.

205. "No notice is necessary in order to justify the admission of evidence, for the purpose of showing the state of the art in respect to improvements existing at the date of the plaintiff's invention, in the class of articles to which it belongs."—*Ib.*

206. Imputing to witnesses fraud and perjury before the examiner, deserves severe reprehension; and proceedings before examiners returned to court "abounding in improper remarks, prolix statements touching the conduct of counsel, officers of the Patent Office, witnesses, and others, which are not proof, . . . ought to have been expunged at the cost of the complainant, before the case was brought to a hearing, or the proofs printed for the use of the court." *Smith v. Elliot*, 9 Blatch. 400.—WOODRUFF, 1872.

207. Reference in an answer to a former application for patent does not warrant calling that applicant to testify as to his acts outside of the application. *Decker v. Grote et al.*, 10 Blatch. 331.—BLATCHFORD, 1872.

208. "The production of the patent is *prima facie* evidence that the several grants of right contained in it are valid, and that the several things, matters, and devices covered by it were new, that they were useful." *McComb et al. v. Brodie*, 1 Woods, 153.—WOODS, 1872.

209. In an action at law before a jury, under the defence of prior publication, the prior patent must go to the jury. *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

210. Although, for lack of proper pleading, a prior patent cannot be offered in evidence to impeach the plaintiff's patent, it may be offered in evidence to a jury to prove the prior art.—*Ib.*

211. A scientific work, such as Mahan's "Civil Engineering," cannot be offered in evidence to prove the prior art.—*Ib.*

212. On the trial of an infringement case be-

fore a jury, plaintiff's patent, and the appurtenant correspondence, cannot be offered in evidence.—*Ib.*

213. Evidence of prior use, not set up in defendant's answer, cannot be considered. *Richardson v. Lockwood*, 6 Fish. P. C. 454.—LOWELL, 1873.

214. As to mode of proving the legal existence of a corporation, see —. *Dorsey Harvester Revolving Rake Co. v. Marsh et al.*, 6 Fish. P. C. 387.—McKENNAN, 1873.

215. The burden of proof is upon him who denies the validity of the acts of the Commissioner.—*Ib.*

216. Evidence taken under objection, for lack of proper averment in the answer, does not become admissible by amending the answer. *Roberts v. Buck, Jr.*, 1 Holmes, 224.—SHEPLEY, 1873.

217. Evidence taken by a defendant was properly objected to on the ground of lack of proper averment in the answer. The parties agreed that if the court permitted amendment of the answer, the testimony should then be considered. The court permitted the amendment upon the condition that defendant should not in any event recover costs up to the time of hearing the case.—*Ib.*

218. Where evidence is offered not warranted by the defendant's answer, a proper case may arise at the hearing, for proper amendment of the answer on motion and the granting thereof *nunc pro tunc*. *Roberts v. Ryer*, 11 Bissell, 11.—BLATCHFORD, 1873.

219. Testimony that is not admissible because of lack of proper allegation in the answer, does not become admissible when the answer is amended; but it may then become admissible by agreement of both parties and permission of court. *Roberts v. Blake*, 3 O. G. 268.—SHEPLEY, 1873.

220. "The patent, when introduced in evidence by the complaining party in a suit for infringement, affords a *prima facie* presumption that the patentee is the original and first inventor of what is therein described and claimed as his invention. Application for patent is required to be made to the Commissioner appointed under authority of law, and inasmuch as that officer is empowered to decide upon the merits of the application, his decision in granting the patent is presumed to be correct." *Mitchell v. Tilghman*, 19 Wall. 287.—SUP. CT. 1873.

221. Rejected applications are not, under all circumstances, inadmissible in evidence. "By themselves they are inconsequential, but when the inventor's idea is perfected by the practical

adaptation of it, in the form of mechanism, they are valuable guides in ascertaining the date of the invention, and the design of the inventor, and the principle, intended functions, and mode of operation of his mechanism, and they must, therefore, necessarily be considered in connection with it." *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 1 Bann. & Ard. 177.—McKENNAN, 1874.

222. "Parties are not allowed to experiment with witnesses, suffering them to be examined, and then subjecting them to cross-examination, and afterward, if the testimony does not happen to suit them, asking for its exclusion. The object of the statute is to guard plaintiffs against surprise; but if they will not avail themselves of the privilege, and require the previous notice, they must not expect the court to invoke for them the provisions of the act." *Crouch v. Speer et al.*, 1 Bann. & Ard. 145.—NIXON, 1874.

223. Failure to interpose an objection "when the witness is offered, before the examination, is a waiver of notice, and . . . it is too late, after acquiescing in the admission of the testimony, to object to the evidence for want of notice." *Roemer v. Simon et al.*, 1 Bann. & Ard. 138.—NIXON, 1874.

224. The uncontradicted admission of an expert concludes the party for whom he testifies. *Wells v. Jacques et al.*, 1 Bann. & Ard. 60.—NIXON, 1874.

225. "The presumptions of the law are in favor of the patent and the utility of the invention." *Grier v. Goettinger*, 1 Bann. & Ard. 553.—SWING, 1874.

226. "The novelty of a patented invention cannot be assailed by any other evidence than that of which the plaintiff has received notice; and . . . the state of the art, at the time of the alleged invention, though proper to be considered by the court in construing the patent, in the absence of notice, has no legitimate bearing upon the question whether the patentee was the first inventor." *Le Bau et al. v. Hawkins et al.*, 1 Bann. & Ard. 428.—NIXON, 1874.

227. A suit was brought for the infringement of reissued letters-patent for skates, dated April 6, 1875. Complainant, in taking his testimony to prove his *prima facie* case, caused a subpoena to be issued to one of the defendants requiring him to produce before the examiner "all books, papers, and documents whatever, that will show the number of skates made or delivered by the defendants, or their employés, since the sixth day of April, 1875." The court held the reissued patent in suit to be for a combination. A

part of the examination of said defendant by complainant's counsel was as follows:

"Q. 26. During the period of time between the reissue of the patent and the filing of the bill, did you have on hand a considerable number of each of the parts constituting the clamping mechanism like that in exhibit No. 1?"

"A. Yes. We always do have such parts in the factory."

"Q. 27. Since that time, have you used any of the parts that you then had in the store in the construction of skates, substantially like complainant's exhibit No. 1?" (No answer).

The court ordered the *subpoena duces tecum* to be modified by inserting the clause "and until the commencement of the suit," after the words and figures "sixth day of April, 1875," but at the same time ordered defendant, and any other witnesses, to answer question 27, and all other questions tending to show the subsequent use of any other parts of the skates, like a certain exhibit which defendants had on hand when the suit was begun. *Turrell v. Spaeth et al.*, 2 Bann. & Ard. 185.—NIXON, 1875.

228. "It cannot be . . . admitted, that the written declarations of a trustee, in a conveyance to a third person, of property which had previously been conveyed to the trustee by his *cestui que trust*, can be used against the latter to determine the intent of both parties, in making the original conveyance, and to show the extent of the interest which the *cestui que trust* intended to convey by his deed." *Waterman v. Wallace & Sons et al.*, 13 Blatch. 128.—SHIPMAN, 1875.

229. Evidence as to prior patents and prior use, not set up in defendant's answer, will not be considered in the hearing. *Carsteadt v. United States Corset Co.*, 13 Blatch. 199.—SHIPMAN, 1875.

230. A certified copy of a Patent Office model is not conclusive evidence of the character of the model. *Johnson v. Beard*, 2 Bann. & Ard. 50.—WOODRUFF, 1875.

231. The rule of presumption is that, ordinarily, a witness who testifies to an affirmative is to be preferred to one who testifies to a negative. *Hawes v. Antisdel*, 2 Bann. & Ard. 10.—LONGYEAR, 1875.

232. "Of private and special facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all prior knowledge. But there are many things of which judicial cognizance may be taken." "Among the things of which judicial notice is taken, are: the laws of nations; the general customs and usages of merchants; the

notary's seal ; things which must happen according to the laws of nature ; the coincidences of the days of the week with those of the month ; the meaning of words in the vernacular language ; the customary abbreviations of Christian names ; the accession of the Chief Magistrate to office and his leaving it. In this country, such notice is taken of the appointment of members of the Cabinet, the election and resignation of senators, and the appointment of marshals and sheriffs, but not of their deputies. The courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows, of the boundaries of the several states and judicial districts, and of the laws and jurisprudence of the several states in which they exercise jurisdiction. Courts will take notice of whatever is generally known within the limits of their jurisdiction ; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him." *Brown et al. v. Piper*, 91 U. S. 37.—SUP. CT. 1875.

233. Where the patent in suit is for a refrigerating process, the court may take judicial notice of such a common thing as an ice-cream freezer.—*Id.*

234. "The law is well settled that the letters-patent in question, where they are introduced in evidence in support of the claim, if they are in due form, afford *prima facie* presumption that the alleged inventor is the original and first inventor of what is therein described as his improvement." *Tucker v. Tucker M'fg Co.*, 4 Clifford, 397.—CLIFFORD, 1876.

235. "The patent, if regular in form, and introduced in evidence, affords a *prima facie* presumption that the alleged inventor is the original and first inventor of what is therein described as his improvement." *Brady v. Atlantic Works*, 4 Cliff. 408.—CLIFFORD, 1876.

236. "Where the invention is embodied in a machine, the question of infringement is best determined by a comparison of the machine or apparatus constructed or used by the respondent, with the mechanism described in the specification of complainants' patent." *Fuller et al. v. Yentzer et al.*, 94 U. S. 288.—SUP. CT. 1876.

237. "Proof of the state of the art is admissible in equity cases without any averment in the answer touching the subject, and in actions at law without giving the notice required when evidence is offered to invalidate the patent. It consists of proof of what was old and in general use at the time of the alleged invention ; and

may be admitted to show what was then old, or to distinguish what was new, or to aid the court in the construction of the patent. *Donbar et al. v. Myers et al.*, 94 U. S. 187.—SUP. CT. 1876.

238. "There are certain matters, as the Supreme Court of the United States has decided, consonant with right reason, which the court can always consider independent of affidavits—such general principles as are supposed to be known to every one of ordinary intelligence." *Adams & Westlake M'fg Co. v. St. Louis Wire Goods Co.*, 3 Bann. & Ard. 77.—TREAT, 1877.

239. Rejected applications for patents are not admissible in evidence as anticipatory of a later patent. *Herring et al. v. Nelson et al.*, 14 Blatch. 293.—JOHNSON, 1877.

240. "The examination of an adverse party as a witness, before trial, in a common lawsuit, cannot be had. . . . But a suit in equity, to obtain a discovery under oath, in aid of the prosecution or defence of a suit at law, is not abolished in the courts of the United States." *Beardsley v. Littell et al.*, 14 Blatch. 102.—BLATCHFORD, 1877.

241. "The court can always best judge from models whether one machine differs in principle and mode of operation from another." *Birdsall v. Hagerstown Agricultural Implement M'fg Co.*, 1 Hughes, 59.—BOND, 1877.

242. Where a bill of complaint charges infringement, and an answer denies it under oath, "it is necessary . . . for the plaintiffs to sustain the allegation of infringement by a preponderance of evidence." *Am. Middlings Purifier Co. v. Atlantic Pilling Co.*, 4 Dillon's C. C. 100.—MILLER and DILLON, 1877.

243. A rejected application for a patent is not admissible in evidence to impeach the novelty of a subsequent patent. *Rubber Step M'fg Co. v. Metropolitan R. R. Co. et al.*, 3 Bann. & Ard. 252.—SHEPLEY, 1878.

244. "The grant of a patent is an adjudication that every fact, which must necessarily appear to entitle the patentee to it, has been established by sufficient proof. . . . This evidence is, however, only presumptive, and its truth may be contested." *Konold et al. v. Klein et al.*, 3 Bann. & Ard. 226.—McKENNAN, 1878.

245. "Where the invention is embodied in a machine, manufacture, or product, the question of infringement, which is a question of fact, is ordinarily best determined by a comparison of the exhibit made by respondent with the mechanism described in the complainants' patent." *Bates et al. v. Coe*, 98 U. S. 31.—SUP. CT. 1878.

246. While the court cannot take judicial notice of a model of a machine, it has full power

to personally inspect it and base conclusions upon that inspection. *Everet v. Thatcher et al.*, 2 Flippin, 234.—BAXTER, 1878.

247. Where a person is charged with infringement, and does not deny it in his answer, and the patented machinery is proved to be in his possession, infringement is sufficiently shown. *Gear v. Fitch*, 3 Bann. & Ard. 573.—LOWELL, 1878.

248. In the absence of other evidence complainant's invention is of the same date as his patent. *Cahill v. Brown*, 3 Bann. & Ard. 580.—CLIFFORD, 1878.

249. "Questions of the kind where the invention is embodied in a machine, are usually best determined by a comparison of the machine made by the respondent with the mechanism described in the specification and drawing of the complainant's patent." *Am. Whip Co. v. Lombard*, 4 Clifford, 495.—CLIFFORD, 1878.

250. Mere application for patents cannot be considered on the question of novelty. *Barker v. Stow*, 15 Blatch. 49.—BLATCHFORD, 1878.

251. The record of the evidence stated that plaintiff objected to the testimony of one Witherell "as incompetent under the rules of the court." The record stated further that plaintiff objected to Witherell's testimony as "incompetent under the laws and rules governing the practice in the circuit courts of the United States." The court held the objections insufficient, and directed the attention of the defendant to the point that the objection was based on the omission of the name of Witherell from the answer, and stated that "An objection of that kind may be waived, and it is waived unless it is distinctly made. The time to make it is when the evidence is taken and not at the first hearing."—*Id.*

252. "Where the invention is embodied in a machine, manufacture, or product, the question of infringement, which is a question of fact, is ordinarily best determined by a comparison of the exhibit made by the respondent with the mechanism described in the complainants' patent." *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

253. A suit was brought for alleged infringement of a patent for metal corner sockets of show-cases. The court took judicial notice that such things were old. *Terhune v. Phillips*, 99 U. S. 592.—SUP. CT. 1878.

254. "Where a patent in suit is introduced in evidence it affords a *prima facie* presumption that the invention is new and useful, but the burden to prove infringement never shifts if the charge is denied in the plea or answer. Sufficient

proof of infringement may be derived from the comparison of that which is used by the defendant party, with the description of the invention given in the specification of the patent which constitutes the foundation of the suit; and where the invention is embodied in a machine or an apparatus, that mode of conducting the examination is usually the most satisfactory." *Imheuser v. Buerk*, 101 U. S. 647.—SUP. CT. 1879.

255. Where a party puts a writing in evidence in his own behalf, all the parts of the writing are in evidence for both parties. *Campbell v. James et al.*, 17 Blatch. 42.—WHEELER, 1879.

256. An affidavit which lacks venue and notarial seal, which is verified before a justice of the peace or verified before plaintiff's counsel, is defective in all these regards. *Barker v. Stowe*, 4 Bann. & Ard. 485.—BLATCHFORD, 1879.

257. Certified copies of recorded assignments are evidence of what is recorded, but are not evidence that there are not other records. *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 17 Blatch. 208.—WHEELER, 1879.

258. "After notice of the name and residence of the inventor, and of the place of use, and of the name of some one who has used it, has been given or waived, all other witnesses may be examined without notice." *Woodbury Patent Planing Mach. Co. v. Keith*, 4 Bann. & Ard. 100.—LOWELL, 1879.

259. Testimony expressing opinions is only admissible from an expert. *Toohy v. Harding*, 4 Hughes, 253.—MORRIS, 1880.

260. "Certified copies of disconnected papers in the Patent Office, showing former acts and declarations of the opposing party with reference to the procurement of the patent in suit, are admissible in evidence."—*Id.*

261. "An objection to the examination of a witness should state specifically the ground of the objection, in order that the opposite party may have the opportunity of removing it, if possible." *Planing Mach. Co., Woodbury, v. Keith*, 101 U. S. 479.—SUP. CT. 1879.

262. A model with a placard "proves nothing of itself." *Page et al. v. Holmes Burglar Alarm Tel. Co.*, 17 Blatch. 484.—BLATCHFORD, 1880.

263. Where a witness deposes to alleged facts impeaching the patent sued on, and where he has testified in prior suits on the same patent and said nothing about such alleged facts, it is "impossible to accept what he says as worthy of reliance." *Atlantic Giant Powder Co. v. Dittmar Powder M'f'g Co. et al.*, 17 Blatch. 531.—BLATCHFORD, 1880.

264. By the court : " Whether the invention was known, or used, or described in the exact manner, or by the persons set up in the answer or not, the patent, in this respect, . . . is not void in its face for want of novelty within that common knowledge which is sufficient for dismissing the bill without regard to the answer." *Quirolo v. Ardito et al.*, 17 Blatch. 400.—WHEELER, 1880.

265. By the court : " Every one having experience in these matters knows how easy it is to exhibit an article of manufacture to an honest and well-meaning person, and procure his affidavit that many years before he saw or made something similar to it. The witness may be quite sincere, but altogether mistaken." *Greenwood v. Bracher*, 1 Fed. Rep. 856.—NIXON, 1880.

266. As evidence offered as to the state of the art, and whereby to construe the claim, cannot be objected to, it follows that complainants' allowance of the taking of such evidence without objection is no waiver of his right to object to its consideration as anticipatory evidence, it not having been set up in the answer. *Zane et al. v. Soffe*, 2 Fed. Rep. 229.—WHEELER, 1880.

267. Defendants answered complainant by saying that they were operating under a patent of later date than complainant's, and denied infringement. In evidence defendants showed that they were operating under a patent of later date, which had been in different litigations, and the date of the invention embodied therein had been by different judges found to antedate complainant's patent. *Held*, that defendants could not, under the pleadings, avail themselves of such prior findings, the present complainant not having been a party to any of the prior suits. *Day v. Combination Rubber Co. et al.*, 2 Fed. Rep. 570.—WHEELER, 1880.

268. By the court : " If the patent was not accompanied by the application, the date of the patent would be deemed the date of the invention." *Eagleton M'fg Co. v. West, Bradley & Carey M'fg Co. et al.*, 18 Blatch. 218.—WHEELER, 1880.

269. " The application, when produced in order to be effective evidence to carry the date of the invention back to its own date, must be an application for substantially the same invention for which the patent is granted, without material variation or addition."—*Ib.*

270. When defendants show prior use antedating the patent, " the burden is shifted to the plaintiff to show invention or discovery by the patentee still prior to that."—*Ib.*

271. " A patentee whose patent is assailed

upon the ground of want of novelty may show by sketches and drawings the date of the inceptive invention, and if he has exercised reasonable diligence in perfecting and adapting it, and in applying for his patent, its protection will be carried back to such date." *Kneeland et al. v. Sheriff et al.*, 2 Fed. Rep. 901.—MCKENNAN, 1880.

272. A patentee is entitled to the presumption of priority which his patent affords, and this presumption is only overcome by clear and satisfactory proof to the contrary. " Some of the cases hold that the defence that the patentee was not the original and first inventor of the patented subject can only prevail when shown beyond any reasonable doubt." *Rogers v. Beecher et al.*, 3 Fed. Rep. 639.—WALLACE, 1880.

273. Complainant's invention being a process of making birch beer by a certain formula, it was held not sufficient to establish infringement to show a substantial similarity between complainant's and defendants' beer in taste, the defendants meanwhile denying infringement.—*Ib.*

274. Where a prior patent is set up to defeat a later one, the file wrapper, etc., of the prior patent are not admissible in evidence. *Hoves et al. v. McNeal*, 17 Blatch. 396.—BLATCHFORD, 1880.

275. The difficulties inherent in the subject, when it is attempted to attack the validity of a patent by putting in evidence matters occurring many years before, must be fully overcome in order to succeed in the attempt. *Sinclair et al. v. Backus*, 4 Fed. Rep. 539.—LOWELL, 1880.

276. When a patentee attempts to impeach a patent he has sold to others, his evidence will have little weight except when corroborated.—*Ib.*

277. By the court : " We do not intend to be understood as intimating that the witnesses who have testified to the various instances of the use of barbed wire for fencing purposes have been guilty of intentional false swearing, but simply to say that this proof, which is almost wholly made up of the recollections of witnesses revived after the lapse of many years, and contradicted as it is in most instances by the explicit testimony of other equally credible witnesses, leaves so much doubt as to the actual existence of these various barbed wire fences, or any of them, as to make it at least unsafe ground on which to defeat a patent." *Washburn & Moen M'fg Co. et al. v. Haish*, 10 Bissell, 65.—BLODGETT and DRUMMOND, 1880.

278. " Exhibits introduced by a party without needful explanation do not deserve and will not receive much consideration." *Miller et al. v. Smith et al.*, 5 Fed. Rep. 359.—CLIFFORD, 1880.

279. "When the defence of want of novelty is made, it is the duty of the tribunal, whether court or jury, to give it effect; but such proof or testimony should be weighed with care, and never be allowed to prevail when it is unsatisfactory, nor unless its probative force is sufficient to outweigh the *prima facie* presumption arising from the introduction of the patent."—*Ib.*

280. For an example of testimony as to prior use not found to be clear and conclusive enough to establish such use see —. *Wilson v. Coon et al.*, 18 Blatch. 532.—BLATCHFORD, 1880.

281. Example of evidence of prior use held sufficient —. *Marks v. Fox et al.*, 18 Blatch. 502.—BLATCHFORD, 1880.

282. Evidence of prior use not set up in defendants' answer, stricken out.—*Ib.*

283. By the court: "The defendants, in selling the soaps they sold, represented them as containing ten per cent of carbolic acid by printed matter on the boxes enveloping them. This fact, with the affirmative testimony as to their containing carbolic acid, is sufficient to establish the fact, although by the lapse of time and exposure they may, at certain date, have so parted with their carbolic acid as to make it impossible appreciably to recognize its presence." *Buchan et al. v. McKesson et al.*, 18 Blatch. 485.—BLATCHFORD, 1880.

284. The testimony of a number of persons to circumstances of prior invention will not avail as proof where they are shown to be mistaken as to dates incidentally brought in. *U. S. Stamping Co. v. Jewett et al.*, 18 Blatch. 469.—BLATCHFORD, 1880.

285. The fact that, in numerous suits many years before, the defendant took licenses, and complainant withdrew the suits, is strong evidence that the prior use then set up as a defence was not a sustainable one. *Atwood v. Portland Co.*, 10 Fed. Rep. 283.—LOWELL, 1880.

286. A replication filed after the time allowed, and testimony taken by complainant more than three months thereafter, may stand as regular if the court so order. *Fischer v. Hayes*, 19 Blatch. 26.—BLATCHFORD, 1881.

287. A bill of complaint alleged that the defendant's use of the patented machine was without the complainant's consent. This allegation was not specifically denied in the answer. Complainant did not prove want of consent. "It was for the defendant to prove consent, if anything needed to be proved on the subject."—*Ib.*

288. Amid testimony as to prior use so contradictory as to be uncertain, the finding will be for the patent.—*Ib.*

289. For analysis of objections made to the regularity of testimony taken and the findings thereon, see —. *Fischer v. Hayes*, 6 Fed. Rep. 86.—BLATCHFORD, 1881.

290. As to what amounted to proof of infringement under certain circumstances, see —. *Fischer v. Neil*, 6 Fed. Rep. 89.—BLATCHFORD, 1881; *Fischer v. O'Shaughnessy et al.*, 6 Fed. Rep. 92.—BLATCHFORD, 1881.

291. "If no objection is made at the time to evidence, all objection to it is considered as waived. If a general objection to it is made, but no ground of objection is specified, the objection will not be considered. If a ground of objection is stated, all grounds not specified are considered as waived."—*Ib.*

292. Where patents are put in evidence to anticipate complainants' patent, and no testimony is given concerning them, they will not receive much attention. *Putnam et al. v. Von Hofe*, 19 Blatch. 63.—BLATCHFORD, 1881.

293. "It is a presumption of law that all mechanics interested in upholding or defeating a patent were fully acquainted with the state of their art when they took out their patent or when they built their machine. This presumption is founded upon a policy like that which imputes to all persons charged with crime a knowledge of the law. It is necessary to the safe administration of justice." *Crompton v. Knowles et al.*, 7 Fed. Rep. 199.—LOWELL, 1881.

294. It seems that expert evidence as to whether an original patent shows and describes what is shown and described in its reissue is admissible. *Potter et al. v. Stewart*, 18 Blatch. 561.—BLATCHFORD, 1881.

295. When a witness is shown to be mistaken in a material statement that he makes, it destroys the value of his memory on other points. *Root et al. v. Lamb*, 7 Fed. Rep. 222.—LOWELL, 1881.

296. Where defendants set up a license and its existence is disputed, the defendants must offer preponderating evidence in order to prevail. *Watson et al. v. Smith et al.*, 7 Fed. Rep. 350.—WHEELER, 1881.

297. "Courts of this country take judicial notice of all other nations and their seals of state, but not of their inferior departments and their offices and seals." *Schoerken v. Swift, Courtney & Beecher Co.*, 19 Blatch. 209.—WHEELER, 1881.

298. A copy of a French patent certified by the director of the *Conservatoire National des Arts et Metiers of France*, under the seal of that department, verified by the Minister of Agriculture and Commerce and the Minister of Foreign Affairs under their seals, but not by the great



seal of France, would not be admissible in evidence at common law, but it is under the statute.—*Id.*

299. The unsupported testimony of a single witness to the minor details of a few structures he made fifteen years before, none of which structures are produced, cannot overcome the presumption that belongs to the patent. *Woven Wire Mattress Co. v. Wire Bed Co.*, 8 Fed. Rep. 87.—SHIPMAN, 1881.

300. Upon the question whether defendant made the end-rails of a bed-frame inclined depended the question of infringement. The officers of the defendant corporation testified that care and pains were taken that they should not incline. The sample in evidence was inclined. *Held*, that defendant infringed.—*Id.*

301. Defendant being sued for infringement, justified under license, by plea, and at the trial of the plea offered affidavits taken prior to the filing of the plea. The court doubted whether *ex parte* affidavits were receivable at all, and held that if they could be offered at all, "it must be on notice to the adverse party, and the tender of the affiant for cross-examination." *Lilienthal et al. v. Washburn*, 8 Fed. Rep. 707.—PARDEE, 1881.

302. Two witnesses swore positively to prior use [of lamp chimneys]; a number of witnesses situated so as to be likely to have known of the prior use, if there had been any, testified negatively, and the defence was held not proven. *Shirley v. Sanderson*, 8 Fed. Rep. 905.—BLATCHFORD, 1881.

303. Of facts that are matters of common knowledge, courts will take judicial notice. *McCloskey v. DuBois et al.*, 20 Blatch. 7.—WHEELER, 1881.

304. By the court: "The testimony of all these witnesses is merely from recollection of the shape of a few articles made from twenty-three to twenty-five years before they testified, and is not sufficient to destroy the presumptions of a patent upon an article which has been long and extensively used. . . . In the absence of specimens of the work made at the time, such testimony is an unsafe foundation upon which to rest a finding that the patent had been anticipated." *Zane et al. v. Peck Bros. & Co.*, 9 Fed. Rep. 101.—SHIPMAN, 1881.

305. "The patent, whether a reissue or an original, is entitled to a presumption in its favor." *Dederick v. Cassell et al.*, 9 Fed. Rep. 306.—BUTLER, 1881.

306. The evidence of a single witness, not rebutted, is sufficient to establish infringement. *Spring et al. v. Domestic Sewing Machine Co.*, 9 Fed. Rep. 505.—NIXON, 1881.

307. It is lawful and proper to take the testimony of a person in *perpetuam rei memoriam* in behalf of a party who fears that he may thereafter be sued under a patent. [Sec. 866, rev. stat.] *N. Y. & Balt. Coffee Polishing Co. v. N. Y. Coffee Polishing Co.*, 20 Blatch. 174.—BENEDICT, 1881.

308. Although a witness's general character may be successfully impeached, that does not prevent his testimony from being considered for what it is worth. *Miller et al. v. Foree et al.*, 9 Fed. Rep. 603.—BAXTER, 1882.

309. "The patent is evidence of its own validity, and hence the burden of proof to invalidate it rests upon the defendants. Every reasonable doubt ought to be resolved against them."—*Id.*

310. Testimony taken out of time allowed, and objected to, cannot be used. *Wooster v. Clark et al.*, 9 Fed. Rep. 854.—BLATCHFORD, 1881.

311. An earlier patent to the same inventor for an inferior form of device for the same purpose is evidence, approaching the conclusive, that the later and perfected form was not invented first. *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1881.

312. In a part of a series of cases using the same evidence, defendant had no just claim to further time for taking testimony; but, because of the other part of such series, the time was extended. *Wooster v. Howe Mach. Co.*, 10 Fed. Rep. 666.—BLATCHFORD, 1882.

313. Complainants, in a suit on a design patent, put in evidence, as an infringement, an article made by defendants, without testimony that the article was an infringement. Defendants contended that this was insufficient. The court said: "In view of the proper test as above given [referring to *Gorham Co. v. White*, 14 Wall. 511], and of the simple character of the designs in the present case, I am of opinion that the absence of any testimony as to identity does not make it improper for the court in this case to compare the defendants' nubia with the patents as to design, and determine the question of identity from such comparison. It is not intended to imply that the practice can be extended to any other patent that one for a design, or that it ought to be extended to all design patents." *Jennings et al. v. Kibbe et al.*, 20 Blatch. 353.—BLATCHFORD, 1882.

314. Testimony of witnesses that they did not know of an alleged prior use, when the circumstances were such that they would have been likely to have known of it if it had existed, is entitled to great weight. *Am. Ballast Log Co. v. Cotter*, 21 O. G. 1030.—BUTLER, 1882.

315. The direct and positive testimony of four witnesses held insufficient to prove prior use in the face of negative testimony. *Green v. French*, 21 O. G. 1351.—NIXON, 1882.

316. Complainant having brought suit on its patent, defendant submitted the evidence and decision in a Patent Office interference awarding priority to defendant's patent. The court said: "While this decision is not conclusive here [*Mach. Co. v. Crane*, 6 O. G. 801], it is nevertheless entitled to sufficient weight to cast the burden of proof on the plaintiff." *Wire Book Sewing Mach. Co. v. Stevenson*, 11 Fed. Rep. 155.—BUTLER, 1882.

317. A prior suit between the same parties is a bar to a later suit, so far as the questions involved are the same. The former suit must have proceeded to a decree upon such question, and the record of the former suit must be placed in evidence in the later suit. *Barker v. Stowe*, 20 Blatch. 185.—BLATCHFORD, 1882.

318. "A plaintiff who, after an acquiescence for the period of twelve years in the almost universal use of a patented invention, buys into the patent and essays to enforce it against the public, ought not to be surprised to find the courts inclined to believe a multitude of respectable witnesses who testify to prior use, even should the witnesses speak largely from memory." *Doubleday v. Beatty*, 11 Fed. Rep. 729.—ACHESON, 1882.

319. Prior patents relating to the same general subject-matter as the present patent, and making no mention of the particular devices of the present patent, weigh strongly against a claim that the invention of the devices of the present patent was made prior to the taking of said prior patent. *Fish v. Domestic Sewing Mach. Co.*, 12 Fed. Rep. 495.—WALLACE, 1882.

320. In an action to recover penalties for wrongfully stamping an article as patented, evidence which goes to show intent in affixing the patent stamp is admissible. *French v. Foley*, 11 Fed. Rep. 801.—BROWN, 1882.

321. A certified copy of the file wrapper and contents, appurtenant to an application for patent showing a defective oath, does not alone prove that a proper oath was not made at some other time. *Hoe et al. v. Kahler*, 20 Blatch. 430.—BLATCHFORD, 1882.

322. An application for a patent will be presumed to correspond with the patent. *Webster Loom Co. v. Higgins et al.*, 105 U. S. 580.—SUP. CT. 1882.

323. Failure to interpose [before final hearing] objection to evidence supporting a defence which ought to be, but is not, pleaded in the

answer, is a waiver of objection to such defence.—*Id.*

324. Where evidence has been taken which was not admissible under the original pleadings, but would have been admissible if taken subsequent to an amendment which was made to the pleadings, it is within the sound discretion of the court to receive or reject such evidence. *Allis v. Buckstaff et al.*, 22 O. G. 1705.—DYER, 1882.

325. "The presumptions of the law are in favor of the patent and of the novelty of the invention."—*Id.*

326. By the court: "The examiner had no power to rule on the admissibility of the evidence, and the defendant had the right upon a question which, to say the least, was not free from doubt, to take the opinion of the court. Had he answered, the mischief which he seeks to avoid would have been accomplished, and he would have been left remediless. He acted under the advice of counsel, apparently in good faith, and even though he acted mistakenly, it is not a case where he should be punished." *Roberts et al. v. Walley*, 14 Fed. Rep. 167.—COXE, 1882.

327. The above was said in a case where complainants called defendant as a witness. Complainants asked the witness for how many persons he had put torpedoes into oil wells [oil-well torpedoes being the patented thing] up to a certain date. Complainants also asked witness for the name of one such person. Defendant declined to answer both questions on the ground that he did not desire to disclose his customers to complainants. The court sustained the refusal to answer the first question, but held that the second should be answered.—*Id.*

328. Evidence taken out of time will stand and be considered unless a motion to suppress it is filed and allowed. *Matthews v. Spangenberg et al.*, 20 Blatch. 482.—WHEELER, 1882.

329. Some of defendants' evidence was taken and filed out of time. No motion to suppress was filed. The orator objected to its consideration. As no motion to suppress was filed, the testimony was allowed to stand and was considered. *Matthews v. Spangenberg et al.*, 20 Blatch. 482.—WHEELER, 1882.

330. Where evidence of prior use is put in by defendant without objection, it will be considered by the court, although unwarranted by defendant's answer to the bill of complaint. *Barker v. Shoots*, 20 Blatch. 178.—BLATCHFORD, 1882.

331. Evidence that should have been offered in complainant's opening case will not be accepted in rebuttal.—*Id.*

332. Irrelevant evidence, objected to as such, will not be accepted.—*Ib.*

333. A case where the invalidity of a reissue was charged in the answer, but the original was not offered in evidence, and the court permitted the original to be read and used at the hearing. *Knapp et al. v. Shaw et al.*, 15 Fed. Rep. 115.—LOWELL, 1883.

334. By the court: "In rebuttal of defendant's testimony, the plaintiff cited the defendant, and now insists that he, by one answer in regard to a date, has established an infringement which had not been the subject of previous testimony, and that this answer is to overthrow his uniform denial of his having made the infringing device during the life of the patent, without the knowledge and permission of the patentee. Such testimony is not sufficient to make out a case of infringement." *Reay v. Ray*, 15 Fed. Rep. 749.—SHIPMAN, 1883.

335. Where a man's conduct is strongly inconsistent with the claims and evidence he produces, such conduct will overcome such claims and evidence. *Atlantic Works v. Brady*, 107 U. S. 192.—SUP. CT. 1883.

336. "The presumption of law where a patent is claimed for a combination simply is, that all the separate elements are old." *Clarke Potomac Holder Co. v. Ferguson*, 21 Blatch. 376.—COXE, 1883.

337. It is a presumption of law that a patented thing possesses advantages over the prior art.—*Ib.*

338. It is a presumption of law that that which is covered by a claim involves the presence of patentable novelty, in the absence of any evidence attacking the same. *Moffitt v. Cavanaugh*, 17 Fed. Rep. 336.—SHIPMAN, 1883.

339. As to certain kinds of testimony pertinent in an accounting, see —. *Marks v. Fox*, 18 Fed. Rep. 713.—WALLACE, 1883.

340. Where infringement is denied by defendants, complainant must affirmatively show infringement or fail. *Slessinger v. Buckingham et al.*, 8 Sawyer, 469.—SAWYER, 1883.

341. Where complainant makes an allegation against defendants in the bill of complaint, and does not expressly waive an answer under oath, and defendants deny the allegation in their answer, the allegation must stand not proved.—*Ib.*

342. Special permission to take testimony is only granted where there is a reasonable prospect of securing the desired testimony. *Hicks v. Otto et al.*, 17 Fed. Rep. 539.—WHEELER, 1883.

343. "In deciding whether the patent covers an article the making of which requires invention, we are not required to shut our eyes to mat-

ters of common knowledge or things in common use." *King v. Gallun et al.*, 109 U. S. 99.—SUP. CT. 1883.

344. A mere statement of opinion by the defendants that there is no invention in the patented thing, without reasons being given, is not sufficient to overcome the *prima facie* effect of the patent. *Lambert v. Hofheimer et al.*, 18 Fed. Rep. 654.—WHEELER, 1883.

345. By the court: "The sale procured by and to another for the orators would not of itself probably be an unlawful infringement of which they could justly complain; yet, when made in the usual course of business, as of goods kept for sale, it might be evidence of sales of similar goods." *Dryfoos et al. v. Friefman et al.*, 21 Blatch. 563.—WHEELER, 1884.

346. "Under a denial of the patentee's priority of invention, evidence of prior knowledge and use, taken without objection, is competent at the hearing on the question of the validity of the patent." *Zane et al. v. Soffe*, 110 U. S. 200.—SUP. CT. 1884.

347. Although on motions for provisional injunction, wherein the ordinary rules of evidence do not obtain, records pertaining to other cases to which defendant was a party or privy may be introduced, such records are not admissible in a trial upon the merits. *Matthews v. Iron Clad M'fg Co.*, 19 Fed. Rep. 321.—WALLACE, 1884.

348. A court having in its hands the letters-patent under discussion, with illustrative models and the machine used, can and will decide a question of mechanical equivalents for itself, although there be no expert evidence upon that point. *Doyle v. Spaulding*, 27 O. G. 300.—NIXON, 1884.

349. By the court: "In passing upon the novelty of the alleged improvement covered by the patent, we are permitted to consider matters of common knowledge or things in common use." *Phillips et al. v. City of Detroit*, 111 U. S. 604.—SUP. CT. 1884.

350. Where defendant alleges that complainants were not the original inventors of the thing patented, the burden of proof is on the defendant to establish that fact. *Patterson et al. v. Duff*, 20 Fed. Rep. 641.—BRADLEY and MCKENAN, 1884.

351. By the court. "The date being fixed, the burden was transferred to the complainant to satisfy the court by proof as convincing as that required of the defendant that his invention preceded theirs. The rule in such a case is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not

admit of reasonable doubt. Where interests so vital are at stake, where intervening years have made perfect accuracy well-nigh impossible, where an event not deemed important at the time has been crowded from the memory and obscured by the ever-varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the fact accords with his inclination concerning it. The evidence of prior invention is usually within the control of the party asserting it; and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unanimous in holding that it must be established by proof, clear, positive, and unequivocal; nothing must be left to speculation or conjecture." *Thayer v. Hart, Jr., et al.*, 22 Blatch. 229.—COXE, 1884.

352. Where defendant relies upon a prior structure as an anticipation of the patented structure, "the burden of proof is on the defendant to show the similarity." *Cottier et al. v. Stimson et al.*, 20 Fed. Rep. 906.—DEADY, 1884.

353. Where the question was one of prior use, the patented thing being a railroad frog, and at a certain date railroad frogs were shown to be kept for sale, and sold, and put in use on several railroads, the court said: "The court will presume that, in the due course of business, it took at least some months before that time to devise and produce these frogs." *Weir v. Morden*, 21 Fed. Rep. 243.—BLDGGETT, 1884.

354. Where defendant sets up the defence of prior use, the burden of proof is on him to show it; and if he leaves that matter in doubt, such doubt will be resolved against him. *Bostock v. Goodrich*, 21 Fed. Rep. 316.—BUTLER, 1884.

355. Where expert testimony is in direct conflict, the court will, from its own inspection of the evidence, decide the question in conflict.—*Id.*

356. In the absence of other evidence, the date of complainant's patent is the date of his invention. *Havemeyer v. Randall*, 21 Fed. Rep. 404.—NIXON, 1884.

357. "The presumption is in favor of the validity of the patent, which presumption must be overcome by clear and positive testimony." *McMillin et al. v. St. Louis & Vicksburg Anchor Line*, 22 Fed. Rep. 169.—TREAT, 1884.

358. "Where a witness falsifies a fact in respect to which he cannot be presumed liable to mistake, courts are bound, 'upon principles of law, morality, and justice, to apply the maxim *falsus in uno falsus in omnibus*.'" *Am. Bell Tel. Co. et al. v. People's Tel. Co. et al.*, 22 Blatch. 531.—WALLACE, 1884.

359. In the district of Vermont a wife is not a competent witness as to an invention made by the husband, even though, at the time of the suit, the husband is only a nominal defendant, and has assigned away the invention. *Wooster v. Hill et al.*, 22 Fed. Rep. 830.—WHEELER, 1885.

360. An expert need not necessarily be called to show infringement. *Hayes v. Bickelhaupt*, 23 Fed. Rep. 183.—WHEELER, 1885.

361. "The burden is upon the defendants to satisfy the court that the prior descriptions contained such a clear, full, and exact statement that a person skilled in the art, with the statement before him, could produce the fabric in question. . . . The law requires something beyond mere suggestion to defeat a patent. Prophecy will not do; facts, not theories, are needed." *Celluloid M'fg Co. v. Crothilion Collar & Cuff M'fg Co.*, 31 O. G. 519.—COXE, 1885.

362. The evidence of experts has only bearing upon questions of fact. Questions of law are for the court. *Tompkins v. Butterfield*, 33 O. G. 758.—NELSON, 1885.

363. "It is entirely clear that the defendant is entitled to put in evidence any document or affidavit which has been used by the complainant in any proceeding in the suit for the purposes of interlocutory relief. By the production of any such documents or affidavits as the basis of relief sought, the complainant has impliedly vouched for the truth of the facts recited in them, and they are admissible as the declarations of the complainant. It is well settled that if a party, upon a motion in the cause, or for the purpose of obtaining any relief, produces a document or uses the affidavit of another person, the document or affidavit is, on any subsequent occasion in the suit, admissible as evidence against him who so used it. Such an affidavit may be used upon the trial when the person who made the affidavit is present in the court and is not called." *Western Union Tel. Co. v. Baltimore & Ohio Telegraph Co.*, 26 Fed. Rep. 55.—WALLACE, 1885.

364. Where a party has put in evidence communications passing between itself and its attorney, it waves privilege as to such communication, and may be compelled to show the whole of the transaction, at the instance of the other party.—*Id.*

365. In the suit of A against B and C, a copy of the written testimony of C, in another case between other parties, is not of itself admissible in evidence. *Hoe et al. v. Kahler*, 23 Blatch. 354.—BLATCHFORD, 1885.

366. "Showing what were the contents of the file wrapper" at a former date, "or what are its,

contents now, or what was the practice of the Patent Office in regard to preserving papers filed in applications for patents, and letters to and from the Office, and in regard to the proceedings and the date of filing papers, and of receiving and sending communications, and the scope and functions of a file wrapper and contents in the matter of a patent, is not sufficient to rebut the presumption that the Commissioner required and received a proper preliminary oath. . . . The affirmative probative force of a paper in a file wrapper, to show the existence of its contents, is one thing, but its negative probative force, to show that a paper or fact not shown by anything in its contents did not exist, is quite a different thing. The fact that papers known to have existed, and which properly belonged in a file wrapper, are missing therefrom is a fact of such frequent occurrence in patent suits as to have become a matter of judicial cognizance."—*Id.*

367. Patents and the like pertaining to the art may be offered in evidence and used at the hearing on the question of the construction of the patent in issue, although not set up in the defendant's answer. *Eachus v. Broomall*, 115 U. S. 429.—*SUP. CT.* 1885.

368. As to evidence not thoroughly satisfactory, which was accepted by a court as to who was the infringing party, see —. *Peterson et al. v. Simpkins*, 25 Fed. Rep. 486.—*TREAT*, 1885.

369. The court being of the opinion that defendants' machine was, in its mode of operation, like that of complainant's patented machine, said: "The burden is on the defendants to clearly establish this point." *Nat'l Hat Pouncing Mach. Co. v. Thom et al.*, 25 Fed. Rep. 496.—*COURT*, 1885.

370. Where the state of the evidence is such as to leave doubt in men's minds, the doubt will be resolved in favor of the defendants, and defendants held not to infringe. *Mallory M'fg Co. v. Hickok et al.*, 25 Fed. Rep. 827.—*SHIPMAN*, 1885.

371. Where defendants set up two years' public use prior to application for the patent, "the party asserting such a defence assumes the burden of proof, and is bound to sustain it by clear and convincing testimony." *Adams & Westlake M'fg Co. v. Rathbone et al.*, 26 Fed. Rep. 262.—*BLODGETT*, 1886.

372. For an example of a case where the court availed itself of common knowledge in regard to such a matter as the use of water to remove obstructions in sinking piles in sand, see —. *Knapp v. Benedict et al.*, 26 Fed. Rep. 627.—*SHIPMAN*, 1886.

373. Evidence of a defence not set up in the

answer must be rejected. *Bragg v. City of Stockton*, 27 Fed. Rep. 509.—*SAWYER*, 1886.

374. The decision in *Hollister v. Benedict & Burnham M'fg Co.* "makes independent evidence of the existence of inventive skill, apart from the inferences of such existence which may be drawn from novelty and utility, to be of greater importance than has been understood heretofore." *Celluloid M'fg Co. v. Comstock & Cheney Co.*, 27 Fed. Rep. 358.—*SHIPMAN*, 1886.

375. In proceedings before a master on an accounting, although the record of the case is not put in evidence before the master, he is at liberty to refer to it in making his report for any legitimate purpose. *Reed et al. v. Lawrence et al.*, 29 Fed. Rep. 915.—*SEVERNS*, 1886.

376. "The court is required to take judicial notice of what is commonly known in the various branches of manufacture and industry. It is required that the court should know what is the current progress in the arts affecting the methods in common use among the people."—*Id.*

377. "Patents and other matters showing the prior art are admissible in evidence without being set up in respondent's answer, but only for the purpose of construing the claim of the patent in suit, not for the purpose of showing its invalidity." *Grier v. Wilt*, 120 U. S. 412.—*SUP. CT.* 1887.

378. In determining the question whether a patent is invalid upon its face for want of novelty on demurrer, "the court can only consider such familiar facts as fall within the category of those things of which judicial notice will be taken." *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 30 Fed. Rep. 785.—*WALLACE*, 1887.

379. "It is the settled rule that a defendant, in a suit for the infringement of a patent for an invention, who sets up prior use and want of novelty as a defence, has the burden of proof upon him to establish the facts set up beyond all reasonable doubt." *Cary et al. v. Lowell M'fg Co.*, 31 Fed. Rep. 344.—*ACHESON*, 1887.

380. "The patentee starts with the benefit of the presumption of law that he was the first and original inventor of that for which the letters-patent were granted to him, and whoever alleges the contrary must assume the burden of proof, and the defence of want of novelty or originality must be made out by evidence so clear and satisfactory as to remove all reasonable doubt." *Am. Bell Tel. Co. v. Globe Tel. Co.*, 31 Fed. Rep. 729.—*WALLACE*, 1887.

381. "Patents can be invalidated by showing that there was in fact no invention, that the patentee was not the original inventor or discoverer,

or that the invention was not new or useful. To maintain these defences, the evidence must show clearly and satisfactorily, and beyond a reasonable doubt, that such claimed invention lacked some one or other of these elements to authorize the issuing of the patent." *Byerly v. Cleveland Linseed Oil Works*, 31 Fed. Rep. 73.—WELKER, 1887.

382. "The issuing of the plaintiff's patent by the department having the right so to grant patents for inventions is itself *prima facie* proof that an invention has been made, that the patentee is the inventor, that it is new and useful, and that he has complied with the law to obtain the patent."—*Ib.*

383. Twenty years of acquiescence by the public in a patent is very strong evidence of its validity. *Good v. Bailey et al.*, 41 O. G. 935.—BUTLER, 1887.

384. Defendant sought to have complainant estopped, by reason of the proceedings in the Patent Office pending the application for the patent in suit. Complainant's expert testified without objection that he was familiar with the history of the original patent, that the Patent Office requested a selection to be made from the two claims of the application because they stated precisely the same invention, and such selection was made. The court held that there was no estoppel. *Ewart M'fg Co. v. Bridgeport Malleable Iron Co.*, 31 Fed. Rep. 149.—SHIPMAN, 1887.

385. Evidence of prior invention that simply creates doubt cannot prevail. It must produce conviction. *Osborne v. Glazier*, 31 Fed. Rep. 402.—BUTLER, 1887.

386. By the court: "The question really before us is whether we will take judicial notice of certain processes described in various mechanical dictionaries, encyclopædias, and other publications produced on the hearing of the demurrer, and by reason of our taking judicial cognizance of such processes, determine that the patent in question does not describe an advance in the art to which it appertains, arising to the dignity of an invention. Besides those facts of which the courts are bound by law to take judicial notice, they will ordinarily only take notice of facts of universal notoriety—of facts that are so generally understood that they may be regarded as forming a part of the common knowledge of every person. . . . The matters of which we are asked to take judicial cognizance in this instance, and thereupon declare the invalidity of this patent, do not strike us as falling within the last category." *Koalatype Engraving Co. et al. v. Hoke et al.*, 30 Fed. Rep. 444.—THAYER, 1887.

387. A suit was brought for an alleged infringement of a machine for counting and packing envelopes, the essence of the improvement being that the machine made no count unless an envelope passed. It was in proof that defendant had built certain machines which counted at every revolution. A witness, who saw some of defendant's machines, thought they counted with the passage of the envelope. An expert testified that he could not tell by seeing the operation of the machine whether it counted with every revolution or not. The evidence of infringement was held insufficient. *Hill v. Holyoke Envelope Co.*, 30 Fed. Rep. 623. COLT, 1887.

388. The presumption in favor of patentable novelty—arising from the patent—"must be allowed to stand until overborne by countervailing proof, certain and convincing." *Am. Box Mach. Co. v. Day et al.*, 32 Fed. Rep. 585.—BUTLER, 1887.

389. The patent in suit was for a composition for casting ornamental figures, consisting of paraffine, stearine, and pulverized sugar. Complainant purchased statues from defendants at their place of business, had them analyzed, and found them to be of this composition. Defendants stated generally that they did not use this composition, but were unable to tell of what their manufactures were made. Defendants were held to infringe. *Keiseler v. Haas et al.*, 32 Fed. Rep. 794.—COXE, 1887.

390. Where the answer does not set up prior use, evidence thereof, duly objected to, is not admissible.—*Ib.*

## EXECUTOR.

[See "Administrator and Executor."]

## EXPERT.

### CASES.

1. A witness cannot be examined as to a third machine in order to test the correctness of his testimony as to the similarity or dissimilarity of the machines of the plaintiff and defendant. *Odiorne v. Winkley*, 2 Gall. 51.—STORY, 1814.

2. "As to the opinion of skilful witnesses, whether the principles of two machines are the same, no person doubts that it is competent evidence." *Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

3. The testimony of experts is but matter of opinion, "and its weight must be judged by all the other circumstances of the case."—*Ib.*

4. The testimony of persons conversant with the art, as to resemblances or differences, is entitled to great but not conclusive weight. *Dixon v. Moyer*, 4 Wash. 68.—WASH. 1821.

5. Upon no question do experts disagree oftener than on the question as to whether a difference is in form or in principle. *Treadwell et al. v. Bladen*, 4 Wash. 703.—WASH. 1827.

6. The jury are to judge from the models and from the evidence whether the two machines differ in principle. "Nothing is more common than for persons skilled in the structure of machines to disagree in regard to the principles of them." *Smith v. Pearce et al.*, 2 McLean, 176.—MCLEAN, 1840.

7. "Whether the patent is void for uncertainty and ambiguity in the description is a matter of fact to be decided upon the evidence by experts." *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

8. For a judicial statement to the effect that in thirty years' experience the court has never known experts to agree in opinion, see —. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

9. "Great respect is due to the opinions of professional men on matters which relate to their professions. On such subjects, and on such subjects only, are the opinions of witnesses received as evidence. This rule applies as strongly to mechanics as to any other profession or business." *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

10. Artisans skilled in the trade to which the patented improvement appertains are proper witnesses on the question whether a specification is sufficient to practise by. Persons who, although not practical artisans, are thoroughly conversant with the subject of mechanics as a science, are proper expert witnesses. "The very highest witnesses to ascertain and verify the novelty of an invention, and the identity and diversity of mechanical apparatus and contrivances and equivalents, are, beyond all question, all other circumstances being equal, scientific mechanics." *Allen v. Blunt*, 3 Story, 742.—STORY, 1845.

11. "The opinion of experts—contrary to the general principle of law, which excludes opinions from going to a jury as evidence—is admissible in cases . . . involving questions of science and artistic skill, in which it is presumable that the jury are not versed, and with regard to which, therefore, they may desire the aid of other persons skilled or versed in the art or science in question. Hence it is that the results which such skilful and accomplished persons

have arrived at, in their own minds, are suffered to go to the jury as matters of evidence. But they are not to be held as conclusive. They are to be judged of . . . and weighed . . . in the same manner as all the other evidence in the case." *Mamy v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

12. "Great respect is due to the views and opinions of scientific individuals and practical mechanics on the question of identity of different mechanical structures. From their acquaintance with the elements of mechanical science they are enabled satisfactorily to decide this question, while to others it might seem involved in obscurity and doubt." *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

13. "There is no place in which the evidence of scientific men, upon topics within their own departments of knowledge, is more to be desired than in . . . court, when sitting for the trial of patent causes; and the opinions also of such men, when duly supported by reasonings founded on ascertained facts, must, of course, be valued highly. But it is a mistake to suppose that, even on a question of science, opinion can be dignified here as elsewhere with the mantle of authority. Still less can we allow it to avail "when it assumes contested facts, or volunteers to aid . . . in determining the most important written instruments." *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—KANE, 1851.

14. "Experts may be examined as to the meaning of terms of art on the principle of '*cuique in sua arte credendum*,' but not as to the construction of written instruments." *Corning et al. v. Burden*, 15 Howard, 252.—SUP. CT. 1853.

15. "The mere opinion of experts, when not sustained by particulars of difference or coincidence clearly pointed out between pieces of machinery constructed to produce the same results, and working out those results by means so nearly identical as to create a strong presumption of a common origin, cannot afford proof very satisfactory to the mind that the judgments of the witnesses ought to be adopted." *United States Annunciator Co. v. Sander-son et al.*, 3 Blatch. 184.—BETTS, 1854.

16. "The testimony of respectable and intelligent experts . . . is entitled to great consideration." *Carr v. Rice*, 1 Fish. P. C. 198.—BETTS, 1856.

17. "The statute defines the character of an expert as one '*skilled in the art or science*' to which his opinion or judgment appertains, or in a business or art most nearly connected with that to which his judgment or opinion is applied."

*Page v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

18. Persons "experienced in the art or mystery to which they were called to testify" may give their opinions as evidence.—*Id.*

19. "Widely as experts differ in opinion in the trial of patent causes, those differences are almost always traceable to the assumption of different postulates; their opinions differ because they are given on substantially different cases. When their minds can be drawn to the same points, and they use the same words in the same sense, they rarely differ. . . . When their opinions are expressed in *ex parte* affidavits, and there is no opportunity for the court to ascertain in what sense they use important words, nor what facts they take into view, nor what standards of comparison they assume, their opinions are of comparatively little use in guiding the court to a safe conclusion." *Sargent et al. v. Carter*, 11 Mo. L. Rep. 651.—CURTIS, 1857.

20. By the court: "It may be assumed in this and in most other patent cases that neither party would have called the experts on his own side unless he had supposed that their opinions in reference to the straining point of the case would be directly opposed to the opinions which he supposes will be expressed by the expert of his adversary. Their well-considered and deliberately formed opinions are asked in advance, and if they are found to be adverse to the party who seeks such opinion, that expert is not called on his part. . . . Upon these questions of mechanical equivalents, of substantial identity and substantial difference of organization and mode of operation, these *opinions* are to be regarded . . . as opinions merely." *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

21. "There are various classes of cases which depend upon the knowledge of a peculiar art or science for their solution, of a particular business, requiring a peculiar knowledge, in order to form a satisfactory judgment of the question involved; and in this case the law allows testimony to be given by those skilful in the particular art, science, or profession, and permits them to give their opinions, as results which they arrive at from an examination of the questions of fact that are before the jury." *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

22. "The testimony of experts is useful to show the operation of devices; indeed, very essential; but when experts undertake to tell what the patent is for, they assume the duty of the court; and when they undertake to say what is or what is not a violation of the patent, they not only assume the duty of the court, but of the

jury." *Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co.*, 3 Fish. P. C. 43.—INGERSOLL, 1858.

23. By the court: "Experience has caused me to have little confidence in the opinions of experts and professors, who often have more knowledge than judgment. Courts and juries may be much benefited in their researches by the one, while they would be led into great error by confiding too much to the other.

"The art of printing was stumbled over for five thousand years, and if a patent for it were now presented to our expert, he would show you at once that the whole art consisted in multiplying impressions from a combination of movable types. He would point you to the tracks of animals as original impressions from movable types, and show the invention of printing letters to be as old as Adam.

"Few patents could stand the test of such ingenuity as this. Inevitable as it may appear, yet it is nevertheless true that on the trial of the originality of Morse's telegraph, it was gravely argued that two thieves in the penitentiary, who had corresponded by means of scratches and dots on the prison wall, had preceded Morse in the invention of this most astonishing and useful art." *Livingston et al. v. Jones et al.*, 1 Fish. P. C. 521.—GRIER, 1859.

24. "Experts may be examined to explain terms of art and the state of the art at any given time. They may explain to the court and the jury the machines, models, or drawings exhibited. They may point out the differences or identity of the mechanical devices involved in their construction. The maxim of '*cuique in sua arte credendum*' permits them to be examined in questions of art or science peculiar to their trade or profession; but professors or mechanics cannot be received to prove to the court or jury what is the proper or legal construction of any instrument of writing. A judge may obtain information from them, if he desires it, on matters which he does not clearly comprehend, but cannot be compelled to receive their opinions as matters of evidence. Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing instead of elucidating the questions involved in the issue." *Day et al. v. Stellman et al.*, 1 Fish. P. C. 487.—GILES, 1859.



25. "The law permits the opinions of men called experts to be given in evidence; and when such men are qualified and free from bias, their testimony is entitled to great respect." *Morris v. Barrett et al.*, 1 Bond, 254.—LEAVITT, 1859.

26. "The opinions of witnesses who are experts are admitted, contrary to the general rule, which requires witnesses to testify only as to facts." *Conover v. Rapp*, 4 Fish. P. C. 57.—INGERSOLL, 1859.

27. "It would seem as well, if not better, that the opinions of such witnesses should be excluded from the consideration of the jury."—*Ib.*

28. Where the opinion of an expert involves, in effect, the construction of a patent, it is without force. *Ely v. Monson & Brimfield M'fg Co.*, 4 Fish. P. C. 64.—SPRAGUE, 1860.

29. "The mere opinion of experts is not entitled to much weight unless founded on good and satisfactory reasons. In many cases the testimony of experts is somewhat colored with feelings of a partisan character. The statement of a fact by one who has seen the machine worked is better, if reliable, than the mere opinion of ever so many scientific experts." *Cox v. Griggs*, 1 Bissell, 362.—DRUMMOND, 1861.

30. "The testimony of this class of witnesses, when intelligent and otherwise reliable, is of great value in patent-right controversies involving questions of identity as between two machines." *Potter et al. v. Muller*, 2 Fish. P. C. 465.—LEAVITT, 1864.

31. It is not uncommon that in different cases experts do not agree in their opinions as to what are matters of form and what are matters of substance. *Turrell et al. v. Ill. Cent. R. R. Co.*, 3 Bissell, 66.—DRUMMOND, 1867.

32. Where experts of equal intelligence testify in direct opposition to each other, models form excellent evidence for the court. *Crompton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.

33. "The opinions of experts are evidence as to matters of science within their peculiar departments of knowledge, but the value of such opinions must be tested by the reasons on which they are built." *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

34. The testimony of experts is to be considered like any other evidence. It is to be tried by the same tests that are applied to the evidence of other witnesses, and as much credit and weight given to it as it is deemed entitled to from all the circumstances, and no more. *Carter et al. v. Baker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

35. The opinions of experts are of little value when weighed against the demonstrations of actual results. *Seymour et al. v. Marsh et al.*, 9 Phil. 380.—MCKENNAN, 1872.

36. "When the question of infringement is under consideration, and expert testimony is necessary, the action of official experts on the subject is entitled to some consideration, especially where doubt exists." *Westlake v. Carter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

37. Courts are governed, to a certain extent, by the testimony of experts. *Ingels v. Mast*, 6 Fish. P. C. 415.—SWING, 1873.

38. By the court: "I have not examined minutely the testimony of the experts produced by the respective parties in this case, because I do not ordinarily attach much importance to the opinion of witnesses so produced. I find them generally advocates of the party producing them. I have rarely derived any assistance from an expert who was not summoned and examined on the suggestion of the court itself." *King v. Louisville Cement Co.*, 6 Fish. P. C. 336.—BALLARD, 1873.

39. Experts usually differ about the questions at issue. *Wells v. Jaques et al.*, 1 Banning & Arden, 60.—MCKENNAN and NIXON, 1874.

40. The uncontradicted admission of an expert concludes the party for whom he testifies.—*Ib.*

41. By the court: "I have no confidence myself in the impression produced by any number of *ex parte* affidavits of experts." *American Middlings Purifier Co. v. Christian et al.*, 4 Dillon, C. C. 448.—MILLER, 1877.

42. "Whenever the matter in contest involves an immense sum in value, and where the question turns mainly upon opinions of experts, there is no difficulty in introducing any amount of them on either side; and yet this class of cases is one in which there is value to be attached to experts."—*Ib.*

43. Expert witnesses are usually as wide apart as are the poles asunder. *Turrell v. Spaeth*, 3 Banning & Arden, 458.—NIXON, 1878.

44. Testimony expressing opinion is only admissible from an expert. *Toohy v. Harding*, 4 Hughes, 253.—MORRIS, 1880.

45. A court having in its hands the letters-patent under discussion, with illustrative models and the machines used, can and will decide a question of mechanical equivalents for itself, although there be no expert evidence upon that point. *Doyle v. Sparulding et al.*, 19 Fed. Rep. 744.—WHEELER, 1884.

46. Where expert testimony is in direct conflict, the court will, from its own inspection of the evidence, decide the question in conflict.

*Bostock v. Goodrich*, 21 Fed. Rep. 316.—BUTLER, 1884.

47. An expert need not necessarily be called to show infringement. *Hayes v. Bickelhaupt*, 23 Fed. Rep. 183. — WHEELER, 1885.

48. The evidence of experts has only bearing on questions of fact. Questions of law are for the court. *Tompkins v. Butterfield*, 33 O. G. 758.—NELSON, 1885.

49. The testimony of an expert is to be considered and weighed the same as the testimony of any other witnesses. *May v. County of Fond du Lac*, 27 Fed. Rep. 691.—DYER, 1886.

50. The court spoke of experts as "auxiliary counsellors called experts, whose arguments upon the law and the facts terminate in a jurat, and are frequently referred to as affidavits." *Steam Gauge & Lantern Co. v. Ham M'fg Co.*, 28 Fed. Rep. 618.—COXE, 1886.

### EXTENSION.

#### "EXTENSION" IN THE PATENT ACTS.

Act approved July 3d, 1832.

SECTION 2. *And be it further enacted*, That application to Congress to prolong or renew the term of a patent shall be made before its expiration, and shall be notified at least once a month, for three months before its presentation, in two newspapers printed in the city of Washington, and in one of the newspapers in which the laws of the United States shall be published in the state or territory in which the patentee shall reside. The petition shall set forth particularly the grounds of the application. It shall be verified by oath; the evidence in its support may be taken before any judge or justice of the peace; it shall be accompanied by a statement of the ascertained value of the discovery, invention, or improvement, and of the receipts and expenditures of the patentee, so as to exhibit the profit or loss arising therefrom. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 18. *And be it further enacted*, That whenever any patentee of an invention or discovery shall desire an extension of his patent beyond the term of its limitation, he may make application therefor, in writing, to the Commissioner of the Patent Office, setting forth the grounds thereof; and the Commissioner shall, on the applicant's paying the sum of forty dollars to the credit of the Treasury, as in the case of an original application for a patent, cause to be published in one or more of the principal newspapers in the city of Washington, and in

such other paper or papers as he may deem proper, published in the section of country most interested adversely to the extension of the patent, a notice of such application and of the time and place when and where the same will be considered, that any person may appear and show cause why the extension should not be granted. And the Secretary of State, the Commissioner of the Patent Office, and the Solicitor of the Treasury shall constitute a board to hear and decide upon the evidence produced before them both for and against the extension, and shall sit for that purpose at the time and place designated in the published notice thereof. The patentee shall furnish to said board a statement, in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention. And if, upon a hearing of the matter, it shall appear to the full and entire satisfaction of said board, having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the Commissioner to renew and extend the patent, by making a certificate thereon of such extension, for the term of seven years from and after the expiration of the first term; which certificate, with a certificate of said board of their judgment and opinion, as aforesaid, shall be entered on record in the Patent Office; and thereupon the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years. And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein: *Provided, however*, That no extension of a patent shall be granted after the expiration of the term for which it was originally issued. [Repealed July 8th, 1870.]

Act approved May 27th, 1848.

SEC. 1. This section provides "That the power to extend patents, now vested in the board composed of the Secretary of State, Commissioner of Patents, and Solicitor of the Treasury, by the eighteenth section of the act approved July fourth, eighteen hundred and thirty-six, respecting the Patent Office, shall hereafter be vested solely in the Commissioner of Patents;

and when an application is made to him for the extension of a patent according to said eighteenth section, and sixty days' notice given thereof, he shall refer the case to the principal examiner having charge of the class of inventions to which said case belongs, who shall make full report to said Commissioner of the said case, and particularly whether the invention or improvement secured in the patent was new and patentable when patented; and thereupon the said Commissioner shall grant or refuse the extension of said patent, upon the same principles and rules that have governed said board; but no patent shall be extended for a longer term than seven years." [Repealed July 8th, 1870.]

Act approved March 2d, 1861.

SEC. 12. This section provides that "all applications for the extension of patents shall be filed at least ninety days before the expiration thereof; and notice of the day set for the hearing of the case shall be published, as now required by law, for at least sixty days."

SEC. 16. *And be it further enacted*, That all patents hereafter granted shall remain in force for the term of seventeen years from the date of issue; and all extension of such patents is hereby prohibited. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 63. *And be it further enacted*, That where the patentee of any invention or discovery, the patent for which was granted prior to the second day of March, eighteen hundred and sixty-one, shall desire an extension of his patent beyond the original term of its limitation, he shall make application therefor, in writing, to the Commissioner, setting forth the reason why such extension should be granted; and he shall also furnish a written statement under oath of the ascertained value of the invention or discovery, and of his receipts and expenditures on account thereof, sufficiently in detail to exhibit a true and faithful account of the loss and profit in any manner accruing to him by reason of said invention or discovery. And said application shall be filed not more than six months nor less than ninety days before the expiration of the original term of the patent; and no extension shall be granted after the expiration of said original term. . . .

SEC. 64. *And be it further enacted*, That upon the receipt of such application, and the payment of the duty required by law, the Commissioner shall cause to be published in one newspaper in the city of Washington, and in such other papers published in the section of country most interested adversely to the extension of the patent as he may deem proper, for at least sixty days prior

to the day set for hearing the case, a notice of such application, and of the time and place when and where the same will be considered, that any person may appear and show cause why the extension should not be granted. . . .

SEC. 65. *And be it further enacted*, That on the publication of such notice, the Commissioner shall refer the case to the principal examiner having charge of the class of inventions to which it belongs, who shall make to said Commissioner a full report of the case, and particularly whether the invention or discovery was new and patentable when the original patent was granted. . . .

SEC. 66. *Be it further enacted*, That the Commissioner shall, at the time and place designated in the published notice, hear and decide upon the evidence produced both for and against the extension; and if it shall appear to his satisfaction that the patentee, without neglect or fault on his part, has failed to obtain from the use and sale of his invention or discovery a reasonable remuneration for the time, ingenuity, and expense bestowed upon it, and the introduction of it into use, and that it is just and proper, having due regard to the public interest, that the term of the patent should be extended, the said Commissioner shall make a certificate thereon, renewing and extending the said patent for the term of seven years from the expiration of the first term, which certificate shall be recorded in the Patent Office, and thereupon the said patent shall have the same effect in law as though it had been originally granted for twenty-one years. . . .

SEC. 67. *And be it further enacted*, That the benefit of the extension of a patent shall extend to the assignees and grantees of the right to use the thing patented to the extent of their interest therein.

SEC. 74. *And be it further enacted*, That patentees of designs issued prior to March second, eighteen hundred and sixty-one, shall be entitled to extension of their respective patents for the term of seven years, in the same manner and under the same restrictions as are provided for the extension of patents for inventions or discoveries issued prior to the second day of March, eighteen hundred and sixty-one. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4924. Where the patentee of any invention or discovery, the patent for which was granted prior to the second day of March, eighteen hundred and sixty-one, shall desire an extension of this patent beyond the original term of its limitation, he shall make application therefor, in writing, to the Commissioner of Patents,

setting forth the reasons why such extension should be granted; and he shall also furnish a written statement under oath of the ascertained value of the invention or discovery, and of his receipts and expenditures on account thereof, sufficiently in detail to exhibit a true and faithful account of the loss and profit in any manner accruing to him by reason of the invention or discovery. Such application shall be filed not more than six months nor less than ninety days before the expiration of the original term of the patent; and no extension shall be granted after the expiration of the original term.

SEC. 4928. The benefit of the extension of a patent shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their interest therein.

SEC. 4932. Patentees of designs issued prior to the second day of March, eighteen hundred and sixty-one, shall be entitled to extension of their respective patents for the term of seven years in the same manner and under the same restrictions as are provided for the extension of patents for inventions or discoveries issued prior to the second day of March, eighteen hundred and sixty-one.

#### CASES.

1. Congress has the power of extending letters-patent after they have once expired. *Evans v. Robinson*, 1 Car. L. R. 209.—DUVAL and HOUSTON, 1813.

2. "The grant of an exclusive privilege to an invention for a limited time" does not imply "a binding and irrevocable contract with the people that, after the expiration of the period, the invention shall become public property." *Evans v. Eaton*, 1 Peters' C. C. 322.—WASH. 1816.

3. If a patent were held to imply a contract between the Government and the people that the invention shall become public property at the expiration of the patent, yet Congress has power to pass laws violating contracts and to create a monopoly of the invention.—*Id.*

4. Congress passed an act extending Thomas Blanchard's patent "for the term of fourteen years from the *twelfth* day of *January*," 1837, for "a *machine* for turning and cutting irregular forms, a description of which is given in the schedule or specification annexed to letters-patent granted to the said Thomas Blanchard for the said invention of the *twelfth* day of *January*, in the year eighteen hundred and twenty." No letters-patent had been granted to Thomas Blanchard the *twelfth* day of *January*, 1820, but had been granted him on the twentieth day of *January*, the same year, wherein the invention

was entitled "An Engine for Turning or Cutting Irregular Forms," etc. The variation was held to be fatal. *Blanchard v. Sprague*, 3 Sumner, 279.—STORY, 1838.

5. Congress has power to give renewed patents retroactive effect. *Blanchard v. Sprague*, 2 Story, 164.—STORY, 1839.

6. An assignee or grantee under an original patent does not "acquire any right under the extended patent unless such right was expressly conveyed to him by the patentee." *Woodworth v. Sherman*, 3 Story, 171.—STORY, 1844.

7. The grant of the extension of a patent to an administrator is within the statute of 1836.—*Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

8. Where a certified copy of record shows the grant of an extension, it will be presumed that all the preliminary formalities for procuring the extension were complied with. *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

9. Extension of a patent in the name of the administrator is within the spirit and policy of the act of 1836.—*Id.*

10. Under the act of 1836 an administrator was competent to apply for and receive a patent. *Woodworth v. Sherman*, 3 Story, 171.—STORY, 1844.

11. An assignment of a patent by the inventor does not carry the extension thereof to an assignee under the original term. *Brooks et al. v. Bicknell et al.*, 4 McLean, 64.—MCLEAN, 1845.

12. By a clause in a mutual deed of assignment, it was agreed "that any improvement in either of the patents mutually assigned in the machinery, or any alteration or renewal of the same, shall accrue to the benefit of the respective parties in interest, and may be applied and used within their respective districts as therein designated." This was held to convey an interest in extensions. *Wilson v. Turner et al.*, Taney Dec. 278.—TANEY, 1845.

13. The act of July 4th, 1836, provides that the benefit of renewal shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein. "It means to provide that assignees and grantees shall share with the patentees the benefit of the renewal according to the interests which they had respectively acquired in the thing patented within particular districts of the country, or for their own individual use."—*Id.*

14. "Congress has not only secured to the inventor . . . absolute indefeasible interest in the property in the subject of the invention for the fourteen years, but has also agreed that upon

certain conditions occurring, to be shown before the expiration of this period, . . . this right of property in the invention shall be continued for the further term of seven years. Subject to this condition, the right of property in the second term is as perfect, to the extent of the interest, as the right of property in the first." *Wilson v. Rousseau et al.*, 4 Howard, 646.—SUP. CT. 1846.

15. The right to an extension is to be dealt with after the decease of the patentee, the same as an interest in the original patent, and passes, with other rights of property belonging to him, to the personal representatives as part of the effects of the estate.—*Ib.*

16. An administrator may properly apply for and receive an extension of the letters-patent of the deceased.—*Ib.*

17. A statute contained the following: "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein." Thereof the court said: "The clause in question, upon a true and reasonable interpretation, does not operate to vest the assignees and grantees named therein with any exclusive privileges whatever in the extended term." "This clause does not apply to those who have provided themselves with the patented article for use, or as a matter of trade after the original monopoly ceased, but to those who were in the use and enjoyment of the patented thing, under right originally purchased from the patentee."—*Ib.*

18. The decision of a Patent Office tribunal upon an application for an extension of a patent, under Section 18 of the act of 1836, is not conclusive upon the question of their jurisdiction to act in a different tribunal.—*Ib.*

19. A patent may be reissued during its extended term.—*Ib.*

20. Where a licensee's power gave him the right to make and use and vend one machine during an original term, it was held that he had the right to continue the use of the particular machine in existence at the time of the grant of an extended term. *Woodworth v. Curtis*, 2 Woodbury & Minott, 524.—WOODBURY, 1847.

21. In an act of Congress extending a patent it was provided "that all rights and privileges heretofore granted by said patentee to make, construct, or vend the said invention, and not forfeited by the purchasers or grantees, shall inure to and be enjoyed by such purchasers or grantees respectively as fully and upon the same conditions during the period hereby granted as for the term that did exist when such sale or grant was made."

The inventor had previously made an assignment "of all his right to the invention covered by the patent under the said patent and any other patent issued or to be issued for the same invention, with all the rights he might have enjoyed if the assignment had not been made."

It was held that the assignee took the extended term, and that Congress had the constitutional right to extend a grant of patent for the benefit of an assignee. *Blanchard's Gunstock Turning Factory v. Warner*, 1 Blatch. 258.—NELSON, 1848.

22. A declaration averred "that before the expiration of the term for which the original patent was granted, to wit, October 4th, 1843, it was in due form of law extended for the term of seven years from and after October 19th, 1843;" being demurred to, it was held sufficient in form. *Phelps v. Comstock*, 4 McLean, 353.—MCLEAN, 1848.

23. Where an assignment extended "to the full end of the term or terms for which the letters-patent are or may be granted for said improvements as fully and entirely as the same would have been enjoyed by me had this assignment not been made," it was held to carry the extended term.—*Ib.*

24. An assignment conveyed "all the right, title, and interest which said heirs had in said invention and improvement, as secured to them by said letters-patent for the whole of the United States, with certain exceptions, and for the use and behoof of their legal representatives for which letters-patent are or may be granted for said improvement as fully and entirely as the same would have been held and enjoyed by said heirs had that assignment and sale not been made." The court held "that this was intended to transfer the right under a renewal of the patent." *Case v. Redfield et al.*, 4 McLean, 526.—HUNTINGTON, 1849.

25. Where, during a certain term of a patent, machines were constructed and used under a right acquired from the patentee, and were in use at the expiration of that term, the possessor had a right to continue their use during an extension of the patent granted under the general statute. *Woodworth et al. v. Cook*, 2 Blatch. 151.—NELSON, 1850.

26. A conveyance under a patent carried the right "during the said extension," etc., and vested the grantee "with an exclusive right to construct and use the six machines during the terms aforesaid." The conveyance concluded as follows: "It is understood that the said Cooke has all the rights I have in the county of Washington, under said patent, to use six machines

and no more." The patent was afterward extended by special act of Congress. It was held that the grantee took no rights under said extended term. *Gibson v. Cooke*, 2 Blatch. 144.—NELSON, 1850.

27. Even though a conveyance under a certain term of the patent might be such as to be intended to convey an interest in another and extended term of the same patent, yet if that extension is afterward granted and duly assigned to a purchaser without notice, the latter will take a good title.—*Ib.*

28. It is within the constitutional power of Congress to specially extend a single patent. *Bloomer v. Stolley*, 5 McLean, 158.—MCLEAN, 1850.

29. "A retrospective law is not necessarily unconstitutional. No state can impair the obligations of a contract; but the inhibition does not apply to the general Government."

Therefore a licensee under a patent does not necessarily remain a licensee under an extended term created by specific act of Congress.—*Ib.*

30. After the Woodworth planer patent had been once extended under the statute, it was subsequently extended by act of Congress. A licensee under the statutory extension claimed that his license had force under the Congressional extension. The court held otherwise. *Gibson v. Gifford*, 1 Blatch. 529.—NELSON, 1850.

31. "The reason for conferring extensions generally by the officers of the Government who are authorized to do it is to reward the party, in some degree, for his skill and genius when he has not, to appearances, been already rewarded." *Colt v. Massachusetts Arms Co.*, 1 Fish. P. C. 108.—WOODBURY, 1851.

32. By act of Congress of May 27th, 1848, the powers of extension theretofore vested in a board composed of the Secretary of State, Commissioner of Patents, and the Solicitor of the Treasury, were given to the Commissioner of Patents. It was held that proceedings begun before the passage of the act properly proceeded without interruption before the Commissioner after the passage of the act. *Colt v. Young et al.*, 2 Blatch. 471.—NELSON, 1852.

33. The act of the Commissioner of Patents in granting an extension is conclusive as to the proceedings except perhaps in case of fraud.—*Ib.*

34. Where a patent has been extended under a special act of Congress, and a question arises with reference thereto, in determining this question there must be taken into consideration not only the special act, but also the general laws of Congress in relation to patents and the special acts which have from time to time been passed

in favor of the particular patentee. *Bloomer v. McQueenan et al.*, 14 Howard, 539.—SUP. CT. 1852.

35. Rights to make and vend a patented machine acquired under an original term expire with the original term; he who buys outright such a patent during the original term may use it during the extended term.—*Ib.*

36. "A special act of Congress in favor of a patentee, extending the time beyond that originally limited, must be considered as ingrafted on the general law." He who purchases for use a patented machine during an original term of the patent has a right to use it during an extended term acquired through a special act of Congress.—*Ib.*

37. "Congress undoubtedly has power to promote the progress of science and the useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

"But it does not follow that Congress may, from time to time, as often as it thinks proper, authorize an inventor to recall rights which he had granted to others, or reinvest in him rights of property which he had before conveyed for a valuable and fair consideration."—*Ib.*

38. The term "renewal" may be properly applied to an extension. *Pitts et al. v. Hall*, 3 Blatch. 201.—HALL, 1854.

39. A patentee sold one of his patented machines during the original term of his patent. It was held that he could not stop the use of that machine during the extended term. *Blanchard v. Whitney*, 3 Blatch. 307.—NELSON, 1855.

40. "As respects the rights of a patentee as against those using the patented article, there is a manifest distinction between a case where the title to a machine is derived from a person who has purchased simply a right or license to manufacture it under the patent, and a case where the purchase of the article is made directly from the patentee. In one case, the patentee has parted only with his interest in the term of the patent, which is limited; in the other, he has sold the machine itself, with all the rights appertaining to his title as vendor, and, of course, without any necessary limitation of its use or enjoyment."—*Ib.*

41. The right to a future extension is a proper subject of a contract of sale. *Clum v. Brewer et al.*, 2 Curtis' C. C. 506.—CURTIS, 1855.

42. "A sale of an invention before letters-patent are obtained does not necessarily carry with it the exclusive right to an extended term."—*Ib.*

43. "Under the provision of Section 18 of

the act of July 4th, 1836," "the right to use the thing patented was continued to the assignees and grantees of such right for the original term, without regard to the question whether the patent was for a process or a machine, or to the question whether the particular machine was or was not in existence at the time the original term expired." *Day v. Union India Rubber Co.*, 3 Blatch. 488.—HALL, 1856.

44. "Congress, in renewing patents, has been quite careful to protect the rights and interest of assignees and grantees of the right to use the thing patented which existed independently of the ownership of the machines patented, as to protect the rights and interests of those who merely owned such machines, and had no right to use the thing patented other than that impliedly granted by the sale of such patented machines."—*Ib.*

45. The word "renewed" may be construed to mean "extended." *Day et al. v. Cary et al.*, 1 Fish. P. C. 424.—INGERSOLL, 1859.

46. The word "renewed" may properly be taken to denote an extended term of a patent. *Goodyear et al. v. Cary et al.*, 4 Blatch. 271.—INGERSOLL, 1859.

47. A party who purchases a patented machine and uses it during the original term may continue to use the machine during the extended term. *Chaffee v. Boston Belting Co.*, 22 Howard, 217.—SUP. CT. 1859.

48. "Patentees acquire the exclusive right to make and use and vend to others to be used, their patented inventions for the period of time specified in the patent, but when they have made and vended to others to be used one or more of the things patented, to that extent they have parted with their exclusive right. They are entitled to but one royalty for a patented machine, and, consequently, when a patentee has himself constructed the machine and sold it, or authorized another to construct and sell it, or to construct and use and operate it, and the consideration has been paid to him for the right, he has then, to that extent, parted with his monopoly and ceased to have any interest whatever in the machine so sold or so authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns." *Bloomer v. Millinger*, 1 Wall. 340.—SUP. CT. 1863.

49. In a suit for an infringement of an extend-

ed patent, the defence cannot be made that the extension was procured by fraud. The decision of the Commissioner is to be regarded as final in collateral proceedings. *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Clifford, 351.—CLIFFORD, 1864.

50. "Where the imputation of fraud arises in a proceeding between the Government and the patentee, and a third person whose rights of property were directly involved in the question of extension, proof of fraud in obtaining the extension is sufficient to defeat the patent; but the proof, to avail the party making the imputation, must be clear and satisfactory."—*Ib.*

51. A party held a license upon royalty under an original patent which by its language comprehended the extended term. The patent being extended the licensee contended he had the right to use the patent without compensation after the expiration of the original term. The court held the license in force during the extended term and held defendant to pay the royalty. *Union M'fg Co. v. Lounsbury*, 42 Barbour, 125.—CLERKE, 1864.

52. A patent owner A, made to the defendant B, a grant of a territorial right, conveying the right "to the utmost and fullest extent as to duration, manner of enjoyment, or otherwise, howsoever that he is or may be entitled to under said letters-patent." This was held to carry an equitable right under the extended term of the patent. *Chase et al. v. Walker et al.*, 3 Fish. P. C. 120.—CADWALADER, 1866.

53. Extension adds to the presumption of the validity of a patent. *Swift et al. v. Whisen et al.*, 3 Fish. P. C. 343.—LEAVITT, 1867.

54. The doctrine established in the different cases decided by the courts under Section 18 of the act of July 4th, 1836, "is that an assignee of a patent, holding, at the expiration of the first term, a right during that term to make and use the thing patented, may, during the time of its subsequent extension, continue to use it and even repair it for use, but that he cannot make it for use or for any other purpose." *Wood v. Michigan Southern & Northern Indiana R. R. Co.*, 2 Bissell, 62.—MCDONALD, 1868.

55. An assignment under the original term of a patent was: "For and during the term for which said letters-patent are or may be granted." This was held not to convey to the assignee a right under the extended term.—*Ib.*

56. A license granted the right "for and during the term for which said letters-patent are or may be granted." This was held not to give a right under the extended term of the patent.

*Hodge et al. v. Hudson River R. R. Co.*, 6 Blatch. 85.—BLATCHFORD, 1868.

57. The meaning of Section 18 of the act of July 4th, 1836, is that he who lawfully uses a patented machine during the original term of the patent has the right to continue the use of that specific machine until it is worn out, under the extension of the patent.—*Ib.*

58. It is a "settled presumption of law, in respect to every license under a patent, that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted looking for a further interest, and . . . that, unless there be such a stipulation showing that the parties contemplated an extension, the instrument and each and all of its provisions will be construed as relating to the then existing term only." *Hodge et al. v. Hudson River R. R. Co.*, 6 Blatch. 165.—BLATCHFORD, 1868.

59. The patentee who sells his patent, which is then reissued, may have the original extended in place of the reissue. *Potter et al. v. Braunsdorf et al.*, 7 Blatch. 97.—BLATCHFORD, 1869.

60. The Commissioner's decision upon an extension "must be held conclusive until the patent is impeached in a proceeding had directly for that purpose according to the rules which define the remedy, as shown by the precedents and authorities upon the subject." *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

61. An original patent was reissued. The patentee did not have any interest in the reissue. The original patent was extended to the patentee and the extension held proper. *Crompton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.

62. In extending a patent that has been reissued the notice need not state specially a reissue.—*Ib.*

63. Fraud in the obtaining of an extension cannot be inquired into in an action for infringement.—*Ib.*

64. "The extension of the patent by the Commissioner must be treated as a judicial act, not to be impeached except in some direct proceeding duly instituted for that purpose." *Am. Wood-Paper Co. v. Glens Falls Paper Co.*, 8 Blatch. 513.—WOODRUFF, 1870.

65. A suit for infringement being based upon an extended patent, defendant contended that the extension was procured by fraud, because the parties had agreed to a postponement of the hearing, and, before the day thus agreed upon had arrived, the Commissioner heard the case *ex parte* and granted the extension. The court held otherwise.—*Ib.*

66. Congress has the power, after a patent has expired, to provide for its extension. *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

67. "A special act of Congress providing for an extension, is to be considered as engrafted on the general law pertaining to extensions."—*Ib.*

68. "The action of the Commissioner in granting an extension is conclusive evidence of all the facts he is required to find."—*Ib.*

69. Where a person purchases a machine under the original term of a patent, and therefore has a right to use it during the extended term, he may, during the extended term, replace old parts which become worn out with new parts. *Farrington et al. v. Water Commissioners of Detroit*, 4 Fish. P. C. 216.—LONGYEAR, 1870.

70. In an action for infringement of an extended patent, the validity of the extension cannot be inquired into. *Whitney v. Mowry*, 4 Fish. P. C. 207.—SWAYNE, 1870.

71. A grant under the original term of certain letters-patent had an *habendum* clause as follows: "The same to be held and enjoyed by the said Taylor, for the use and behoof of him and his legal representatives, to the full extent of the term for which the said letters-patent are or may be granted." This was held not to include the extended term. *Jenkins v. Nicolson Pavement Co.*, 1 Abb. U. S. 567.—SAWYER, 1870.

72. "It is quite clear that an assignment of an interest in an invention, and letters-patent therefor, before the expiration of the original term, carries with it no interest in a subsequently extended term, unless it contains a specific provision to that effect."—*Ib.*

73. In computing the ninety days' notice upon application for extension of a patent, the day on which the application is filed is to be counted. *Johnson v. McCullough et al.*, 4 Fish. P. C. 170.—GILES, 1870.

74. A deed from one Howe recited that he had obtained two patents, and then proceeded: "I have assigned, sold, and set over, and do hereby assign, sell, and set over, all the right, title, and interest which I have *in said invention*, as secured to me by said letters-patent, *and also all right, title, and interest* which may be secured to me for all alterations and improvements on the same *from time to time*, for, to, and in the following States—viz., etc.; . . . the same to be held and enjoyed by the said I. R. Trimble for his own use and behoof, and for the use and behoof of his legal representatives to the full end of the term for which said letters-patent are *or may be granted*, as fully and entirely as the same would have been held and enjoyed by me had



this assignment and sale not have been made." It was held that under this assignment Trimble took title under the extended term. *Railroad Co. v. Trimble*, 10 Wall. 367.—SUP. CT. 1870.

75. The expiration of an English patent for the same invention forms no objection to an extension of the home patent. *Tilghman v. Mitchell*, 9 Blatch. 18.—BLATCHFORD, 1871.

76. By the act of July 4th, 1836, the chief clerk of the Patent Office was made acting Commissioner in the necessary absence of his chief. By act approved July 23d, 1868, this duty of acting Commissioner was devolved upon the oldest examiner. July 24th, 1868, the chief clerk acting as Commissioner indorsed a patent as extended. The extension was held invalid. *American Wood-Paper Co. v. Glens Falls Paper Co.*, 8 Blatch. 513.—WOODRUFF, 1871.

77. "Where a machine is the subject of letters-patent, and is in lawful use by any party at the expiration of the original term of the patent, such a party may continue to use the identical machine as long as it shall last, notwithstanding the extension of such letters-patent beyond the original term." *Hawley v. Mitchell et al.*, 1 Holmes, 42.—SHEPLEY, 1871.

78. "No words of limitation, however clearly expressed, confining an assignee's right to the original term, will have any effect to deprive the assignee or his assigns of the right to use during the extended term of the patent, machines lawfully constructed and used by them during the original term."—*Ib.*

79. A licensee's right under the original term of a patent was specifically limited to the original term. He sold machines and the buyers attempted to use them in the extended term. The buyers were held to be infringers.—*Ib.*

80. A conveyance under a patent recited the invention and agreement of the grantee to purchase the right to use it in the city of San Francisco, and then conveyed to the grantee all the title and interest which the grantor had in the invention and letters-patent for and in the said city, to be enjoyed by the grantee and his legal representatives to the full end of the term, "for which the said letters are or may be granted." Held to include the extended term.—*Ib.*

81. "A transfer of an interest in a subsisting patent will not extend beyond the term of the patent, unless there are words that indicate an intention to convey more than a present interest." *Wetherill et al. v. Passaic Zinc Co. et al.*, 9 Phil. 385.—MCKENNAN, 1872.

82. The words of a license were, in part, "with rights to use all his patents and processes for the manufacture of zinc oxide, metallic zinc,

retorts, etc., which said Wetherill now has or has in contemplation to obtain." Thereof the court said: "The significance of the words 'now has or has in contemplation to obtain,' is merely to individuate the patents which the contract was intended to embrace, and has no reference to the renewal or extension of such patents."—*Ib.*

83. Where a licensee's right expires with the original term of a patent, the right to the use of any machines derived from him ceases then.—*Ib.*

84. As to machines made under an assignment or grant under an original patent "while the right to the use of the invention expires with the end of the term of the original patent, the right to the continued use of the machine which embodies it is protected. The law did not intend to revive an assignment or grant which expired with the term of the original patent, but to protect a species of tangible property sold by the patentee, the value of which depended chiefly upon the owner's right to use it, and which, without some saving provision, would fall within the grasp of the exclusive right vested in the patentee by the extension."—*Ib.*

85. As to Section 18 of the act of 1836, "this saving clause is applicable only to inventions which are susceptible of embodiment in a substantial and tangible form, and not to those which consist in a formula for producing prescribed results, and when those results are obtained there is an end of the thing patented, and which, as often as it is employed in practice, involves the renewed use or reproduction of the entire invention."—*Ib.*

86. As regards the principle last stated, it is not changed by the fact that the process requires the use of a peculiar machine or apparatus for its practice.—*Ib.*

87. Where a suit is brought upon a patent which, pending the suit is extended, an injunction cannot be awarded. *Renwick et al. v. Pond*, 10 Blatch. 39.—BLATCHFORD, 1872.

88. An assignment conveyed "all the right, title, and interest which I (the patentee) have in the said inventions, or either of them, as secured to me by said letters-patent, . . . to the full end of the term for which said letters-patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not have been made." The court held that: "The words 'to the full end of the term for which the said letters-patent are or may be granted,' necessarily import an intention to convey both a present and a future interest." *Ruggles v. Eddy et al.*, 10 Blatch. 52.—WOODRUFF, 1872.

89. If there is any fraud in the procurement of an extension, it does not lie with the patentee or his assigns to take advantage of that fraud.—*Ib.*

90. A written conveyance set out that the inventors : "Have applied or intend to apply, for letters-patent," and it conveyed "all the right, title, and interest whatsoever, which we now have, or, by letters-patent, would be entitled to have and possess, in the aforesaid invention, the said invention being described in the specification as prepared and executed by us, for the obtaining of said letters-patent, the whole to be held and enjoyed by the said Henry Tanner and his legal representatives, to the full extent and manner would have been, or could be held and enjoyed by us, had this assignment not been made ; and we do, by these presents, authorize the Commissioner of Patents to issue the said letters-patent to the said Henry Tanner and his legal representatives, as the assignee of our whole right and title to the same, and to the new invention aforesaid." This was held not to apply to the extended term. *Mowry et al. v. Grand Street & Newtown Railroad Co.*, 10 Blatch. 89.—BENEDICT, 1872.

91. "An assignment of the invention, without words importing an intention to convey both a present and a future interest, will not pass the right to an extension."—*Ib.*

92. An assignment under a patent conveyed the right "to the full end of the term for which said letters-patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made." This was held to apply to an extended term. *Thayer et al. v. Wales et al.*, 5 Fish. P. C. 448.—BENEDICT, 1872.

93. "Purchasers of the exclusive privilege of making or vending the patented machine hold the whole or a portion of the franchise which the patent secures, depending upon the nature of the conveyance, and of course the interest which the purchaser acquires terminates at the time limited for its continuance by the law which created the franchise, unless it is expressly stipulated to the contrary. But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different grounds, as he does not acquire any right to construct another machine either for his own use or to be vended to another for any purpose. Complete title to the implement or machine purchased becomes vested in the vendee by the sale and purchase, but he acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser, ceases

to be within the limits of the monopoly." *Mitchell v. Hawley*, 16 Wall. 544.—SUP. CT. 1873.

94. A "conveyance of license, subject to certain restrictions and limitations, was made by the patentee, of the exclusive right to make and use 'and license to others the right to use the said machines' in the States of Massachusetts and New Hampshire, during the remainder of the original term of said letters-patent, it being expressly stipulated in the instrument of conveyance that the licensee 'shall not, in any way or form, dispose of, sell, or grant, any license to use the said machines beyond the expiration' of the original term." This was held to carry the right to the extended term.—*Ib.*

95. Where a patent had been reissued in divisions, and only one division extended, it was held that "nothing fell into the public domain on the expiration of that patent except the special device claimed in it, and that the patent did not include the devices embraced in the other reissues upon which this suit was brought." *Wheeler v. McCormick*, 11 Blatch. 334.—WOODRUFF, 1873.

96. Although a bill of complaint may allege that a patent was extended by the Commissioner, an extension by an acting Commissioner fulfils the averment. *Dorsey Harvester Revolving-Rake Co. v. Marsh et al.*, 6 Fish. P. C. 387.—MCKENNAN, 1873.

97. "The granting of an extended patent is a judicial act."—*Ib.*

98. "The extension must be granted before the term of the original patent expires, but when it is granted, in apparent conformity to the act of Congress, the decision of the officer has the attributes of a final judgment. It is not subject to repeal or revision."—*Ib.*

99. As to "a patentee, when he has himself constructed a machine, and sold it without any conditions, or authorized another to construct, sell, and deliver it, or to construct, and use, and operate it, without any conditions, and the consideration has been paid to him for the thing patented, the rule is well established that the patentee must be understood to have parted to that extent with all his exclusive right, and that he ceases to have any interest whatever in the patented machine so sold and delivered, or authorized to be constructed and operated." *Mitchell et al. v. Hawley*, 16 Wall. 544.—CLIFFORD, 1873.

100. "The owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every exten-

sion subsequently obtained by the patentee or his assigns."—*Ib.*

101. "Purchasers of the exclusive privilege of making or vending the patented machine, hold the whole or a portion of the franchise which the patent secures, depending upon the nature of the conveyance, and of course the interest, which the purchaser acquires terminates at the time limited for its continuance by the law which created the franchise, unless it is expressly stipulated to the contrary."—*Ib.*

102. "Where the sale is absolute, and without any conditions, the rule is well settled that the purchaser may continue to use the implement or machine purchased until it is worn out, or he may repair it or improve upon it as he pleases, in the same manner as if dealing with property of any other kind."—*Ib.*

103. A conveyance under a patent stipulated that the licensee "'shall not, in any way or form, dispose of, sell, or grant and license to use the said machines beyond the expiration' of the original term. The licensee sold machines and authorized the purchasers 'to run and use two sets (four machines) for felting hats, in said town of Haverhill, under Taylor's patent, bearing date as specified in the original letters-patent.'" As to these machines the court held that they were not authorized to be used under the extended term of the patent.—*Ib.*

104. "It is well settled that a patent from the Government cannot, in a collateral proceeding, be impeached for fraud in procuring its issue; this can only be done in a direct proceeding to set it aside." (Said of an extended patent.) *Gear et al. v. Grosvenor et al.*, 1 Holmes, 215.—SHEPLEY, 1873.

105. In an action for infringement of a patent, the defence cannot be made that the notice required by law to be published, as to the hearing before the Commissioner of Patents, was fraudulently suppressed, and never published in the manner required by law.—*Ib.*

106. An inventor made an assignment of an extended term of his patent before the same was granted. It was held to become operative upon the grant of the extension. In this case the patentee was interested to the extent of one half of the proceeds from sales or use of the patented invention.—*Ib.*

107. "The act of Congress authorizing extensions of patents, undoubtedly contemplated a benefit to the patentee, not yet sufficiently rewarded by the receipts from his patent. The policy of the law would seem to require that the patentee applying for the extension should himself have an interest. An equitable interest is

sufficient for this purpose, the court having decided that he may convey the legal interest."—*Ib.*

108. An assignment of a patent carried the right "to the full end of the term for which said letters-patent are or may be granted." This was held not to apply to the extended term.—*Ib.*

109. "An assignment of an interest in an invention, and letters-patent therefor, before the expiration of the original term, does not carry with it any interest in a subsequently extended term, unless the assignment contains a specific provision to that effect."—*Ib.*

110. After the original term of a patent has expired, injunction cannot be granted in a suit based thereon, although the patent has since been extended. *McComb v. Beard*, 10 Blatch. 350.—BLATCHFORD, 1873.

111. A party ignorantly bought and used an infringing machine. Subsequently the same party bought a grant under the patent. It was held that the machine might be freely used during the extended term of the patent. *Eunson et al. v. Dodge*, 18 Wall. 414.—SUP. CT. 1873.

112. "The patent act of 1836 gives to the assignee of the patent, during the original term, the right to continue during the extended term the use of the machine used by him during the original term."—*Ib.*

113. Where a patent has been extended pending a suit on the original patent a supplemental bill needs to be filed in order to warrant injunction. *Booth v. Parks*, 1 Flippin, 381.—WELKER, 1874.

114. "Neither reissued nor extended patents can be abrogated by an infringer in a suit against him to recover damages for unlawfully making, using, or selling a patented invention, upon the ground that the letters-patent were procured by fraud in prosecuting the application for the same before the Commissioner." *Milligan & Higgins Glue Co. v. Upton*, 4 Cliff. 237.—CLIFFORD, 1874.

115. The operative words in an assignment were: "I have assigned, sold, and set over, in trust, and do hereby sell and set over, in trust, all my right, title, and interest of, in, and to the aforesaid reissued letters-patent, and the invention thereby secured." The assignee gave a license "to be exercised during the unexpired terms for which the said patents are granted and may be hereafter extended, on the terms and conditions hereinafter specified." These were held not to have any effect under the extended term of the patent. *Waterman v. Wallace & Sons et al.*, 13 Blatch. 128.—SHIPMAN, 1875.

116. "A sale of 'the invention' does not necessarily carry with it the exclusive right to

the extended term, but 'where an inventor has, in terms, sold to another person a part of his invention, he has done that which is quite consistent with an intent to have that other person participate in all the rights which he, as inventor, can acquire by law.'—*Ib.*

117. "An assignment of the invention, after a patent has been issued, without any other language to indicate the intention of the parties, does not import a conveyance of the right to an extended term."—*Ib.*

118. During the original term of a patent for a binding attachment for sewing-machines, the owner authorized all who should own a certain sewing-machine to use such binder upon it. During the extended term another party, owner of the extended term, sought to prevent the further use of such binders. The court held that such use could not be prevented. *Wooster v. Seidenberg et al.*, 13 Blatch. 88.—SHIPMAN, 1875.

119. A, the assignee of a patent, sold to B the exclusive right to the use of the patented machines in the State of Ohio. B sold the same right to C. B then assumed to buy the patented machines of A for use during the extended term. A subsequently held the extended term for a short time. B, being sued for infringement during the extended term, contended that the complainants who claimed through A were estopped from proceeding against B. It was held that B's purchase from A was in fraud of complainants' rights, and that B could not use the machines during the extended term. *Union Paper-Bag Machine Co. et al. v. Nixon et al.*, 1 Flippin, 491.—EMMONS and SWING, 1876.

120. "It is not a fair construction of the assignment of a patent that the assignee shall first assign the entire right for a particular territory, and get its whole value from his vendee, and after having received thus all the benefit he was entitled to under the transfer, sell single machines to be used in the same territory during the extended term. He will in this mode obtain the value of a right never conveyed to him."—*Ib.*

121. The right to use a patented machine after the expiration of the original term is an incident to the primal right to use it during the original term, and if that fails on account of fraud the incident fails with it.—*Ib.*

122. A license which is to remain in force "until the full expiration of the contract for which said letters-patent have been granted, and during such period as the same may be hereafter renewed or extended," has life and force under an extended term of the patent. *Hammond et*

*al. v. Mason & Hamlin Organ Co.*, 92 U. S. 724.—SUP. CT. 1876.

123. During the original term of a patent for a furnace, such a furnace was constructed under a license. It was held that the defendants' use might be continued during the extended term of the patent. *Black et al. v. Hubbard et al.*, 3 Banning & Arden, 39.—WHEELER, 1877.

124. The legal title to an extension of a patent was in one party. The invention was joint. The administrator of one of the inventors, and the other inventor in person, petitioned for the extension; the grant of the extension inured to their benefit and was held proper. *Sayles v. Dubuque & Sioux City R. R. Co.*, 5 Dillon, 561.—DILLON and LOVE, 1878.

125. In counting the ninety days prior to expiration of patent required in an application for extension, the day of filing the application is to be counted. *Johnson v. Onion et al.*, 3 Hughes, 290.—GILES, 1878.

126. An assignment of an "invention" before patent issues, carries with it the right to the extended term. *Hendrie v. Sayles*, 98 U. S. 546.—CLIFFORD, 1878.

127. "Extensions, when they were authorized here, were inchoate rights under the law, and were so far property that such a right could be sold and conveyed by an instrument of sufficient scope to show clearly that the grantor intended to convey the estate absolutely or upon condition." *Henry v. Providence Tool Co.*, 3 Banning & Arden, 501.—CLIFFORD, 1878.

128. "There is a wide difference between the legal discretion which the Commissioner of Patents exercised under the act of Congress granting extensions, and the prerogative power exercised by the Crown in granting what is called prolongations of original patents."—*Ib.*

129. "Although the statutes . . . seemed to contemplate that extensions should be granted only to inventors, for their own benefit, or to their personal representatives, there is no doubt under the construction which has been given to them, but that, by appropriate instruments and words of conveyance, they could be conveyed wholly in advance. . . . Nor but that an agreement for their conveyance made beforehand would be binding in equity." *Prime et al. v. Brandon Mfg Co.*, 16 Blatch. 453.—WHEELER, 1879.

130. "The legal title to a patent may be in one person, and the equitable right to it in another; and this applies to extensions as well as to original patents."—*Ib.*

131. A patent for the invention in question was granted in France, August 31st, 1854; in

Great Britain, March 27th, 1855; and in the United States, July 24th, 1860; this latter patent was not limited in terms (as it should have been under the act of 1839) to fourteen years from the date of the French patent. In July, 1862, Congress validated the United States patent for fourteen years from its date, and at the expiration of said fourteen years the Commissioner extended it for seven years. It was contended that under the act of 1870 the Commissioner had no power to so extend. *Held*, that the Commissioner had such power. *New Am. File Co. v. Nicholson File Co.*, 8 Fed. Rep. 816.—LOWELL, 1881.

132. "The right of an owner of a patented machine, without any conditions attached to his ownership, to continue the use of his machine during an extended term of the patent, is well settled." . . . "Power to sell the machine and transfer the accompanying right of use, is an incident of unrestricted ownership." *Union Paper-Bag Machine Co. et al. v. Nixon et al.*, 105 U. S. 766.—SUP. CT. 1882.

133. "After an extension has been obtained on the condition precedent of making . . . disclaimer, the disclaimer cannot be held inoperative as respects the extended term." *Union Metallic Cartridge Co. v. U. S. Cartridge Co.*, 112 U. S. 624.—SUP. CT. 1884.

134. "The assignment of an extension before the same is granted vests the extension in the assignee." *Adams et al. v. Bridgewater Iron Co. et al.*, 34 O. G. 1045.—COLT, 1886.

135. The assignment by an inventor of his "right, title, and interest in said improvement," without more, does not carry to the assignee a title to an extension of the original patent. *Johnson v. Wilcox & Gibbs Sewing-Machine Co.*, 23 Blatch. 531.—WALLACE, 1886.

## FEES—GOVERNMENT.

[See "Government Fees."]

## FOREIGN PATENT.

### "FOREIGN PATENT" IN THE PATENT ACTS.

Act approved July 4th, 1836.

SECTION 8 Provides That "nothing in this act contained shall be construed to deprive an original and true inventor of the right to a patent for his invention, by reason of his having previously taken out letters-patent therefor in a foreign country, and the same having been published at any time within six months next pre-

ceding the filing of his specification and drawings." [Repealed July 8th, 1870.]

Act approved March 3d, 1839.

SEC. 6. *And be it further enacted*, That no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act approved on the fourth day of July, one thousand eight hundred and thirty-six, to which this is additional, by reason of the same having been patented in a foreign country more than six months prior to his application: *Provided*, That the same shall not have been introduced into public and common use in the United States prior to the application for such patent: *And provided also*, That in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters-patent. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 25. *And be it further enacted*, That no person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented in a foreign country: *Provided*, The same shall not have been introduced into public use in the United States for more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, but in no case shall it be in force more than seventeen years. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years.

## CASES.

1. By the act of 1839 a home patent was to be limited to the term of fourteen years from the date or publication of a prior foreign patent to the same person for the same thing. It was held that a home patent not thus limited was "not only without the authority of the law, but

in violation of it." It was, however, held that the error might be corrected by the Patent Office. *Smith v. Ely et al.*, 5 McLean, 76.—McLEAN, 1849.

2. The proviso in Section 6 of the act of 1839, and the proviso in Section 8 of the act of 1836, have reference to home patents applied for after the issue of the foreign patent. *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—KANE, 1851.

3. Where the act of July 4th, 1836, mentions a patent for an invention previously "patented" abroad, the "word 'patented,' as here used, must, of course, mean covered and made known to the world by a public patent, so as to bring home to the public, generally and probably, a knowledge of its existence, and deprive any one of the credit and protection of being original if he afterward construct a like machine." And where the foreign country issues both secret and public patents, defendants must show the foreign patent to have been a public one. And where the foreign patent law required a certain kind of publication to make the patent valid, defendants must show that fact. *Brooks et al. v. Norcross et al.*, 2 Fish. P. C. 661.—WOODBURY, 1851.

4. Under the act of March 3d, 1839, previous patenting abroad does not bar a patent here, unless the invention was introduced into public and common use in the United States prior to the application here.—*Id.*

5. Morse's home patent was applied for before, but issued after his French patent for the same invention; the home patent was limited on its face and expired with the said French patent. The home patent was nevertheless sustained. *O'Reilly et al. v. Morse et al.*, 15 Howard, 62.—SUP. CT. 1853.

6. Where the statute refers to the date of a foreign patent it refers to the date of making the same public to the world. In the case of a British patent it means the date of the enrolment of the complete specification. *Howe v. Morton et al.*, 13 M. L. R. 70.—SPRAGUE, 1860.

7. Having reference to Section 6 of the act of March 3d, 1839, "this 'public and common use,' prior to the application in this country, in the case of a foreign patent procured by the inventor more than six months before his application here, must be something more than the mere use of one machine or more by the inventor himself, in public, or by other persons, with his consent and allowance. The invention must have passed into general use in the community. To invalidate a patent upon the ground of a prior English patent, the use of the thing patented must not only be public within the United States,

but must be a common and general use by the community. There is an obvious reason . . . for this distinction, which existed in the statute in force up to the act of July 8th, 1870, but which does not now exist, because the time has been extended to two years, and the word 'common' has been stricken out." "In order now to void a patent upon the ground of a prior patent in England, the invention must have been in public use two years prior to the application here, although it is not required to be in common use; but this law was not in force before the act of July 8th, 1870." *Am. H. & L. S. & D. M. Co. v. Am. T. & M. Co. et al.*, 1 Holmes, 503.—SHEPLEY, 1870.

8. Having reference to Section 6 of the act of March 3d, 1839, "What would be a common use . . . must be considered with reference to the device invented or the thing patented. What would be a passing into common use of one invention might be a very different thing from what would be a passing into common use with regard to another invention. For instance, an hotel annunciator might be an invention applicable to hotels alone and useless for any other purpose. Such an invention could never come into common use in the community in the sense in which a friction match or a paper collar would, or any other device or invention which was intended to be used by the community."—*Id.*

9. Having reference to Section 6 of the act of March 3d, 1839, "There might be an invention applicable to only one species of manufacture, and if there were only three manufacturers of that particular article in the United States, and each one of those three publicly used the invention, and if they were the only persons who would be likely to use, or whose business would require them to use such an invention, you might be justified in finding that the invention had passed into public and common use when it became universal with all the persons, or in all the manufactories for whose use the invention was designed."—*Id.*

10. Referring to Section 6 of the act of March 3d, 1839, "If an inventor obtained an English patent more than six months before he made his application in the United States for a patent for the same invention, and after it had been patented abroad, and prior to the application here, that invention passed into public and common use in this community so as to become a part of the manufactures of this country, then whether the persons through whom it had been introduced here had derived their information of it from the English patent, or had invented it

themselves, or had derived it from the first inventor himself, the patent would be void."—*Ib.*

11. "The statute was intended to require the patentee to use reasonable diligence, and to fix a proper time within which he must make his application, in justice to the public; so that an invention which has been patented abroad and has become a matter of public notoriety, and of common knowledge among persons engaged in that art or manufacture, shall not pass into the commerce of the country, and into common and daily and public use by the community, and then, after the lapse of any length of time, the party go on and obtain a patent and prosecute the whole community as infringers."—*Ib.*

12. Referring to Section 6 of the act of March 3d, 1839, "In determining what is common and general use . . . take into consideration the nature of the machine, the effects which it is designated to produce, and the number of persons or of manufactories likely to use it, so as to determine whether, in view of all the devices which constitute the characteristics of the invention, and the uses to which it can be, and is designed to be applied, the use is a general, and common, and public use, or a private, special use under a particular grant or license."—*Ib.*

13. In considering the effect of a prior foreign patent upon a later home patent, the question is whether the foreign patent "does or does not embody what is in the American patent, striking out of consideration those claims in the respective patents which are not in issue, . . . and whether, so far as relates to that invention which is in issue, . . . they are or are not identical."—*Ib.*

14. If the machine of the foreign patent requires "further invention to make it a practical and operative machine, and to embody the same invention which is described in the American patent, it would not work a forfeiture of the American patent."—*Ib.*

15. The term of a home patent is not limited by that of a foreign patent granted surreptitiously to a party other than the original inventor. *Kendrick v. Emmons*, 2 Bann. & Ard. 208.—SHEPLEY, 1875.

16. "The act of 1839 was not intended to limit the inventor's rights under the act of 1836, but to enlarge them. He still had the right to take out his patent for the full term, notwithstanding that he had obtained and published a foreign patent within six months. But after the six months, he had, for a further specified time, a right to take out his patent subject to the conditions and limitations specified in the act of 1839."—*Ib.*

17. "The provisions in the act of 1839, with reference to the effect of his invention having been patented in a foreign country more than six months prior to his application, evidently refer to the fact of its having been patented by him, the applicant for the American patent."—*Ib.*

18. "Sections 16 and 17 of the act of March 2d, 1861, . . . were intended to change all pre-existing statutory provisions by which American patents were limited to fourteen years, and to provide thereafter a term of seventeen years without extension. This being the intent of the Legislature, the provision of Section 6 of the act of March 3d, 1839, . . . that, where a foreign patent had been granted to the patentee, prior to his American patent, the latter patent should be limited to the term of fourteen years from the date of such letters-patent, was, by the operation of Section 16 of the act of 1861 necessarily amended, so that American patents subsequently issued, and embraced within such proviso, should extend for the new term of seventeen years from the date of the foreign patent. . . . The act of July 8th, 1870, . . . introduced a new principle, and provided that the American patent should expire at the same time with the foreign patent, but should not exceed a term of seventeen years." *Weston v. White et al.*, 13 Blatch. 364.—SHIPMAN, 1876.

19. "The act of 1870 provides that in case of a prior foreign patent the United States patent 'shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term.' The law of July 8th, 1870, Rev. Stat. 4887, was not retroactive, and could not operate to put an end to American patents granted before the law took effect." *Badische Anilin & Soda Fabrik v. Hamilton M'fg Co.*, 3 Bann. & Ard. 235.—SHEPLEY, 1878.

20. A home patent was granted October 10th, 1871. Letters-patent of Great Britain were granted for the same invention to the same party, November 15th, 1860. The patentee made successful application for extension of the British patent, the extension being granted subsequent to the expiration of the British patent, such extended letters dating from the date of said expiration. The court held that the home patent in suit ceased to be operative when the original foreign patent expired. *Henry v. The Providence Tool Co.*, 3 Bann. & Ard. 501.—CLIFFORD, 1878.

21. Inventions first patented in a foreign country may be patented here, "provided the same shall not have been introduced into public use

in the United States for more than two years prior to the application. . . . By public use is meant use in public."—*Ib.*

22. "The rule established by the Patent Office requiring the applicant whose invention has been patented abroad to state that fact, and to give the date of any and all such foreign grants, is in conformity with the statute." *Bland, ex parte*, 15 O. G. 828.—CARTTER, 1879.

23. A foreign patent is not such for the purpose of limiting the home patent until that foreign patent is a full and perfect patent. *American Diamond Rock Boring Co. v. Sheldon et al.*, 17 Blatch. 303.—WHEELER, 1879.

24. The acts of 1836 and 1839 touch the question of limiting the term of a home patent by reason of a foreign patent. "By the terms of the two acts inventions patented abroad more than six months before were not affected at all by the foreign patent."—*Ib.*

25. "The burden rests upon the party claiming that the patent should be limited to show the facts which would limit it."—*Ib.*

26. In considering whether a prior foreign patent limits the later home patent one question is, Whether what is set forth and claimed in the home patent as the invention, is set forth as the invention in the foreign patent? *Reissner et al. v. Sharp*, 16 Blatch. 333.—BLATCHFORD, 1879.

27. Where a United States patent and a Canadian patent have been granted for the same invention, and the Canadian patent, being the earlier, is for a term of five years, extensible to ten or fifteen years, the United States patent will expire at the expiration of said five years.—*Ib.*

28. For a *résumé* and discussion of legislation bearing on the question how a foreign patent limits the term of a United States patent for the same invention, see —. *De Florez et al. v. Raynolds et al.*, 17 Blatch. 436.—BLATCHFORD, 1880.

29. A patent granted between the act of March 2d, 1861, and the act of July 8th, 1870, for an invention previously patented abroad runs seventeen years from the date when the foreign grant took effect as a patent.—*Ib.*

30. While the date at which a foreign grant of patent takes effect is to be taken as the date of the foreign patent, so far as its limiting effect on a home patent for the same invention is concerned, the date of its publication is the important date so far as its effect in anticipating a home patent is concerned.—*Ib.*

31. "An interlocutory decree is always open to amendment and correction." It is proper, during an accounting, to have the answer and decree amended to let in a prior foreign patent

for the same inventor, in order to get its limiting effect on the home patent.—*Ib.*

32. A patent for the invention in question was granted in France, August 31st, 1854; in Great Britain, March 27th, 1855; and in the United States, July 24th, 1860; this latter patent not limited in terms (as it should have been under the act of 1839) to fourteen years from the date of the French patent. In July, 1862, Congress validated the United States patent for fourteen years from its date, and at the expiration of said fourteen years the Commissioner extended it for seven years. It was contended that, under the act of 1870, the Commissioner had no power to so extend. *Held*, that the Commissioner had such power. *New Am. File Co. v. Nicholson File Co.*, 8 Fed. Rep. 816.—LOWELL, 1881.

33. Though a United States patent be not limited in terms by a prior foreign patent for the same invention, it will expire the same as though it were so limited.—*Ib.*

34. It seems that if a foreign patent were kept secret it would not be a bar to a later patent here. *Schoerken v. Swift, Courtney & Beecher Co.*, 19 Blatch. 209.—WHEELER, 1881.

35. The fact that a copy of a foreign patent is properly certified goes to show that it is an open and not a secret patent.—*Ib.*

36. In considering the limitation of the term of a United States patent by reason of a prior foreign patent for the same subject-matter, it is the dates at which the patents are actually granted, not the dates of application, that are to be taken into consideration. And it matters not that the foreign patent was actually delivered after the grant of a home patent. And in the case of a Canadian patent for five years, extensible by law, and actually extended, such extension does not count to prolong the life of a home patent. *Bate Refrigerating Co. v. Gillett*, 22 O. G. 1205.—NIXON, 1882.

37. After interlocutory decree respondent will not be permitted to impeach the decree on the ground that complainant's patent was void, by reason of not being limited on its face to expire with a prior foreign patent for the same subject-matter.—*Ib.*

38. By the court: "We find the law declaring that an inventor taking out a patent in the first instance in this country is entitled to a seventeen years' protection; but if he has previously obtained letters-patent in one or more foreign countries, then, while not deprived of his right to a patent here, the term to which the law in such case limits his protection is a period not extending beyond the date of the expiration of that one of the foreign patents first expiring."



*United States v. Commissioner of Patents*, 22 O. G. 1365.—CARTTER, 1882.

39. Where complainants have a foreign patent prior in date to the patent on which they bring suit, and the same as the patent in suit, with unsubstantial differences, the act which makes the home patent begin with the date of the foreign patent takes effect. *Siemens et al. v. Sellars et al.*, 23 O. G. 2234.—BUTLER, 1883.

40. The decision of Judge Blatchford in *De Florez v. Reynolds*, 17 Blatch. 436, as to the effect of the foreign patent for the same invention upon the term of the home patent approved and followed.—*Id.*

41. "The meaning of Section 25 of the act of 1870 is that the United States patent shall expire at the same time with the foreign patent having the shortest term to run which was granted before the United States patent was granted, and not that it shall expire at the same time with the foreign patent having the shortest term to run which was granted before the time when the application for the United States patent was made." *Gramme Electric Co. v. Arnoux & Hochhausen Electric Co. et al.*, 21 Blatch. 450.—BLATCHFORD, 1893.

42. In considering the limiting effect of a foreign patent upon a home patent, it is not a pertinent fact that the foreign patent had a capacity of prolongation beyond the time at which it actually expired.—*Id.*

43. Although a foreign patent may be a secret patent, it yet has the limiting effect provided for by the statute upon the duration of the home patent.—*Id.*

44. Defendants having set up as a part of their defence a foreign patent anticipating the foreign invention, the court said. "As to these foreign patents, it might be remarked that this patent was granted under the act of 1870, . . . which provides that no person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application, and that there is no evidence of such introduction into public use during that time anywhere." *Vogely v. Noel et al.*, 18 Fed. Rep. 827.—WHEELER, 1884.

45. Where a foreign court passes upon a foreign patent, the decision of that court is law for the courts of the United States. *Bate Refrigerating Co. v. Gillett et al.*, 20 Fed. Rep. 192.—NIXON, 1884.

46. Where a Canadian patent had been issued

to a home patentee for the same invention patented here, and prior to patent here, the expiration of the Canadian patent was first held to cause the home patent similarly to expire. A Canadian court adjudged the Canadian void *ab initio*. Thereupon it was held that the Canadian patent had no effect to limit the duration of the home patent.—*Id.*

47. Where an American patentee took a prior English patent for the same thing which had been suffered to lapse for non-payment of tax, it was held that the home patent would not expire until the expiration of the term originally contemplated by the foreign patent. *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 22 Blatch. 471.—WHEELER, 1884.

48. "It is only a patent for an invention that has been previously patented in a foreign country that is limited by the foreign patent. The description of the invention in the foreign patent might affect the validity of the domestic one and might not, but would not limit it." *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 22 Fed. Rep. 341.—WHEELER, 1884.

49. By the court: "There seems to be no room for fair doubt that Section 4887 is not to be construed as requiring the limitation to be expressed in the patent, but merely as controlling the effect or duration of the grant." *Canan v. Pound Mfg Co.*, 23 Blatch. 173.—WALLACE, 1885.

50. Complainant's English patent was applied for March 16th, 1868, and sealed August 21st, 1868, taking date from the time first named. Its United States patent was applied for December 28th, 1867, and issued April 21st, 1868. The court held that under Section 16 of the act of March 2d, 1861, taken in connection with Section 6 of the act of March 3d, 1839, this foreign patent did not limit the duration of the home patent. *Gold & Stock Tel. Co. v. Commercial Tel. Co. et al.*, 23 Blatch. 199.—SHIPMAN, 1885.

51. Where it is shown that, pending the application for a patent, applicant was referred to a prior foreign patent, and met and overcame the reference, it is to be presumed that the date of applicant's invention is prior to such foreign patent. *Railway Register Mfg Co. v. No. Hudson C. R. R. Co. et al.*, 23 Fed. Rep. 593.—NIXON, 1885.

52. When the differences between the thing shown and described in home and foreign patents for the same general improvement are simply differences of degree, the two patents are in substance for the same improvement. *Commercial Mfg Co. et al. v. Fairbank Canning Co.*, 27 Fed. Rep. 78.—BLODGETT, 1886.

53. A fair test of the question whether the American patent is anticipated by the foreign patent, or is included therein, would be whether a person practising the precise improvement under the foreign patent would be held to infringe the home patent.—*Ib.*

54. An inventor made application for patent in July, 1866. This application was rejected in November, 1866, and lay dormant in the Patent Office until June 23d, 1869, when a new and entirely different specification was substituted. The patent was granted July 16th, 1869. In December, 1866, an English patent issued for the same invention. The court held that the home patent was to be limited to run from the date of the foreign patent. *Globe Nail Co. v. Superior Nail Co. et al.*, 27 Fed. Rep. 450.—BLODGETT, 1886.

55. Where there is a home patent for a certain invention and a prior foreign patent in question, the question is whether the same invention is patented in both patents. *Clark v. Wilson*, 28 Fed. Rep. 95.—WHEELER, 1886.

56. The fact that a United States patent is not limited upon its face to expire with the life of a prior English patent does not affect the validity of the United States patent. *American Paper Barrel Co. v. Laraway*, 28 Fed. Rep. 141.—SHIPMAN, 1886.

57. A general statement by an applicant for a patent or his solicitor that he had patented the same thing abroad is not an estoppel against an inquiry into the identity of the home and foreign patent. *Commercial Mfg Co., Consol'd, et al. v. Fairbank Canning Co.*, 36 O. G. 1473.—BLODGETT, 1886.

58. For an example of difference between a home and a foreign patent held to be immaterial, see —. *Ib.*

59. A fair test of the question as to whether an American patent is substantially identical with a previous foreign patent is to inquire whether a person would infringe the American patent if he were to practise the improvement described in the foreign patent.—*Ib.*

60. The claim in the patent in suit for cotton belting was: "The improved article of manufacture of hard, even-surfaced, rigid, impervious, non-elastic belt, composed of cotton canvas or duck, having its warp thread larger than the weft, both weft and warp being hard spun, the fabric tight woven, and folded, stitched, and saturated with linseed-oil." The matters described in the specification and claims, with the exception of the feature expressed in the words "having its warp thread larger than the weft," involved no novelty, such subject-matter being

found in a British provisional specification\* of 1878. The same subject-matter was shown in a British patent of 1877 to the patentee of the home patent. The patentee of the home patent sought to date his invention back of this British patent of 1877, by reference to it. The court held that such pretence was not sustainable. *Gandy v. Main Belting Co.*, 28 Fed. Rep. 570.—BUTLER, 1886.

61. Section 4887 of the revised statutes provides that "every patent for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent; or, if there be more than one, at the same time with the one having the shortest term; and in no case shall it be in force more than seventeen years." Of this the court said that it "should be read as though it declared that the United States patent is to expire at the same time with the term of the foreign patent previously obtained for the same invention, or, if there be more than one, at the same time with the one having the shortest term. Upon this construction the duration of the term of the United States patent is fixed when the patent issues." (The meaning of this is, that where a prior foreign patent is taken for a certain term of years and lapses before the expiration of that time by reason of the non-payment of the tax, such lapse does not affect the duration of the home patent.) *Paillard et al. v. Brung*, 38 O. G. 900.—WALLACE, 1886.

62. James E. Emerson filed application for United States patent on saws May 31st, 1871, and his patent was granted February 6th, 1872. October 12th, 1871, Emerson's agent made application for English patent on the same invention and filed a provisional specification. The British patent was sealed April 3d, 1872, and dated October 12th, 1871. (Note that Emerson's British application was by provisional specification.) *Held*, that the British patent did not limit the life of the home patent. *Emerson et al. v. Lippert*, 31 Fed. Rep. 911.—ACHESON, 1887.

63. Where an American patent has been granted for an invention previously patented abroad no subsequent foreign patent can affect the status of the American patent. *Bate Refrigerating Co. v. Gillette et al.*, 31 Fed. Rep. 809.—BRADLEY, 1887.

64. In its limiting effect on a home patent a Canadian patent takes effect from its date, and not from the time of filing the Canadian model.—*Ib.*

65. A Canadian patent for five years granted prior to the amended Canadian act of May 25th, 1883, extensible for a further term, expires at

the end of the five years, as regards its limiting effect on a home patent.—*Id.*

66. A British patent granted for the term of fourteen years, defeasible before that time if certain taxes are not paid, is a patent for fourteen years as regards its limiting effect on a home patent.—*Id.*

67. Where a patentee has a home patent for an invention, and also a British patent showing the same thing in part, the additions found in the home patent do not prevent the foreign patent from limiting the term of the home patent as to the part which is common to both. *Guarantee Ins. T. & S. D. Co. et al. v. Sellers et al.*, 8 Sup. Ct. Rep. 117.—BRADLEY, 1887.

68. A home patent had the following claim : “ ‘ We claim, in combination with a furnace A, and its chimney or smoke-discharge flue P, a system or series of air and gas regenerators, B<sup>1</sup>, B<sup>2</sup>, B<sup>3</sup>, B<sup>4</sup>, constructed substantially as specified, and having conduits and dampers so arranged that the air and gas may be led into and through such regenerators and furnace and out of the chimney, in manner and so as to be operated as and for the purposes hereinbefore described. We also claim the arrangement and combination of the air-space or open chamber C, with the furnace and its system of regenerators arranged and applied together, substantially in the manner and so as to operate as described. [The air-space here referred to is that by which the hearth of the furnace and other parts are cooled and prevented from destruction by the intense heat.] We also claim the arrangement and combination of the air-chamber or space E, with the furnace, regenerators, conduits, and damper-chests applied thereto, the whole being substantially as specified. [The air-chamber D admits the atmospheric air to the regenerator.] We also claim the combination of a furnace with one or more regenerators or means of receiving the waste smoke and gaseous products, and intercepting or receiving heat therefrom, and also with means or devices by which all or a portion of the heat so intercepted or received may be absorbed by the fluent air or gas during its passage into or to such furnace, for the purpose of improving or promoting combustion therein.’ ” A prior British patent to the same patentee had but one claim. Thereof the court said : “ There is only one claim in the British patent, it is true. But that claim, under the British patent system, entitled the patentees to their entire invention, and is at least as broad and comprehensive as all four claims in the American patent. It is in these terms : ‘ Having now described the nature of our invention, and the best modes we are ac-

quainted with of performing the same, we wish it to be understood that we do not confine ourselves to the precise details shown on the accompanying drawings ; but we claim as our invention the various arrangements of regenerative furnaces worked by the gases resulting from an imperfect combustion of solid fuel in separate places, as hereinbefore set forth.’ ”—*Id.*

69. The sealing of a British patent is equivalent to the publication thereof.—*Id.*

70. The condition imposed by the act of 1839, that the term of a patent for an invention which has been patented in a foreign country shall commence to run from the time of publication of the foreign patent, was not repealed or abrogated by the act of 1861.—*Id.*

## FRAUDULENT SALE OF PATENT RIGHT.

### CASES.

1. A, a patent owner, sought to sell an interest under his patent. B would not purchase unless C purchased with him. Thereupon A induced C to purchase with B, taking the separate note of B and C. Then, as had been agreed between A and C, A returned C his notes and paid him twelve dollars besides. A's conduct as regards B was held to be fraudulent, and compelled him to payment of damages to B. *Culver v. Webb*, 12 Conn. 441.—WAITE, 1838.

2. Fraud in the sale of a patent right will avoid the sale. *Newell v. Gatling*, 7 Ind. 147.—PERKINS, 1855.

3. Fraudulent representations in the sale of a patent will avoid the sale. *Pierce v. Wilson*, 34 Ala. [N. S.] 596.—CLARK, 1859.

4. State courts have jurisdiction of actions for recovery of damages for fraudulent representations in the sale of a patent right. *Hunt v. Hoover*, 24 Iowa, 231.—WRIGHT, 1868.

5. In an action on a promissory note given as a part of the consideration for the purchase of a patent right, the defendant may plead in bar of the action that he made the purchase through the false and fraudulent representations of the patent owner, and this defence will avail even though defendant, on discovering the fraud, did not offer to reassign the right. *Groff v. Housel*, 33 Maryland, 161.—MILLER, 1870.

6. False and fraudulent representations of the value of the device of a patent will avoid a contract for the sale of an interest therein, and allow the buyer to recover back his money. *Page v. Dickerson*, 28 Wis. 694.—COLE, 1871.

7. Where fraud is practised in the sale of a

patent the contract will be rescinded at the instance of the party injured. *Hall v. Orvis*, 35 Iowa, 366.—MILLER, 1872.

8. Where A, a patent owner, and B, another person, induce C to purchase an interest in a patent with B, the latter being really a sham purchaser, the transaction is a fraudulent one on the part of A and B. *Hess v. Young*, 59 Ind. 379.—BIDDLE, 1877.

### GOVERNMENT FEES.

#### "GOVERNMENT FEES" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 7. *And be it further enacted*, That such patentee as aforesaid shall, before he receives his patent, pay the following fees to the several officers employed in making out and perfecting the same, to wit: For receiving and filing the petition, fifty cents; for filing specifications, per copy-sheet containing one hundred words, ten cents; for making out patent, two dollars; for affixing great seal, one dollar; for indorsing the day of delivering the same to the patentee, including all intermediate services, twenty cents. [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 11. *And be it further enacted*, That every inventor, before he presents his petition to the Secretary of State, signifying his desire of obtaining a patent, shall pay into the Treasury thirty dollars. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 7 Provides that "if the applicant shall elect to withdraw his application, relinquishing his claim to the model, he shall be entitled to receive back twenty dollars, part of the duty required by this act."

SEC. 9. *And be it further enacted*, That before any application for a patent shall be considered by the Commissioner as aforesaid, the applicant shall pay into the Treasury of the United States, or into the Patent Office, or into any of the deposit banks, to the credit of the Treasury, if he be a citizen of the United States, or an alien, and shall have been resident in the United States for one year next preceding, and shall have made oath of his intention to become a citizen thereof, the sum of thirty dollars; if a subject of Great Britain, the sum of five hundred dollars; and all other persons the sum of three hundred dollars.

SEC. 12 Provides that the fee on application to file caveat shall be twenty dollars, and that the same shall apply upon application for patent

for the same invention. [Repealed July 8th, 1870.]

Act approved March 3d, 1837.

SEC. 12. *And be it further enacted*, That, whenever the application of any foreigner for a patent shall be rejected and withdrawn for want of novelty in the invention, pursuant to the seventh section of the act to which this is additional, the certificate thereof of the Commissioner shall be a sufficient warrant to the Treasurer to pay back to such applicant two thirds of the duty he shall have paid into the Treasury on account of such application. [Repealed July 8th, 1870.]

Act approved March 2d, 1861.

SEC. 9. *And be it further enacted*, That no money paid as a fee, on any application for a patent after the passage of this act, shall be withdrawn or refunded, nor shall the fee paid on filing a caveat be considered as part of the sum required to be paid on filing a subsequent application for a patent for the same invention.

SEC. 10. *And be it further enacted*, That all laws now in force fixing the rates of the Patent Office fees to be paid, and discriminating between the inhabitants of the United States and those of other countries, which shall not discriminate against the inhabitants of the United States, are hereby repealed, and in their stead the following rates are established:

On filing each caveat, ten dollars.

On filing each original application for a patent, except for a design, fifteen dollars.

On issuing each original patent, twenty dollars.

\* \* \* \* \*

On every application for the reissue of a patent, thirty dollars.

On every application for the extension of a patent, fifty dollars; and fifty dollars in addition, on the granting of every extension.

On filing each disclaimer, ten dollars. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 68. *And be it further enacted*, That the following shall be the rates for patent fees:

On the filing of each original application for a patent, fifteen dollars.

On issuing each original patent, twenty dollars.

On filing each caveat, ten dollars.

On every application for the reissue of a patent, thirty dollars.

On filing each disclaimer, ten dollars.

On every application for the extension of a patent, fifty dollars.

On the granting of every extension of a patent, fifty dollars.

On an appeal for the first time from the primary examiners to the examiners-in-chief, ten dollars.

On every appeal from the examiners-in-chief to the Commissioner, twenty dollars.

For certified copies of patents and other papers, ten cents per hundred words.

For recording every assignment, agreement, power of attorney, or other paper, of three hundred words or under, one dollar; of over three hundred and under one thousand words, two dollars; of over one thousand words, three dollars.

For copies of drawings, the reasonable cost of making them.

SEC. 75. *And be it further enacted*, That the following shall be the rates of fees in design cases:

For three years and six months, ten dollars.

For seven years, fifteen dollars.

For fourteen years, thirty dollars.

For all other cases in which fees are required, the same rates as in cases of inventions or discoveries. . . .

Act approved June 22d, 1874.

SEC. 4934. The following shall be the rate for patent fees:

On filing each original application for a patent, except in design cases, fifteen dollars.

On issuing each original patent, except in design cases, twenty dollars.

In design cases: for three years and six months, ten dollars; for seven years, fifteen dollars; for fourteen years, thirty dollars.

On filing each caveat, ten dollars.

On every application for the reissue of a patent, thirty dollars.

On filing each disclaimer, ten dollars.

On every application for the extension of a patent, fifty dollars.

On the granting of every extension of a patent, fifty dollars.

On an appeal for the first time from the primary examiners to the examiners-in-chief, ten dollars.

On every appeal from the examiners-in-chief to the Commissioner, twenty dollars.

For certified copies of patents and other papers, including certified printed copies, ten cents per hundred words.

For recording every assignment, agreement, power of attorney, or other paper, of three hundred words or under, one dollar; of over three hundred and under one thousand words, two dollars; of over one thousand words, three dollars.

For copies of drawings, the reasonable cost of making them.

#### CASES.

1. The omission of the oath of invention, or of payment of Government fees—directed by statute—does not invalidate the patent. *Whittemore v. Cutter*, 1 Gall. 429.—STORY, 1813.

#### GOVERNMENT USE OF PATENT.

#### CASES.

1. The jurisdiction of the Court of Claims does not embrace a case where a Government subordinate infringes a patent upon his own motion and authority. *Pitcher v. U. S.*, 1 Nott & Hunt, 7.—CASEY, 1863.

2. Where a Government agent uses a patented improvement, under an arrangement with the patentee that the latter will await the action of Congress to get his compensation, the Court of Claims has no jurisdiction to award compensation. *Shavor et al. v. U. S.*, 4 Nott & Hunt, 440.—NOTT, 1868.

3. The Court of Claims has jurisdiction of an action by a patentee against the Government for the recovery of an agreed royalty. *Burns v. U. S.*, 4 Nott & Hunt, 113.—LORING, 1868.

4. The patent in suit was for defensive armor for marine or land batteries, and consisted of iron armor plates laid in the usual way against the outer timbers of the vessel. The defendants acted as the agent of the Government in procuring such wooden armor and outside plating to be put on. The work was done by day's work and by the pound; the Government paid the bills through the defendants. Defendants were held not to infringe, the court saying: "To hold that workmen and employés of the Government, who do work for it upon a vessel owned by it, and are paid by it for doing such work, . . . can be held liable . . . for infringing a patent . . . would be, in effect and substance, to allow the Government itself to be sued in the guise of a suit against its workmen, and would lead to embarrassments of the operations of the Government which might prove of serious detriment." *Heaton et al. v. Quintard et al.*, 7 Blatch. 73.—BLATCHFORD, 1869.

5. "If an officer in the military service not specially employed to make experiments with a view to suggest improvements, devises a new and valuable improvement in arms, tents, or any other kind of material, he is entitled to the benefit and to letters-patent for the improvement from the United States, equally with any other citizen not engaged in such service, and the Government cannot, after the patent is issued,

make use of the improvement any more than a private individual, without the license of the inventor, or making compensation to him." *United States v. Burns*, 12 Wallace, 246.—*SUP. CT.* 1870.

6. The Government cannot make use of a patented improvement, without license, any more than a private individual. *Brady v. Atlantic Works*, 4 Cliff. 408.—*CLIFFORD*, 1876.

7. "Contractors of the Government derive no power . . . by virtue of their contract, to take the property of private individuals without their consent, and to use and apply the same in fulfilling their contract obligations."—*Ib.*

8. "Public employment is no defence to the employé for having converted the private property of another to public use without his consent and without just compensation. Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that the provision is as applicable to the Government as to individuals, except in cases of extreme necessity in time of war, and of immediate and impending public danger." *Cammeyer et al. v. Newton et al.*, 94 U. S. 225.—*SUP. CT.* 1876.

9. "The Government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor, or making him compensation."—*Ib.*

10. A Government grant giving a certain party the exclusive right to lay telegraph cables over a certain route, gives that party no right to use patented inventions of other parties. *Colgate v. International Ocean Tel. Co.*, 17 Blatch. 308.—*BLATCHFORD*, 1879.

11. "Neither the Government, nor an agent of the Government, nor a private individual, whether claiming to act under the Government or otherwise, can use a patented improvement without the license of the patentee."—*Ib.*

12. "That the acts constituting the infringement were committed in the exercise of authority derived from the state cannot shield the defendants from liability." *Allen v. City of New York et al.*, 17 Blatch. 350.—*WHEELER*, 1879.

13. A postmaster, who infringes by using a patented cancelling stamp, cannot escape the consequences of his infringement through being a Government officer. *Campbell v. James et al.*, 17 Blatch. 42.—*WHEELER*, 1879.

14. A licensee may defend against a patent on the ground of its invalidity, and where the Government is the licensee it may do likewise.

*Morse M'fg Co. v. United States*, 16 Nott & Hop. C. C. 296.—*DAVIS*, 1880.

15. "The United States has no such prerogative as that which is claimed by the sovereigns of England by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters-patent to those who entitle themselves to such grants. The Government of the United States, as well as the citizen, is subject to the Constitution." *James v. Campbell et al.*, 104 U. S. 356.—*SUP. CT.* 1881.

16. "The mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute."—*Ib.*

17. Doubtful that a suit for infringement of a patent can be sustained against a public officer who has acted "only for and in behalf of the Government."—*Ib.*

18. The United States Government has no right to use a patented invention without permission of the patentee. *McKeever v. U. S.*, 14 Nott & Hop. 396.—*SUP. CT.* 1878.

19. Where the patentee submitted his patented cartridge to a board created for the purpose of adopting a cartridge for the use of the United States, and under recommendations of that board the Government proceeded to manufacture and use cartridges, it was held that such act of the Government was not a tort, and that the patentee had not, by the submission of his cartridge to the board, granted the Government a license.—*Ib.*

20. By the court: "I do not definitely understand that *Campbell v. James* (104 U. S., 356) definitely decided that a bill in equity will not lie against an officer of the United States for his unauthorized use of a patent solely in the service of the Government." *Forehand et al. v. Porter*, 15 Fed. Rep. 256.—*SHIPMAN*, 1883.

21. "If the right of the patentee was acknowledged, and without his consent an officer of the Government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie within the jurisdiction of the Court of Claims. . . . And it may be that, even if the exclusive right of the patentee were contested, such an action might be brought in that court involving all the question relating to the validity of the patent." *Hollister, Collector v. Benedict M'fg Co.*, 118 U. S. 59.—*SUP. CT.* 1885.

## GRANT.

## "GRANT" IN THE PATENT ACTS.

Act approved July 4th, 1836.

SECTION 11. *And be it further enacted*, That every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right, under any patent, to make and use, and to grant to others to make and use the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 36. *And be it further enacted*, That every patent, or any interest therein, shall be assignable in law by an instrument in writing; and the patentee, or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States; and said assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4898. Every patent, or any interest therein, shall be assignable in law by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof.

## CASES.

1. "A patent right of itself is unsusceptible of local subdivision." *Whittemore v. Cutter*, 1 Gall. 429.—STORY, 1813.

2. The grantee of a territorial right "may support a suit in equity to enjoin third persons from infringing the patent, and for an account." *Ogle et al. v. Ege*, 4 Wash. 584.—WASH. 1826.

3. An agreement to make a grant under a patent for a certain territory is not fulfilled by a grant containing a limitation. *Edward v. Richards*, Wright, 596.—LANE, 1884.

4. "The patentee may assign his exclusive

right within and throughout a specified part of the United States, and upon such an assignment the assignee may sue in his own name for an infringement of his rights. But in order to enable him to sue, the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself, as well as others. And any assignment short of this is a mere license." *Gayler et al. v. Wilder*, 10 Howard, 477.—SUP. CT. 1850.

5. A grantee under a patent may and must sue in his own name, and not in that of the patentee.—*Id.*

6. "A grantee is one who has transferred to him in writing the *exclusive* right, under the patent, to make and use, and to grant to others to make and use the thing patented within and throughout some specified part or portion of the United States. Such right must be an *exclusive* sectional right *excluding* the patentee therefrom." *Potter et al. v. Holland*, 4 Blatch. 206.—INGERSOLL, 1858.

7. "The terms assignee and grantee are not used in this patent law of 1836 as synonymous terms, though courts, without having their attention particularly called to the subject, have sometimes used them indiscriminately and in their popular sense. They have, however, . . . separate and distinct meanings."—*Id.*

8. A grant of territory under a patent is sufficiently specific if it give the patentee's name, the title of the invention, and the date of the patent. *Hill v. Thuermer*, 13 Ind. 351.—PERKINS, 1859.

9. The terms of an original grant under a patent are not to be varied by parol evidence. *Galpin et al. v. Atwater*, 29 Conn. 93.—ELLSWORTH, 1860.

10. "Grants, as well as assignments, must be in writing, and they must convey the exclusive right, under the patent, to make and use, and vend to others to be used, the thing patented, within and throughout some specified district or portion of the United States, and such right must be exclusive of the patentee, as well as of all others except the grantee." *Moore v. Marsh*, 7 Wall. 515.—SUP. CT. 1868.

11. In construing a conveyance under a patent, "parol testimony to show all the circumstances is admissible when the language may be susceptible of more than one meaning, such as their knowledge of the subject-matter of the contract, and all other facts that would throw light upon the intention of the parties." *May et al. v. Chaffee et al.*, 2 Dillon, 385.—NELSON, 1871.

12. A conveyance under a patent contained in unmistakable language an absolute conveyance as regarded a certain district ; it compelled the grantee to pay royalty, with a clause of forfeiture in case of non-payment or neglect ; this grant was recorded. It was accompanied, at the time of making it, with a supplementary agreement, never recorded, which contained among other things a stipulation that the grantee should not have the right to apply the principle of the patent to furnaces erected in cellars or basements of houses, for the purpose of heating several rooms. The paper first referred to was held to be a grant notwithstanding the supplementary agreement. *Littlefield et al. v. Perry*, 21 Wall. 205.—SUP. CT. 1874.

13. A conveyance carried "The full and exclusive right to use and to sell to be used the said saw-hangings [the invention being previously stated to be known as Hamilton's oscillating and reciprocating saw-hangings], as they are or may be applied to mulay or single upright mill-saws, as secured by the said letters-patent, for and in the state of New York, I excepting and reserving the right to manufacture the said invention for myself and legal representatives." Thereof the court said : "The effect of such a grant, coupled with the reservation, is to grant an exclusive right to use and sell, and a right to make, and to reserve a right to make in common with the right of the grantee to make, and the grantor not retaining any right to use or sell in the state of New York, any machines made by him in that state." *Hamilton v. Kingsbury et al.*, 15 Blatch. 64.—BLATCHFORD, 1878.

### INFRINGEMENT.

[As to how patents are to be construed and, in the light of such construction, what amounts to infringement, see "Construction of Patent—In General," and "Construction of Patent—Specific Cases." Those questions are not treated under this topic.]

#### CASES.

1. Infringement of a patent is a tort. Torts are several as well as joint. In a suit against several persons, recovery may be had against one only. *Reutgen v. Kanowers et al.*, 1 Wash. 168.—WASH. 1804.

2. The "Act for the relief of Oliver Evans," passed January 21st, 1808, did not permit a person who had not erected the machine in question, prior to the passage of the act, to use the machine afterward. *Evans v. Weiss*, 2 Wash. 342.—WASH. 1809.

3. The right to a patent belongs to the first inventor before his patent issues. One who, knowing that another is the first inventor, erects the invented machine before the patent issues, cannot use the machine after patent granted.—*Id.*

4. The "Act for the relief of Oliver Evans," passed January 21st, 1808, did not authorize a person who erected the machine in question prior to the renewed patent, to use the machine afterward. *Evans v. Jordan et al.*, 1 Brock, 248.—MARSHALL, 1813.

5. The mere making, or using, or vending of a patented thing is an infringement. *Whittemore v. Cutter*, 1 Gall. 429.—STORY, 1813.

6. "The making of a patented machine, to be an offence, . . . must be the making with an intent to use for profit, and not for the mere purpose of philosophical experiment, or to ascertain the verity and exactness of the specification." *Savin et al. v. Guild*, 1 Gall. 484.—STORY, 1813.

7. "A sale of a patented machine (in order to infringe) must be a sale, not of the materials of a machine, either separate or combined, but of a complete machine, with the right, expressed or implied, of using the same in the manner secured by the patent."—*Id.*

8. An inventor and patentee of an improvement on a patented machine does not thereby acquire the right to use the original machine. *Odiorne v. Winkley*, 2 Gall. 51.—STORY, 1814.

9. The "Act for the relief of Oliver Evans," approved January 21st, 1808, does not permit those who erected the machine in question, after the expiration of the original patent, and prior to the grant of the new patent, to use the machine after the issue of the new patent. *Evans v. Jordan et al.*, 9 Cranch, 199.—SUP. CT. 1815.

10. Where a subsequent inventor and patentee improves upon the machine of a prior inventor and patentee, neither patentee is entitled to use the invention of the other without license. *Gray et al. v. James et al.*, 1 Peters's C. C. 394.—WASH. 1817.

11. Where the plaintiff claims distinct improvements in the same machine, he is entitled to recover against the use of any one of them. *Moody v. Fiske et al.*, 2 Mason, 312.—STORY, 1820.

12. If a person puts another's invention into use before the inventor secures his patent, the patent ought not to take away the former's right. *Morris v. Huntington*, 1 Paine, 348.—THOMPSON, 1824.

13. Defendant contracted with another party to buy all of certain articles such party could make in a specified time, defendant knowing that



such party was to employ an infringing machine in making the articles. *Held*, that if the contract was real and not colorable, defendant did not infringe the patent on the machine. *Keplinger v. De Young*, 10 Wheat. 358.—SUP. CT. 1825.

14. Recovery of damages for infringement does not transfer to defendant the right to the subsequent use of the patented thing. *Earle v. Sawyer*, 4 Mason, 1.—STORY, 1825.

15. A mere workman, clerk, or shopman—acting for another—is not an infringer. That other, for whose account the labor is done, is the responsible party. *Delano v. Scott*, 1 Gilpin, 489.—HOPKINSON, 1824.

16. The patent in question was for certain devices for making bedsteads. A owned certain territory under this patent, and B owned certain other territory. The products manufactured by A were sold in B's territory. B claimed infringement, and the court held that there was no infringement. *Boyd v. Brown*, 3 McLean, 295.—MCLEAN, 1843.

17. Doubts upon the question of infringement are to be decided in favor of defendants. *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

18. That section of the law which permits a person who uses a patented machine, before the application for patent was made, to continue that use after patent granted, does not apply to the case where the use prior to application was without the inventor's knowledge and consent. *Pierson v. Eagle Screw Co.*, 3 Story, 402.—STORY, 1844.

19. The sale of a thing manufactured by a patented machine is not a violation of the patent. *Boyd v. McAlpin*, 3 McLean, 427.—MCLEAN, 1844.

20. Defendant's machine may be patented as an improvement upon, and better than, complainants' machine, and still be an infringement. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

21. "Every person who violates a patent is bound before he does so to know that he puts himself to the peril of establishing a good defence, and he has no right to violate it, and then to seek indulgence from the court to find out some possible ground, or some probable evidence to support him in his acts."—*Id.*

22. Foundrymen, who cast an infringing article as employes of another party, may be held as infringers. *Bryce v. Dorr et al.*, 3 McLean, 582.—MCLEAN, 1845.

23. He who is selling patented articles without right, as the agent of another, may be en-

joined. *Buck et al. v. Cobb et al.*, 9 Law Rep. [O. S.] 545.—CONKLING, 1846.

24. A person acting in complainants' behalf went to defendants' store and ordered from the porter a portion of a specific roll of oil-cloth bearing a pattern patented to the complainants, which roll defendants did not intend to sell. The facts were held not to amount to infringement. *Sparkman et al. v. Higgins et al.*, 2 Blatch, 29.—BETTS, 1846.

25. The grantee of an exclusive right to make and use and vend a patented machine, has the right to vend the product of such machine outside of the said territory. *Simpson et al. v. Wilson*, 4 Howard, 709.—SUP. CT. 1846.

26. For a case where infringing articles were made by one party for another, and that other was held an infringer, see —. *Blanchard Gunstock Turning Factory v. Jacobs*, 2 Blatch. 69.—BETTS, 1847.

27. Making an improvement on a patented machine does not give the improver the right to use that patented machine. *Woodworth et al. v. Rogers et al.*, 3 W. & M. 135.—WOODBURY, 1847.

28. Nor can the original patentee of the machine use the afterward patented improvement of another without a license.—*Id.*

29. If a defendant arranges his machinery on the same principle as that of the plaintiff he is guilty of infringement. It is not essential that the defendant's machine in its form should be exactly similar to that of complainant, but it must work on the same principle. *Parker v. Howorth*, 4 McLean, 470.—MCLEAN, 1848.

30. It cannot be said "that the essential character of a machine is varied by a mutual interchange of form and direction between the two elements of which it is a combination, while both object and effect remain as before." *Wilson v. Barnum*, 1 Wall., Jr. 347.—KANE, 1849.

31. The question of infringement, "is one irrespective of motive. The defendant may have infringed, without intending, or even knowing it, but he is not, on that account, the less an infringer." *Parker v. Hulme*, 7 West. L. W. 417.—KANE, 1849.

32. Although defendants may have a patent for their device subsequent to that of the plaintiff, "the question is: Whether the article actually made by the defendants is substantially the same as that patented by complainant?" *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

33. The superior utility of defendants' device "may arise to so high a degree as to become conclusive" of substantial difference. "From our inability to penetrate the secrets of nature

we may not be able to detect the new principle or power otherwise than by its effects. But this utility must be derived from the changes introduced, not from the use of better material or greater skill or care in the manufacture."—*Ib.*

34. "If the changes made by the defendants have rendered their" device "one of greater utility than the plaintiff's, such utility is evidence that some new principle, or mechanical power, or new mode of operation producing a new kind of result, has been introduced. And the greater such utility the stronger is such evidence. And if a manifest and very high degree of utility is obtained by such changes, it becomes full proof and conclusive that a new principle or mechanical power, or a new mode of operation has been introduced, and that the defendants' "device "is no infringement."—*Ib.*

35. "On the question of infringement the burden of proof is with the plaintiff." *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

36. "In order to make out the act of infringement the plaintiff must prove that the defendant has used his invention either in the precise form in which it is constructed under the patent, or in a form, and on principles, substantially the same. To constitute this identity, and to make out the fact of infringement, it is not necessary that the structure or machine used by the defendant should be the same in appearance, form, or proportions as that invented and patented by the plaintiff."—*Ib.*

37. "The inventor is entitled to the protection which the Government has granted him, and any one using the principle thus embodied is guilty of an infringement, however he may have perfected the machinery by superior skill in the mechanical arrangement and construction of the parts. Such perfection is but the skill of the mechanic, not the genius of the inventor." *Parkhurst v. Kinsman et al.*, 1 Blatch. 488.—NELSON, 1849.

38. A man may invent an improvement upon a prior patented device, but he cannot use his device without a license from the prior patentee. *Smith et al. v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

39. The result attained by defendants' device may be the same as the result attained by plaintiffs' patented device, but that is not conclusive of infringement.—*Ib.*

40. "When the material of the combination ceases to exist, in whatever way that may occur, the right to renew it depends upon the right to make the invention. If the right to make does not exist there is no right to rebuild the combination. But it does not follow when one of

the elements of the combination has become so much worn as to be inoperative, or has broken, that the machine no longer exists, for restoration to its original use by the owner who has bought its use. When the wearing or injury is partial, then repair is restoration and not reconstruction." *Wilson v. Simpson et al.*, 9 Howard, 109.—SUP. CT. 1850.

41. "Repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting a machine for use, and it is no more than that, though it shall be a replacement of an essential part of the combination." But if the whole machine "should happen to be broken, so that its parts could not be readjusted, or so much worn out as to be useless, then a purchaser cannot make or replace it by another, but he must buy a new one. The doing of either would be entire reconstruction."—*Ib.*

42. The buyer of such a patented machine as the Woodworth planing machine may properly replace its cutting knives without infringement.—*Ib.*

43. Although a person may patent an improvement upon an earlier patented improvement, he cannot use the combined improvement, in default of license, without infringing the prior patent. *Cott v. Massachusetts Arms Company*, 1 Fish. P. C. 108.—WOODBURY, 1851.

44. On the question of infringement each claim is to be considered separately.—*Ib.*

45. The sale of a patented article by the defendants to an agent of the plaintiffs employed to make a purchase, is an infringement which will support an action. *Byam et al. v. Bullard et al.*, 1 Curtis's C. C. 100.—CURTIS, 1852.

46. He who infringes should satisfy himself of his right beforehand, not infringe first and look up defences afterward; and the statutory reference to the pleading of defences is to be construed in this light. *Silsby et al. v. Foote*, 14 Howard, 218.—SUP. CT. 1853.

47. "It is evident that the sale or use of the product of a patented machine is no violation of the exclusive right to use, construct, or sell the machine itself; and that the patent for a new and improved process, by which any product or manufacture, before known in commerce, may be made in a cheaper and better manner, grants nothing but the exclusive right to use the particular process. Where a known manufacture or process is in the market, purchasers are not bound to inquire whether it was made on a patented machine or by a patented process." *Goodyear et al. v. Central Railroads of New Jersey*, 2 Wall., Jr. 356.—GRIER, 1853.

48. Although complainant may have the legal

title to a patent, if defendants have an equitable right to use it defendants cannot be enjoined. *Day v. Candee et al.*, 3 Fish. P. C. 9.—INGER-SOLL, 1853.

49. Directors of an infringing corporation who participate in its management, and the agents of the corporation, are parties, and may be restrained from infringement by injunction. *Good-year et al. v. Phelps et al.*, 3 Blatch. 91.—NELSON, 1853.

50. Although defendant's machine, incidentally to its main function, may perform the functions of plaintiff's patented machine in some slight degree, that fact does not prove infringement. *Pitts v. Wemple*, 1 Bissell, 87.—DRUMMOND, 1855.

51. A patent is infringed if either claim is infringed.—*Id.*

52. "The superior utility of defendant's device is not, of itself, a certain test upon the question of infringement, because defendant's device may contain the whole substance of plaintiff's and something in addition."—*Id.*

53. Defendant's addition of improvements to plaintiff's patented device does not give defendant the right to use the patented device. *Winans v. New York & Harlem R. R. Co.*, 4 Fish. P. C. 1.—NELSON, 1855.

54. "The patent laws of the United States are not extended over foreign vessels visiting our ports so as to affect the structure or equipment which they bring hither." *Brown v. Duchesne*, 2 Curtis's C. C. 371.—CURTIS, 1855.

55. "An infringement of a patent takes place whenever a party avails himself of the invention of the patentee without such a variation as will constitute a new discovery. A man may improve a patented machine so as to entitle him to a patent for his improvement, but that will not give him a right to use the invention of the first patentee without his license. A machine is an infringement of another if it incorporate in its construction and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service, or produces the same effect in the same way, or substantially the same way. Mere colorable alterations or adroit evasions, by substituting one mechanical equivalent for another in the combination which constitutes the machine, should never be allowed to protect a party." *Foss et al. v. Herbert*, 1 Bissell, 121.—DRUMMOND, 1856.

56. "The rights of property and exclusive use granted to a patentee do not extend to a foreign vessel lawfully entering one of our ports; . . . the use of such improvement in the construction, fitting out, or equipment of such vessel,

while she is coming into or going out of a port of the United States, is not an infringement of the right of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs." *Brown v. Duchesne*, 19 Howard, 183.—SUP. CT. 1856.

57. "An infringement is a copy made after and agreeing with the principle laid down in the patent." *Page v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

58. If a machine is constructed with the intent that by the wear of the machine the patented improvement shall be brought into play, it is an infringement, but if the intent be *bona fide* the other way, then, although wear and use may bring the improvement into play the machine is not an infringement.—*Id.*

59. "The invention patented, when a patent is taken out for a machine, is the machine itself—the mechanical means and devices by which certain results in the operation of the machine can be obtained; and when the inventor has obtained a patent for his invention, he is entitled to the exclusive use of it, if that invention is a machine, for all the uses and purposes to which that machine, without the exercise of any inventive power, can be usefully applied. In other words, when he patents a machine, he cannot patent either a purpose or an effect, but the mechanical means, devices, and organization which his machine embodies; and when these means, devices, and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device, or means for all the uses and purposes to which they can be applied, to every function, power, and capacity of his patented machine, without regard to the purposes to which he supposed originally it was most applicable, or to which he supposed it was solely applicable, if such were his original view." *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

60. "It may . . . happen very frequently in the progress of invention, that the original inventors of a machine, calculated to accomplish a particular purpose, may bring an action against a person who has patented an improvement upon that machine, for using the original machine, while the party who had patented the original machine may also be liable to an action for the use, not of what he has patented, but for the use of what has been patented to his adversary."—*Id.*

61. "If even a party originally obtains a license from a patentee to use his invention, but neglects to pay his license price for a long time,

and, finally, when prosecuted, abandons his license, or, while relying upon it, depends also upon other grounds, the license will be forfeited, and he will be liable as an infringer." *Bell v. McCullough et al.*, 1 Bond, 194.—LEAVITT, 1858.

62. If defendant "has taken that which belongs to the plaintiff, then he is responsible, although he may have added something of his own." *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

63. "If one machine, which is alleged to be an infringement of another, produces a different result, or, in other words, is of greater utility than the former preceding machine, it may be some evidence of a difference, a substantial difference, between them; and the utility of one over the other may be so great as to be satisfactory evidence that some new principle is involved, and that it is not substantially the same. This is sometimes coupled, too, in considering the evidence with the mechanical differences. The mechanical differences may be sufficient to show that the two machines are not substantially the same. The difference of result and utility may be so great as to be satisfactory to the jury. They may be authorized to receive it as satisfactory, if it is of so very high a nature. And it may be that neither of these alone would be satisfactory, yet the mechanical difference, and the difference of utility, taken together, may be sufficient to satisfy the mind."—*Ib.*

64. "Where in two devices the end to be accomplished is the same, and the substantial means to accomplish the end are the same, the two devices are identical, though one may accomplish the end more effectually than the other." *Imlay v. Norwich & Worcester R. R.*, 4 Blatch. 227.—INGERSOLL, 1858.

65. A telegraph company owned certain territory under a certain patent; another telegraph company sent its messages around this territory instead of through it, and was held not to infringe the patent. *Western Tel. Co. v. Magnetic Tel. Co.*, 21 Howard, 456.—SUP. CT. 1858. *Western Tel. Co. v. Penniman*, 21 Howard, 460.—SUP. CT. 1858.

66. Where a party has used a patented improvement in making goods, and put the goods on the market, he cannot escape infringement by calling his operation an experiment. *Poppenhusen v. N. Y. Gutta Percha Comb Co.*, 4 Blatch. 184.—INGERSOLL, 1858.

67. "When one in the employment of a corporation, in the business of his employment does an act for their benefit, and which they adopt and practice, and take advantage of, they

will be deemed to have authorized the act, and will be as much bound by it as though expressly authorized."—*Ib.*

68. "It is a well-established rule that if a patent is granted to one man for any machine or combination, and then a patent is granted to another man for an improvement upon that machine or that combination, that such patent which the second man obtained cannot be used, if by its use the first patent is infringed." *Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co.*, 3 Fish P. C. 43.—INGERSOLL, 1858.

69. "In order to establish an infringement, it is unnecessary that the devices used by the defendants should be an exact copy of the devices of the plaintiffs, that the machine of the defendants should be literally and exactly like the plaintiffs'. All that is required is, that the devices of the defendants should be substantially like the devices patented to the plaintiffs, although they may use another device which improves the devices patented to the plaintiffs."—*Ib.*

70. "If the defendants . . . substitute, for something in the plaintiffs' machine, a passive agency which performs no useful object, in addition to the agency employed by the plaintiffs, such substitution of a passive agency would not alter the character of the plaintiffs' machine; and if without the substitution of such passive agency, the patent of the plaintiffs would be violated, it would also be violated after such passive agency had been substituted."—*Ib.*

71. A man cannot use the patented improvement of another by engrafting his own improvement thereupon. *Whipple v. Baldwin M'f'g Co.*, 4 Fish. P. C. 29.—SPRAGUE, 1858.

72. Although defendants may have a patent on their manufacture, yet, "a mere addition to a patented invention will not justify the use of the invention first patented." *Hayes et al. v. Silsbee et al.*, 1 Bond, 279.—LEAVITT, 1859.

73. A patent is infringed if either claim thereof is infringed.—*Ib.*

74. Where parties had a license to use the Woodworth planer, and did use it, and made and used another machine for doing a part of the work, keeping the planer idle meanwhile, they were held to infringe. *Bloomer v. Gilpin et al.*, 4 Fish. P. C. 50.—LEAVITT, 1859.

75. "It is well settled that the mere making of a patented machine, though it is neither used nor sold, is an infringement of the right of the patentee for which an action may be maintained."—*Ib.*

76. "Forms are nothing. If forms were essential, every patent that had been granted could

be successfully contested." *Conover v. Rapp*, 4 Fish. P. C. 57.—INGERSOLL, 1859.

77. Defendant's patent can have no effect upon plaintiff's rights.—*Ib.*

78. Complainants made and sold rubber shoes vulcanized under the Goodyear patent. Defendant purchased these old, worn-out shoes, ground them to powder, mixed them with coal tar, litharge, resin and lamp-black and made rubber shoes therefrom. Respondent was held not to infringe. *Goodyear et al. v. Beverly Rubber Co.*, 1 Clifford, 348.—CLIFFORD, 1859.

79. A patent owner "having manufactured the material and sold it for a satisfactory compensation, whether as material or in the form of a manufactured article, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters-patent; and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to it, or impressed upon it, by the act of Congress under which the patent was granted."—*Ib.*

80. "In order to determine whether the mechanism of any other machine is the same as the plaintiff's, we may not only look at the mechanism itself, that is, the devices and arrangement of them, but also at their mode of operation, and their effects or results. If the mode of operation be different, it is evidence that the mechanism is different. Or, if the result is different, then, reasoning from effects to causes, we may presume that some new instrumentality has been introduced. If, upon examining the mechanism, we find that it is substantially different in two machines, then they are not the same, although they may produce the same result. That would be the common case where the same end is attained by different processes or instrumentalities. But if a materially different result is reached, it is evidence of some new cause or means, although the mechanism may apparently be substantially the same. Hence, a greater degree of utility being achieved by machines is evidence, and sometimes conclusive evidence, of novelty in the means or instrumentalities which are used." *Eames v. Cooke*, 2 Fish. P. C. 146.—SPRAGUE, 1860.

81. Complainants' patent was for an improvement in fireplaces, consisting of the combination of different elements. One of the elements being already in existence, defendant added the other, and the court doubted whether defendant infringed. *Dodge et al. v. Card*, 1 Bond, 393.—LEAVITT, 1860.

82. An action can be sustained for the infringement of either claim of a patent. *Lee et al. v. Blandy et al.*, 1 Bond, 361.—LEAVITT, 1860.

83. It "is familiar law that the jury are not to inquire whether the two things are identical in structure, form, or dimensions, but whether they involve substantially the same mechanical principles. It will be palpable to the jury that it would be a reproach to the patent system to say that the rights of the patentee may be violated or infringed by a mere colorable pretence, or by the use of a thing which, having a different appearance, nevertheless involves essentially the principles of the patented invention." *Judson v. Cope et al.*, 1 Bond, 327.—LEAVITT, 1860.

84. "It is not necessary to constitute infringement that a man should work by the specifications contained in the patent. He might not even know that there was such a patent, and yet infringe it." *Matthews v. Skates et al.*, 1 Fish. P. C. 602.—JONES, 1860.

85. If defendants have taken what belongs to complainant "they have infringed, although with the improvements the machine may be much more useful than it would be without them. This is a well-known principle of patent law." *Howe v. Morton et al.*, 13 M. L. R. 70.—SPRAGUE, 1860.

86. A patent is infringed if one claim thereof is infringed. *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

87. "Where there is a charge of infringement, it is within the power of the party charged to bring into court the article he uses, so that the court can see what he does use. It is his duty to tell the court what he uses and to describe it." *Ely v. Monson & Brimfield M'f'g Co.*, 4 Fish. P. C. 64.—SPRAGUE, 1860.

88. "When the plaintiff alleges that defendant uses a certain machine which he describes, and defendant does not disprove or deny, it is an admission that he uses such a machine."—*Ib.*

89. Goodyear conveyed to A the right to use his patented compound, known as "vulcanized india-rubber," in the manufacture of "hose pipe and tube," or "conduit hose pipe and tube," and no further. He conveyed to B the exclusive right to use the said rubber, "in combination with all wringing, washing, and starching machines." The licensee, A, sold rubber pipe to C, who used it in the manufacture of wringer rolls. C was held not to be an infringer. *Metropolitan Washing Machine Co. v. Earle et al.*, 3 Wall., Jr., 320.—GRIER, 1861.

90. A patentee licensed a railroad company to use his patent on brakes. The railroad company farmed out the railroad to one of its cred-

itors, and this creditor was sued for infringement. *Held* not to infringe. *Emigh v. Chamberlain*, 1 Bissell, 367.—MILLER, 1861.

91. The respondents being regularly engaged in manufacturing, contended that the alleged infringing acts were done simply by way of experiment. The court held them to be infringers. *Poppenhusen v. Falke et al.*, 4 Blatch. 493.—SHIPMAN, 1861.

92. "It has been held, and no doubt is well settled, that an experiment with a patented article for the sole purpose of gratifying a philosophical taste or curiosity is not an infringement of the rights of the patentee."—*Ib.*

93. "The addition of a useless appendix to a machine or a useless element to a process protected by a patent does not defeat the charge of infringement."—*Ib.*

94. The question in all cases where infringement is disputed is, "Whether by mere change of form the substantial, the essential part of the combination is retained? And perhaps no better criterion can be adopted than to determine whether, in the change that is made, there is an exercise of mere mechanical skill or inventive power. If the former merely, then it may, with confidence, be declared that the substantial, the essential part of the combination is not changed; if the latter, then the principle is not the same." *Case v. Brown*, 1 Bissell, 382.—DRUMMOND, 1862.

95. As regards the result attained by a patented machine, "any one can produce the same results by other and different modes, and still not violate the claim of the plaintiff. In order to constitute a violation there must be a use of the same method substantially as that adopted by the plaintiff."—*Ib.*

96. "But a mere change of form—for example, in the lever and its mode of operation, the adoption of some equivalent suggested by mere mechanical skill—would not prevent it from being an infringement; otherwise, if the change were one of substance and requiring the exercise of inventive power."—*Ib.*

97. "The patent itself, with all the privileges which it confers, is the creature of the statute; and it is clear there can be no remedy for the violation of a patent except as it is conferred by the statute." *Jacobs v. Board of Commissioners of Hamilton County*, 1 Bond, 500.—LEAVITT, 1862.

98. The burden of proof is upon the complainant to show infringement by defendant. *Hayden v. Suffolk Mfg Co.*, 4 Fish. P. C. 86.—SPRAGUE, 1862.

99. Complainant licensed a railroad company

to use a patent on brakes. The road was afterward consolidated with other roads, and the improvement used on the whole consolidated road. The use on other than the old road was held to be an infringement. *Emigh v. C. B. & Q. R. R. Co.*, 1 Bissell, 400.—DRUMMOND, 1863.

100. Where A sues B for the infringement of a patent, and B's machine is licensed under the patent of C, who receives royalty from B, C is not, on that state of facts, an infringer. *Hussey v. Bradley et al.*, 5 Blatch. 134.—HALL, 1863.

101. "Every man has a right to make an improvement in a machine and evade a previous patent, provided he does not invade the rights of the patentee." *Burr v. Duryee*, 1 Wallace, 531.—SUP. CT. 1863.

102. The granting of a patent to defendants for their machine is *prima facie* evidence that defendants' machine does not infringe complainant's prior patent. *Burden v. Corning et al.*, 2 Fish. P. C. 477.—NELSON and HALL, 1864.

103. Where a party is licensed to make certain goods under a patent, he is an infringer if he makes other goods under that patent. *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Clifford, 351.—CLIFFORD, 1864.

104. "The improvement of one element of a combination, though meritorious, does not give the right to use or appropriate the original combination." *Stainthorpe et al. v. Humiston*, 4 Fish. P. C. 107.—HALL, 1864.

105. The president of a railroad made a contract with another person to furnish certain cars containing a certain patented improvement. The cars were furnished provided with such improvement. The making thereof was held not to be any infringement of the patent by the president. *Lightner v. Brooks*, 2 Clifford, 287.—CLIFFORD, 1864.

106. "Where parties contract for implements, machines, or structures to contain one of the modern patented improvements, without knowledge that the contractor is an infringer or intends to use the improvement without authority, it is not the just and legal implication from the contract that the party ordering the article contemplates that the contractor will violate the rights of the patentee, or that he thereby commands or directs an infringement."—*Ib.*

107. Although the president of a railroad company may be an agent of the railroad company for the purpose of contracting for rolling stock, it does not follow that he is the general agent of the corporation.—*Ib.*

108. "Where the patentee is the original inventor of that which is described in his patent as his invention, he has the right to treat as in-

fringers all who make and sell substantially the same thing, even though the infringing machine or structure may be an improvement on the one patented." *Forbes et al. v. Barstow Stove Co.*, 2 Clifford, 379.—CLIFFORD, 1864.

109. "The defence that the article produced is not as good as the patented article is . . . untenable and inadmissible, especially if it appear that it embodies all the peculiarities or characteristics which distinguish the article alleged to be infringed."—*Ib.*

110. Infringement is a wrongful act in the nature of a trespass. *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

111. Stamping the date of complainant's patent upon defendants' goods under a license is evidence that defendants' goods come within the scope of complainant's patent. *Jones v. Van Kirk et al.*, 2 Fish. P. C. 586.—GRIER, 1865.

112. "It cannot be admitted that an infringer can successfully defend himself against the charge of infringement by the allegation and proof that his machine is not as good as that of the inventor whose right he has invaded. The rights of the inventor are oftentimes affected as injuriously by the sale of poor machines in the market as by those made more strictly in conformity to his patent." *Roberts v. Harnden*, 2 Clifford, 500.—CLIFFORD, 1865.

113. "The patent laws of the United States afford no protection to inventions beyond or outside the jurisdiction of the United States; but this jurisdiction extends to the decks of American vessels on the high seas, as much as it does to all the territory of the country, and for many purposes it is even more exclusive." *Gardiner v. Howe*, 2 Clifford, 462.—CLIFFORD, 1865.

114. Plaintiff's patent was for knitting-machine needles; the claim of the patent was for "the application of a latch or tongue to the hook of the needle." Defendant purchased one of the machines accompanied by the patented needles; when the needles were worn out defendant made new ones. Defendant was held to infringe. *Aiken v. Manchester Print Works*, 2 Clifford, 435.—CLIFFORD, 1865.

115. In an equity action an equitable right under the patent is a sufficient defence. *Chase et al. v. Walker et al.*, 3 Fish. P. C. 120.—CADWALADER, 1866.

116. Sales of infringing machines by a party who has no interest therein amount to infringement. *Potter et al. v. Crowell et al.*, 1 Abbott, 89.—WITHEY, 1866.

117. "The man who has made the first invention has made it for all the uses to which it

is applicable." *Woodman v. Stimpson*, 3 Fish. P. C. 98.—LOWELL, 1866.

118. Where a bill of complaint explicitly charged infringement, and one witness for complainants explicitly testified thereto, and there were corroborating circumstances, infringement was held to be established. *Goodyear et al. v. Berry*, 2 Bond, 189.—LEAVITT, 1868.

119. "The act of Congress confers upon the patentee and his assigns the exclusive right to make, to use, or to sell to others to be used, the article patented. It is, therefore, an infringement to make or manufacture a patented article, though it is never used by the maker. It is likewise an infringement to use a patented article, though made by another. It is also an infringement to sell to others the article when it is manufactured by another. The law vests the exclusive right to do all these three things in the patentee, and hence for another to do one or all of them is an infringement." *Haselden v. Ogden*, 3 Fish. P. C. 378.—SHERMAN, 1868.

120. Although a license may give to a licensee the option of taking a new license when it expires, yet if the licensee do not take such a license, but refuses so to do, the licensee becomes an infringer by continuing to work under the patent, even though willing to stand by the terms of the old license. *England v. Thompson et al.*, 3 Clifford, 271.—CLIFFORD and LOWELL, 1869.

121. A patent in suit was for defensive armor for marine or land batteries, and consisted of iron armor plates laid in the usual way against the outer timbers of the vessel. The defendants acted as the agent of the Government in procuring such wooden armor and outside plating to be put on. The work was done by the day's work, and by the pound; the Government paid the bills through the defendants. Defendants were held not to infringe, the court saying: "To hold that workmen and employes of the Government, who do work for it upon a vessel owned by it and are paid by it for doing such work, . . . can be held liable . . . for infringing a patent . . . would be, in effect and substance, to allow the Government itself to be sued, in the guise of a suit against its workmen, and would lead to embarrassments of the operations of the Government which might prove of serious detriment." *Heaton et al. v. Quintard et al.*, 7 Blatch. 73.—BLATCHFORD, 1869.

122. "There are always those who are ready to gather where they have not sown. The number and ardor of the conflicts is usually in proportion to the value of the prize at stake." *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

123. The city of Louisville advertised a contract for the laying of some Nicholson patent pavement. A, a licensee under the patent, permitted a contractor, B, to lay the pavement, giving notice that he should still hold the city. The defendant city was held not liable. *Bigelow v. City of Louisville*, 3 Fish. P. C. 602.—BAL-LARD, 1869.

124. The possession of a patent by the defendants, for their infringing device, does not constitute a defence. *Doughty v. West et al.*, 6 Blatch. 429.—BLATCHFORD, 1869.

125. Additions to a patented device do not avoid infringement. *Howes v. Nute*, 4 Cliff. 173.—CLIFFORD, 1870.

126. "Serious doubts were formerly entertained whether the letters-patent of the respondent were admissible in any view of the case, and it is still the settled rule that the question of infringement cannot be controlled or materially affected by such consideration." *Goodyear Dental Vulcanite Co. et al. v. Gardner*, 3 Cliff. 408.—CLIFFORD, 1870.

127. "It is a familiar rule that a patent for an improvement does not, *per se*, give the right to use the thing improved." *Arkel et al. v. J. M. Hurd Paper Bag Co.*, 7 Blatch. 475.—WOODRUFF, 1870.

128. "The Government cannot, after the patent is issued, make use of the improvement any more than a private individual without license of the inventor or making compensation to him." *United States v. Burns*, 12 Wall. 246.—SUP. CT. 1870.

129. A city bought a patented coupling in question before the reissue of the patent in suit, and was held liable for the use thereof after the reissue. *Bliss v. City of Brooklyn*, 8 Blatch. 533.—BENEDICT, 1871.

130. The owner of a patent for an improvement in the manufacture of sewing silk, for the consideration of one thousand dollars granted unto "Howarth & Co. the right to use the aforesaid invention for the purpose of manufacturing a quantity of silk not exceeding one hundred [100] pounds per week during the term for which said letters-patent are granted." The firm of Howarth & Co., consisting of two partners, subsequently dissolved, one of the partners taking the business, and this partner continued the use of the invention in the shop of, and delivered the whole product to, a third party. Injunction against his partner was refused. *Belding et al. v. Turner*, 8 Blatch. 321.—SHIPMAN, 1871.

131. In a court of equity any equitable title under the patent in suit is as available as is a

legal title, so far as defendant is concerned. *Continental Windmill Co. v. Empire Windmill Co.*, 8 Blatch. 295.—WOODRUFF, 1871.

132. "The mere making of a machine, or the selling of a machine to others to use, or the use of a patented machine, is an infringement of the patent." *Carter et al. v. Baker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

133. A person cannot, without infringement, "use a patented device by constructing it in a slovenly or imperfect manner, so that it will accomplish the same kind of result as that intended by the inventor, but not so perfectly." *Chicago Fruit House Co. v. Busch et al.*, 2 Bissell, 472.—BLODGETT, 1871.

134. "When a patented product passes lawfully into the hands of a purchaser without condition or restriction, it is no longer within the monopoly or under the protection of the patent act, but outside of it." *Adams v. Burke*, 1 Holmes, 40.—SHEPLEY, 1871.

135. Where defendants claim under patents of their own, they are *prima facie* protected in their rights. *Brown v. Selby et al.*, 2 Bissell, 457.—DRUMMOND, 1871.

136. Applying a patented improvement in folding beds at both ends of the bed, instead of at one end only, does not avoid infringement. *Kittle et al. v. Frost et al.*, 9 Blatch. 214.—BLATCHFORD, 1871.

137. Where defendant's machine, though otherwise a substantial reproduction of complainants' patented machine, is so arranged as to produce the result imperfectly or partially, defendant does not thereby avoid infringement. *Union Paper Bag Mach. Co. et al. v. Binney*, 5 Fish. P. C. 166.—LOWELL, 1871.

138. Complainants' patent for a composition of matter stated the proportions of the ingredients approximately. Defendants' answer admitted using the ingredients, but averred that the proportions were different. No other evidence being offered, the court held infringement not proved. *Francis et al. v. Mellor et al.*, 1 Pa. Leg. Gaz. Rep. 291.—MCKENNAN, 1871.

139. "It cannot be that where a useful machine is patented as a combination of parts, two or more can engage in its construction and sale, and protect themselves by showing that, though united in an effort to produce the same machine and sell it and bring it into extensive use, each makes and sells one part only, which is useless without the others; and still another person, in precise conformity with the purpose in view, puts them together for use. If it were so, such patents would, indeed, be of little value. In such case all are *tort feasers*, engaged in a com-



mon purpose to infringe the patent, and actually, by their concerted action, producing that result. In a suit brought against such party or parties, a question might be raised whether all the actors in the wrong should be made parties defendant; but . . . even at law, and certainly when non-joinder was not pleaded, the want of all parties should be no defence. Each is liable for all the damages." *Wallace et al. v. Holmes et al.*, 9 Blatch. 65.—WOODRUFF, 1871.

140. The patent in question was for a lamp-burner, and the combination claimed included the chimney, which defendants did not sell. Defendants were held to infringe.—*Id.*

141. Although defendant may have a patent for his device, and his device may be an improvement over complainants', these facts do not prevent him from being an infringer. *Fales et al. v. Wentworth*, 1 Holmes, 96.—SHEPLEY, 1872.

142. Defendants are none the less infringers because the complainant may be infringing a patent of defendants. *Young v. Lippman et al.*, 9 Blatch. 277.—BLATCHFORD, 1872.

143. "A patent for a device cannot be avoided by dividing it into two parts, which, when combined, produce the same result in substantially the same way." *Wheeler, Jr., v. Clipper Mower & Reaper Co.*, 10 Blatch. 181.—WOODRUFF, 1872.

144. "Section 9 of the act of March 3d, 1837, . . . is designed to allow a patentee to recover on one claim of his patent, notwithstanding other claims in it are void for want of novelty. But it requires that the parts claimed without right, and the parts rightfully claimed, shall be definitely distinguishable, as a matter of fact, on the face of the claims—that is, be definitely distinguished from each other in the claims." *Rumford Chemical Works v. Lauer*, also *Hecker*, 10 Blatch. 122.—BLATCHFORD, 1872.

145. The claim in complainants' patent for fire-arms was: "'The combination, substantially as set forth, of the breech-closing piece, moving longitudinally with the barrel, the cartridge chamber at the butt of the barrel, and the reciprocating extracting hook, arranged in such a manner that its bill enters within the periphery of the said chamber, so that it may engage with the flange of the cartridge therein, when the breech is closed by the forward movement of the closing piece, even though the cartridge be not expanded.'" Defendant sold the gun but not the cartridge, and was held to infringe. *Renwick et al. v. Pond*, 10 Blatch. 39.—BLATCHFORD, 1872.

146. "In a court of equity, an equitable title

is sufficient, as against the patentee and those claiming under him, with notice of the complainant's rights." *Ruggles v. Eddy et al.*, 10 Blatch. 52.—WOODRUFF, 1872.

147. Defendants held a license to use a patented machine on their own premises. Another party used it on other premises not with defendants' consent, but with defendants' acquiescence. Defendants were held to infringe. *Steam Cutter Co. v. Sheldon et al.*, 10 Blatch. 1.—WOODRUFF, 1872.

148. Defendants had a license to use a machine, and used it; they had a right to use additional machines upon making certain payments. They used other infringing machines, and after suit was brought tendered the patent owners money as said payments. Defendants were held to infringe.—*Id.*

149. Where a claim to certain features was limited to their use in a bridge, and defendants simply sold such features, defendants were held not to infringe. *Keystone Bridge Co. v. Phoenix Iron Co. et al.*, 5 Fish. P. C. 468.—MCKENNAN, 1872.

150. "If the question was between a single patented device, conceded to be new, and a device claimed to infringe because an equivalent, the alleged infringer could not protect himself by showing that, although his device was an equivalent of the patented device in all its functions, and in its construction and mode of operation, yet by other or additional features it possessed further and other useful functions." *Sarven v. Hall et al.*, 9 Blatch. 524.—WOODRUFF, 1872.

151. "If a party adopts a different mode of carrying the same principle into effect, and the principle admits of different forms, there is an identity of principle, though not of mode. . . And it makes no matter what additions to or modifications of a patentee's invention a defendant may have made, if he has taken what belongs to the patentee he has infringed, although with his improvement the original machine or device may be much more useful." *McComb et al. v. Brodie*, 1 Woods, 153.—WOODS, 1872.

152. "The man who made the first invention has it for all the uses to which it is applicable." —*Id.*

153. "When the means, devices, and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device, or means for all the uses and purposes to which it can be applied—to every function, power, and capacity of his patented machine or device—without regard to the purposes to which

he supposed originally it was most applicable." —*Id.*

154. "A use of a patented invention of the patentee is not justified by any innocence of design on the part of the defendant." *Hawes v. Washburn et al.*, 5 O. G. 491.—WOODRUFF, 1872.

155. If any claim of a patent is infringed, the patent is infringed. *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

156. Where A has one patent, and B has patent for improvements thereon, neither can (unlicensed) use the patent of the other without infringing. *Bachelder v. Moulton et al.*, 11 Blatch. 304.—BLATCHFORD, 1873.

157. After the Patent Office has decided that there is no conflict between the claims of two patents, that judgment is *prima facie* evidence of no infringement. *Smith et al. v. Woodruff*, 1 MacArthur's P. C. 459.—HUMPHREYS, 1873.

158. Although defendants may graft valuable improvements upon the patented improvement, they do not thereby escape infringement. *Am. Nicholson Pavement Co. v. City of Elizabeth et al.*, 6 Fish. P. C. 424.—NIXON, 1873.

159. Where two parties have been jointly infringing, and one of them has a release, such release does not discharge the other infringer. *Ingels v. Mast*, 6 Fish. P. C. 415.—SWING, 1873.

160. Where parties having a license under a patent transcend the right given by the license they infringe. *Wood v. Wells et al.*, 6 Fish. P. C. 382.—WOODRUFF, 1873.

161. Where defendant's foreman had sold an infringing article, and defendant had received the profits therefrom, defendant was held to be an infringer. *Jones et al. v. Sewall*, 3 Clifford, 563.—CLIFFORD, 1873.

162. Defendants do not avoid infringement because their device is so organized as to attain the desired useful result in a less degree than such result is attained in the patented device of complainant. *Hamilton v. Ives et al.*, 6 Fish. P. C. 244.—LONGYEAR, 1873.

163. "The sale by a person who has full right to make, sell, and use such a machine, carries with it the right to make use of that machine to the full extent to which it can be used in point of time." *Adams v. Burks*, 17 Wall. 453.—SUP. CT. 1873.

164. A, as a licensee under a patent, had the right to manufacture, sell, and use the patented coffin lids within ten miles of Boston. B, living outside that circle, purchased one of the patented improvements in Boston and used it outside the circle. B was held not to infringe. The scope

of the decision was specially limited to articles which perish in the first use thereof.—*Id.*

165. Defendants, being sued for infringement of a nickel-plating patent, showed that his solution had some ingredients not described in the patent. The court found these ingredients to be inert and the defendant an infringer. *United Nickel Co. v. Keith*, 1 Holmes, 328.—SHEPLEY, 1874.

166. Where a party's manufacturing rights are limited by a license, and at his insolvency another party buys the manufactures in question, the latter party, in selling these manufactures, would be an infringer in any case where the party first mentioned would be an infringer. *Moody v. Taben*, 1 Holmes, 325.—SHEPLEY, 1874.

167. The patented machine was a printing-press. The defendants bought their press of a company which had the power to convey to them the machine, with the right to use it anywhere in the United States. Defendants were held not to be infringers, the court saying: "The mere fact that the patentees, in violation of a covenant which they had made with other parties not to do so, had conveyed to them the unrestricted right to use the patented inventions, did not make them infringers of any right under the letters-patent." *Hill et al. v. Whitcomb et al.*, 1 Holmes, 317.—SHEPLEY, 1874.

168. The question of infringement does not depend upon what capacity the device used by defendant has or has not outside of the conditions in which defendant intended to operate. *Russel & Erwin M'fg Co. v. P. & F. Corbin M'fg Co.*, 12 Blatchford, 36.—WOODRUFF, 1874.

169. "If several different parties conspire together, one to make one part of a patented machine, another another, and so on, in order to avoid responsibility, it may well be that each party so conspiring and engaged in making a complete machine would nevertheless be liable, although he himself should actually make but one part of the perfected machine." *Coolidge v. McCone*, 2 Sawyer, 571.—SAWYER, 1874.

170. Defendant cast certain parts for customers from patterns furnished by them without question as to their use. These parts in themselves were not infringements, and the court held that defendant did not infringe.—*Id.*

171. The improvement of a patented machine by defendants does not prevent them from being infringers. *Wells v. Gill et al.*, 1 Bann. & Ard. 77.—NIXON, 1874.

172. "Whatever are the necessary and legitimate results of an invention—whether the pat-

entee comprehends them all or not—belong to him when he has complied with the requirements of the patent law, to protect him in its enjoyment and use against infringement.” *Wells v. Jacques et al.*, 1 Bann. & Ard. 60.—NIXON, 1874.

173. The improvement of a patented machine by a defendant does not remove him from the category of infringers.—*Ib.*

174. Making in this country, for export to a foreign country, machines which are patented here is an infringement. *Dorsey Revolving Harvester Rake Co. et al. v. Bradley M'f'g Co.*, 12 Blatch. 202.—WOODRUFF, 1874.

175. A single instance of using the patented improvement amounts to infringement and entitles complainant to a decree. *Am. Wood Paper Co. v. Fibre Disintegrating Co.*, 23 Wall. 566.—SUP. CT. 1874.

176. Though defendants are improvers, that does not prevent them from being infringers. *Le Baw et al. v. Hawkins et al.*, 1 Bann. & Ard. 428.—NIXON, 1874.

177. With infringers it is often “the old story of taking up the thread of another’s invention or combination, improving upon it by the substitution of well-known equivalents, and then claiming the whole of the invention. In the present state of the mechanical arts it is the most usual and obvious mode of infringing the rights of others, but none the less an injury against which it is the duty of the court to give protection.”—*Ib.*

178. “If the licensee uses the patented invention beyond the limits of the license or grant, in a way not authorized by the license or grant, then there has been a violation of a right secured to the patentee under a law of the United States giving to him the exclusive right to use the thing patented, although such licensee performs, according to their terms, all the covenants entered into by him.” *Magic Ruffle Co. v. Elm City Co.*, 13 Blatch. 151.—SHIPMAN, 1875.

179. “Improvements will not justify the appropriation and use by the defendant of that which has been patented to others.” *Westinghouse, Jr., v. Gardner & Ranson Air Brake Co.*, 2 Bann. & Ard. 55.—SWAYNE and WELKER, 1875.

180. One who buys at an auction, as old iron, the dismantled parts of a patented machine, and reconstructs and uses the machine, is an infringer. *Wortendyke v. White*, 2 Bann. & Ard. 25.—NIXON, 1875.

181. Where A is under injunction against infringing the patent of B, it is proper that B should get C to apply to A and purchase the patented thing from him in order to ascertain

whether A is infringing; and in such a case no suit for conspiracy will lie by A against B and C. A is an infringer under the circumstances. *Knowles v. Peck et al.*, 42 Conn. 386.—PARDEE, 1875.

182. The patent in suit was for an improvement in organs. Complainants had licensed large numbers of manufacturers to use the improvements, and were ready to license every reputable manufacturer who should apply. Defendants were manufacturers of supplies of materials which were elemental parts of organs and other musical instruments; they sold the same to organ manufacturers. Whether the parts thus sold would become infringements depended upon their location and arrangement in the manufacture of the organs. Defendants were held not to be infringers. *Saxe et al. v. Hammond et al.*, 1 Holmes, 456.—SHEPLEY, 1875.

183. “Different parties may all infringe by respectively making or selling, each of them, one of the elements of a patented combination, provided those separate elements are made for the purpose and with the intent of their being combined by a party having no right to combine them. But the mere manufacture of a separate element of a combination, unless such manufacture be proved to have been conducted for the purpose and with the intent of aiding infringement, is not in and of itself infringement. . . . A patent is valid for a new combination of old elements. A person who uses one or more of the old elements is not an infringer unless he uses the new combination.”—*Ib.*

184. Although a device used by a defendant may serve some other and additional purpose than that served by the patented device, such fact will not prevent defendant’s device from being an infringement. *Kendrick v. Emmons*, 2 Bann. & Ard. 208.—SHEPLEY, 1875.

185. “The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not.” *Roberts v. Ryer*, 91 U. S. 150.—SUP. CT. 1875.

186. “To constitute an infringement, the thing used by the defendant must be such as substantially to embody the patentee’s mode of operation, and thereby to attain the same kind of result as was reached by his invention. It is not necessary that the defendant should employ the plaintiff’s invention to as good advantage as he employed it, or that the result should be the same in degree.” *Sewall v. Jones et al.*, 91 U. S. 171.—SUP. CT. 1875.

187. Where the patent in suit is for a process,

and defendants substitute for one of its steps another step which the patentee has discarded as injurious, such defendants do not infringe. *Jones et al. v. Merrill et al.*, 8 O. G. 401.—WALLACE, 1875.

188. One test of infringement is whether or not the process adopted by the alleged infringer is a sufficient departure from that of the patentee to support a patent.—*Id.*

189. Where A is an infringer through an innocent purchase which the act of B made possible, A will not be held responsible to B as an infringer until after B gives A notice of his rights. *Consolidated Fruit Jar Co. v. Whitney et al.*, 2 Bann. & Ard. 375.—NIXON, 1876.

190. A claim in complainant's patent was: "4. The use of phosphoric acid or acid phosphates, when employed with alkaline carbonates, as a substitute for ferment or leaven in the preparation of farinaceous food." Defendant manufactured and sold a self-raising flour; the materials mixed with the flour were the bicarbonate of soda and acid phosphate. Defendant advertised and sold this self-raising flour, and claimed in his advertisements that his self-raising flour was an invaluable article for producing in a few minutes, by the addition of cold water only, without yeast or heat, the most nutritious and wholesome bread. It was held that on the evidence defendant was an infringer, or at least the burden was upon him of showing that the self-raising flour prepared by him was in fact not used for bread-making. *Rumford Chemical Works v. Hecker*, 2 Bann. & Ard. 351.—NIXON, 1876.

191. The fact that the defendant's device is a better one than complainant's, or even performs an additional service, does not prevent it from being an infringement. *Carsteadt v. U. S. Corset Co.*, 13 Blatch. 371.—SHIPMAN, 1876.

192. The patent in suit was for a carriage having a certain adjustable top. Defendants made the top and sold it to manufacturers of carriages. Defendants were held to infringe. *Richardson et al. v. Noyes et al.*, 2 Bann. & Ard. 398.—CLIFFORD and LOWELL, 1876.

193. He who, without license, makes a patented machine so that it can be used to infringe is himself an infringer. *Holbrook et al. v. Small*, 2 Bann. & Ard. 396.—LOWELL, 1876.

194. Complainants' patent was for a nail-puller. Defendant set up that he was simply a salesman, with no interest otherwise. He was held to be an infringer, the court saying: "A wrongdoer cannot set up that he is doing wrong on account of a third person as a bar to his own responsibility. The principal also may be liable,

if the injured party elects to look to him; but the person who is actually doing the wrong cannot escape liability." *Maltby et al. v. Bobo*, 14 Blatch. 53.—JOHNSON, 1876.

195. The Government cannot make use of a patented improvement without license any more than a private individual. *Brady v. Atlantic Works*, 4 Cliff. 408.—CLIFFORD, 1876.

196. "Contractors of the Government derive no power, . . . by virtue of their contract, to take the property of private individuals without their consent, and to use and apply the same in fulfilling their contract obligations."—*Id.*

197. "Because the invention has been used in an imperfect condition or altered slightly in one particular, without serious loss, is no proof that there was no invention, or that the use of it in its altered condition was no infringement." *Ill. Cent. R. R. Co. v. Turrill*, 94 U. S. 695.—SUP. CT. 1876.

198. "Where the invention is embodied in a machine, the question of infringement is best determined by a comparison of the machine or apparatus constructed or used by the respondent with the mechanism described in the specification of complainants' patent." *Fuller et al. v. Yentzer et al.*, 94 U. S. 288.—SUP. CT. 1876.

199. "Public employment is no defence to the employé for having converted the private property of another to public use without his consent and without just compensation. Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that the provision is as applicable to the Government as to individuals, except in cases of extreme necessity in time of war and of immediate and impending public danger." *Cammeyer et al. v. Newton et al.*, 94 U. S. 225.—SUP. CT. 1876.

200. The Government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor, or making him compensation.—*Id.*

201. Respondents do not avoid the charge of infringement because they have improved upon complainants' patented device. *Marsh et al. v. Seymour et al.*, 97 U. S. 348.—SUP. CT. 1877.

202. Where a patented pavement has been laid under a license, the fact that the license fee has not been paid does not make it an infringement. *Stow v. City of Chicago*, 8 Bissell, 47.—BLDGGETT, 1877.

203. The fact that defendant's device works more satisfactorily than the device of the patent in suit will not necessarily prevent defendant's device from being an infringement. *Adams v.*

*Johiet M'fg Co.*, 3 Bann. & Ard. 1.—BLODGETT, 1877.

204. "To constitute an infringement there must be, first [1], similarity of design; [2] substantially identity of purpose or result." *Henderson v. Cleveland Co-operative Stove Co.*, 2 Bann. & Ard. 604.—BROWN, 1877.

205. The purchase of a patented machine does not authorize the continued use of a patented machine, unless it is the identical machine so purchased. *Union Metallic Cartridge Co. v. U. S. Cartridge Co.*, 2 Bann. & Ard. 593.—SHEPLEY, 1877.

206. "A constructor of a machine infringes if he makes his machine with express reference to a result which he knows will happen when the machine is put to its use, and which result, if originally introduced in the machine, is an infringement." *Am. Diamond Rock-Boring Co. v. Sullivan Mach. Co. et al.*, 14 Blatch. 119.—SHIPMAN, 1877.

207. Where a bill of complaint charges infringement, and an answer denies it under oath, "it is necessary . . . for the plaintiff to sustain the allegation of infringement by a preponderance of evidence." *Am. Middlings Purifier Co. v. Atlantic Milling Co.*, 4 Dillon C. C. 100.—MILLER and DILLON, 1877.

208. "When a substitute is used for one ingredient in a patented combination which has every property and performs every function of the original in the combination, it does not cease to be an equivalent because, in addition, it does something more and better." *Atlantic Giant Powder Co. v. Goodyear*, 3 Bann. & Ard. 161.—SHEPLEY, 1877.

209. A board of public works charged with the duty of supervising the grading and paving of streets cannot escape infringement by showing that the street inspectors working under them did not obey orders. *Phillips et al. v. City of Detroit*, 2 Flippin, 92.—BROWN, 1877.

210. The patent in suit being for an improvement in cans, infringement was shown by the sale of the can by the defendants, purchased for and by the direction of the complainants. Defendants claimed that complainants so participated in the transaction that defendants could not be held liable. The court said that if this was all that was in the case, defendants' contention would be a correct one. *De Florez et al. v. Reynolds et al.*, 14 Blatch. 505.—WHEELER, 1878.

211. The fact that defendant's machine is more simple and possibly better than complainant's patented machine does not prevent it from being an infringement. "The law does not al-

low even so meritorious a class of men as inventors to appropriate the property of other people to their own use without making satisfactory compensation." *Odiorne v. Denney*, 3 Bann. & Ard. 287.—NIXON, 1878.

212. "Two patents of" a "kind may both be valid where the second is an improvement upon the first, in which event, if the second includes the first, neither can lawfully use that of the other without the other's consent. Plainly the second patent could not be used without the consent of the owner of the first, nor could the owner of the first patent use the second without the consent of the owner, as the patent contains an invention which the owner of the first patent never made." *Star Salt Caster Co. et al. v. Crossman et al.*, 4 Cliff. 568.—CLIFFORD, 1878.

213. "In a court of equity a party holding an equitable title cannot be ousted of his equitable rights by the holder of the legal title, who in such case stands in a court of equity as trustee for the use of the party beneficially interested." *Whiting v. Graves et al.*, 3 Bann. & Ard. 222.—SHEPLEY, 1878.

214. "Where the invention is embodied in a machine, manufacture, or product, the question of infringement, which is a question of fact, is ordinarily best determined by a comparison of the exhibit made by respondent with the mechanism described in the complainants' patent." *Bates et al. v. Coe*, 98 U. S. 31.—SUP. CT. 1878.

215. An inventor patented an improved driving gear to be applied to a threshing-machine. A person who applied the same driving gear to a sewing-machine was held to be an infringer. *Burke v. Partridge*, 58 N. H. 349.—FOSTER, 1878.

216. Where a person's right under a patent is wholly of the right to make and sell for use within a certain district, it is an infringement to use it outside of that district.—*Id.*

217. Where a person is charged with infringement and does not deny it in his answer, and the patented machinery is proved to be in his possession, infringement is sufficiently shown. *Gear v. Fitch*, 3 Bann. & Ard. 573.—LOWELL, 1878.

218. Where a magnifying glass and calipers are needed to determine whether a certain shape is an infringing shape, the question becomes too fine to base judgment of infringement upon it. *Draper et al. v. Wattles*, 3 Bann. & Ard. 618.—LOWELL, 1878.

219. A claim of complainant's patent was: "The electro-deposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in

such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid or any other acid or alkaline reaction." The court construed this claim to be "a claim to the electro-deposition of nickel by means of any solution of the double sulphate of nickel and ammonia, or of any solution of the chloride of nickel and ammonium, however such solution may be prepared, provided such solution is so used as to be free, while the electro-deposition of the nickel is going on, from the presence of potash, soda, alumina, lime, or nitric acid or alkaline reaction." Defendants introduced the objectionable ingredients into their solutions, but in a manner so that they remained inert. Defendants were held to infringe. *United Nickel Co. v. Harris et al.*, 15 Blatch. 319.—BLATCHFORD, 1878.

220. Although defendant's article may be so much of an improvement on complainant's article as to drive it from the market, that fact does not demonstrate that defendant does not infringe. *Turrel v. Spaeth*, 3 Bann. & Ard. 458.—NIXON, 1878.

221. The complainant's patent in suit was the Cumming patent for artificial gums and palates. The owner of a dental plate made under this patent had it repaired by an unlicensed dentist. Dentist was held to infringe. *Goodyear Dental Vulcanite Co. v. Preterre*, 15 Blatch. 274.—WHEELER, 1878.

222. The complainant's patent in suit was for a combination of saponine extracted from vegetable products with syrups, ciders, beers, ales, and other liquids containing carbonic acid gas, either natural or otherwise. Defendant sold an extract containing saponine to persons intending to use it in the combination claimed in the patent, and it was advertised and sold for that very purpose. Defendant was held to infringe. *Bouker v. Dows*, 3 Bann. & Ard. 518.—LOWELL, 1878.

223. Complainant's patent in suit was for a buckle for cotton ties. Complainant sold the buckles with the words printed on them, "Licensed to use once only." Up to the season of 1876 there was printed on complainant's bill-heads and invoices, "The cotton ties sold by this invoice are licensed to be used only as baling ties, and are sold and purchased subject to this restriction." During the season of 1876 complainant printed the following on the bills: "The buckles accompanying these bands are the property of the American Cotton Tie Company, Limited, and are licensed to be used for one season only, the company reserving the right after such use to recover possession of them wherever found." When cotton bales on which

these ties were used were opened for use at the factories, the manufacturer sold the ties and buckles to junk dealers. Defendants purchased them from junk dealers, repaired them, and sold them again. The court held that defendants were not infringers, and that in selling the cotton ties complainant could not reserve the rights it attempted to. *Am. Cotton Tie Co. v. Simmons et al.*, 3 Bann. & Ard. 320.—SHEPLEY, 1878.

224. A suit for infringement of a patent was brought in the Northern District of Illinois. Motion for provisional injunction was made. It did not appear that the defendant had ever made or sold any infringing goods in said district; he was the agent of a St. Louis packing company for the sale of their goods in New York City, and did no business and had no place of business in said district. The court held that "preliminary injunction ought not, therefore, to issue against him in this district, because such a process cannot run beyond the territorial limits of the district—certainly not in an ordinary case." *Wilson Packing Co. et al. v. Clapp*, 8 Bissell, 154.—BLOGGETT, 1878.

225. An owner of an undivided interest in a patent cannot use an *infringing* device. [No opinion is expressed whether a joint owner might not, for his own account, use the joint patent.] *Herring v. Gas Consumers' Association*, 3 McCrary, 206.—TREAT, 1878.

226. A common carrier may be enjoined from transporting infringing articles for infringers. *Am. Cotton Tie Supply Co. v. McCready et al.*, 17 Blatch. 291.—BLATCHFORD, 1879.

227. A Government grant giving a certain party the exclusive right to lay telegraph cables over a certain route gives that party no right to use patented inventions of other parties. *Colgate v. International Ocean Tel. Co.*, 17 Blatch. 308.—BLATCHFORD, 1879.

228. "Neither the Government, nor an agent of the Government, nor a private individual, whether claiming to act under the authority of the Government or otherwise, can use a patented improvement without the license of the patentee."—*Id.*

229. A was an inventor and patentee. A and B were in partnership. While in partnership they built and used one of the patented machines. B bought out A's interest, including the patented machine. B then tore down the patented machine and commenced business at another place, and built another similar machine. B was held to infringe. *Gottfried et al. v. Phillip Best Brewing Co.*, 5 Bann. & Ard. 4.—DYER, 1879.

230. The patent in suit was for folding guides.

A man in defendants' employ had used infringing articles, a man who was paid for his labor by the piece furnishing his own tools of that sort. Defendants knew of the use of the guides, but not that they were patented, and stopped the use when they were informed of that fact. Defendants were held to infringe. *Wooster v. Marks et al.*, 17 Blatch. 368.—WHEELER, 1879.

231. "That the acts constituting the infringement were committed in the exercise of authority derived from the State cannot shield the defendants from liability." *Allen v. City of New York et al.*, 17 Blatch. 350.—WHEELER, 1879.

232. A postmaster who infringes by using a patented cancelling stamp cannot escape the consequences of his infringement through being a Government officer. *Campbell v. James et al.*, 17 Blatch. 42.—WHEELER, 1879.

233. Complainant's patent in suit was for a cotton tie. Complainant sold its cotton tie stamped with the words "Licensed to use once only," and printed similar matter on its bill-heads. Defendants used these cotton ties the second time, and were held to infringe. *Am. Cotton Tie Supply Co. v. Bullard et al.*, 17 Blatch. 160.—BLATCHFORD, 1879.

234. The owners of a patent cannot be improved out of their right to it. *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 17 Blatch. 208.—WHEELER, 1879.

235. Where A has a patent for an improvement, and B has a patent for a further improvement of the same structure, neither patentee can use the patented improvement of the other without infringing. *Flint v. Roberts et al.*, 4 Bann. & Ard. 165.—NELSON, 1879.

236. Although defendant may have improved upon complainant's patented machine, that does not prevent defendant from being an infringer. *Barber v. Hallett*, 4 Bann. & Ard. 213.—LOWELL, 1879.

237. Defendants made the point that there had been no infringing sale shown after the assignment of the patent to complainant. The court said: "This is so. But the case has been argued on the part of the defendants on the assumption that such sale took place after the assignment to the plaintiff and on the assumption that the defendants continued to sell," and held the evidence sufficient. *U. S. Stamping Co. v. King et al.*, 17 Blatch. 55.—BLATCHFORD, 1879.

238. Where infringing articles are made during the life of the patent, their use will be enjoined after the expiration of the patent. *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 18 Blatch. 50.—WHEELER, 1880.

239. Complainant's patent covered, before it

expired, the drill-head of a drilling machine, but not the combination of the drill-head with the operating machinery. Defendant made such operating machinery before the expiration of the patent, and made and combined therewith afterward the drill-head. Held, that complainant could not, after expiration of the patent, prevent the use of the combination by defendant. *Am. Diamond Rock Boring Co. v. Rutland Marble Co.*, 18 Blatch. 147.—WHEELER, 1880.

240. The use of infringing machine made during the life of the patent will be enjoined after the expiration of the patent. *Am. Diamond Rock Boring Co. v. Rutland Marble Co. et al.*, 18 Blatch. 146.—WHEELER, 1880.

241. Defendants may have a patent for a device to which complainant's patented device is simply an additional improvement; and if defendants use such additional improvement, complainant is entitled to injunction and damages. *Day v. Combination Rubber Co. et al.*, 2 Fed. Rep. 570.—WHEELER, 1880.

242. Defendants' device may infringe a claim in words when it does not in fact. *Pearl et al. v. Appleton Co. et al.*, 3 Fed. Rep. 153.—LOWELL, 1880.

243. Complainant's patent was for a combination of elements. Defendants made and sold an apparatus having all the elements but one, which one the purchaser added. There being no proof of concert of action between defendants and said purchaser, and the apparatus as sold by defendants being complete and usable, held that no infringement had taken place. *Maynard v. Pawling et al.*, 3 Fed. Rep. 711.—BLATCHFORD, 1880.

244. It seems that a father is liable for the infringement of a patent by his non-emancipated minor son, the infringement being with the father's knowledge, but not with his consent. *Dunks v. Gray*, 3 Fed. Rep. 862.—BUTLER, 1880.

245. He who contributes toward infringement of a combination by knowingly furnishing a part of the combination is an infringer. *Holly v. Vergennes Mach. Co.*, 18 Blatch. 327.—WHEELER, 1880.

246. "Where it is obvious defendant's device was invented for an entirely different purpose, and was not intended as an evasion of the plaintiff's patent, the infringement, if any exists, being purely accidental, . . . the evidence of actual infringement should be so clear as to admit of no other reasonable construction." *Nat. Car Brake Shoe Co. v. D. L. & N. R. R. Co.*, 4 Fed. Rep. 224.—BROWN, 1880.

247. By the court: "If I were satisfied that

an evasion was attempted, I should be disposed to resolve any doubts I might have upon the question of infringement or mechanical equivalents as favorably as possible for the complainant."—*Ib.*

248. Defendant's device may be superior to complainant's patented device, and yet include complainant's invention and infringe his patent. *Adair v. Thayer*, 17 Blatch. 468.—*WHEELER*, 1880.

249. A salesman on commission can be enjoined and his profits recovered by complainant. A suit against the salesman's employer is no bar to the suit against the salesman. In an accounting by the employer, the salesman's profits—*i.e.*, commission—cannot be recovered from the employer. *Steiger v. Heidelberg*, 18 Blatch. 426.—*BLATCHFORD*, 1880.

250. Complainants' patent was for a ratchet wrench. Defendant used a ratchet wheel with spring, pawls, and lever precisely like those of the patented wrench, in a bit stock adapted to receive various tools. Defendant's device was held to infringe. *Sinclair et al. v. Backus*, 4 Fed. Rep. 539.—*LOWELL*, 1880.

251. By the court: "The defendants, in selling the soaps they sold, represented them as containing ten per cent of carbolic acid, by printed matter on the boxes enveloping them. This fact, with the affirmative testimony as to their containing carbolic acid, is sufficient to establish the fact, although by the lapse of time and by the exposure they may, at a certain date, have so parted with their carbolic acid as to make it impossible appreciably to recognize its presence." *Buchan et al. v. McKesson et al.*, 18 Blatch. 485.—*BLATCHFORD*, 1880.

252. Defendant had used the valuable patented feature of complainant's device, and had other advantages not present in complainant's device. The court said: "Thus says Mr. Curtis in his Law of Patents [4th ed.], Section 311, p. 409: 'If it accomplishes some other advantages beyond the effect or purpose accomplished by the patentee, it will still be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement upon the former invention.'" *Wilt v. Grier*, 5 Fed. Rep. 450.—*BLATCHFORD*, 1881.

253. Where a patent is granted for a machine, and also a later patent [to the same party] for a product made by the machine, the machine is not open to the public use after the machine patent expires, and before the patent for the product expires. *McKay, Trustee, v. Dibert*, 5 Fed. Rep. 587.—*NIXON*, 1881.

254. "The patent grants to the plaintiff the exclusive right to use the improvement patented for any purpose." *Fischer v. Hayes*, 19 Blatch. 26.—*BLATCHFORD*, 1881.

255. Defendant sought to escape the charge of infringement by showing that it had not used the patented lock in a certain way contemplated by the patent. The lock had the capacity of the use contemplated by the patent, and defendant was held to have infringed. *Yale Lock Mfg Co. et al. v. Norwich Nat. Bank*, 19 Blatch. 123.—*SHIPMAN*, 1881.

256. It seems that where the complainant causes a party to specially order an article from a manufacturer whom complainant holds to be an infringer, the intermediate party cannot be held as an infringer. *Tucker v. Dana*, 7 Fed. Rep. 213.—*LOWELL*, 1881.

257. A defendant's device is not removed from the category of infringements by having parts and functions not in complainants' device. *Potter et al. v. Stewart*, 18 Blatch. 561.—*BLATCHFORD*, 1881.

258. A man who employs a workman to make an infringing article cannot escape responsibility by throwing it upon the workman. *Andrews et al. v. Creegan*, 19 Blatch. 113.—*WHEELER*, 1881.

259. "If two or more persons conspire, one to make one part of a patented combination and another another part, with the intention that the parts should be afterward put together—this is an infringement. But in order to make one who makes and sells parts of the patented combination liable for infringement, the parts manufactured must be useless in another machine, and they must be sold and manufactured with the understanding that the remaining parts are to be supplied by another and will then be combined for use." *Millner v. Schofield et al.*, 4 Hughes, 258.—*HUGHES*, 1881.

260. Where inclination of the end bars of defendants' bed would have made it an infringement, and it showed some slight inclination, the court held that such inclination was the result of steam and wear, and did not amount to infringement. *Woven Wire Mattress Co. v. Simmons et al.*, 10 Bissell, 394.—*DYER*, 1881.

261. A "patent secures the combination or machine therein described, without regard to the purposes for which the" patented thing "is intended;" though the claim may in terms cover it for a specific purpose. *Zinn et al. v. Weiss*, 7 Fed. Rep. 914.—*BENEDICT*, 1881.

262. Upon the question whether defendant made the end rails of its bed frame inclined depended the question of infringement. The officers of the defendant corporation testified that



care and pains were taken that it should not incline. The sample put in evidence was inclined. *Held*, that defendant infringed. *Woven Wire Mattress Co. v. Wire Web Bed Co.*, 8 Fed. Rep. 87.—SHIPMAN, 1881.

263. An infringing machine may contain improvements that are patentable and still be more or less an infringement. *Corvalles Fruit Co. v. Curran et al.*, 7 Sawyer, 270.—DEADY, 1881.

264. Where a license is granted to use a certain machine, the patented part whereof is a combination, parts of the machine which become worn out may be replaced and the use of the machine continued under the license. If the patented part had been a single part of the structure, and that part had worn out, the user would have had no right to replace it. *Gottfried v. Seipp Brewing Co.*, 10 Bissell, 368.—BLODGETT, 1881.

265. Where a patented process ends at a specified point in the whole operation, it is not an infringement to do the same thing at a later stage for a different purpose. *New Process Fermentation Co. v. Baltz*, 10 Fed. Rep. 289.—McKENNAN, 1882.

266. A release for past infringement protects defendant against an infringement suit therefor until the release is set aside, even though the release infringe after the making of the release. *Loercher et al. v. Crandal*, 20 Blatch. 106.—BLATCHFORD, 1881.

267. "The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters-patent to those who entitle themselves to such grants. The Government of the United States, as well as the citizen, is subject to the Constitution." *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1882.

268. "The mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute."—*Ib.*

269. *Doubted* that a suit for infringement of a patent can be sustained against a public officer who has acted "only for and in behalf of the Government."—*Ib.*

270. The fact that defendants have a patent for their article does not tend to show that defendants do not infringe. *Holliday et al. v. Pickhardt et al.*, 12 Fed. Rep. 147.—BLATCHFORD, 1882.

271. It seems that a man who rents premises and uses a patented well which is unlaw-

fully thereon is an infringer; also that the owner of premises having such a well, who rents the premises, is an infringer. *Green v. Gardner et al.*, 22 O. G. 683.—NIXON, 1882.

272. By the court: "Infringement is not a trespass. The form of action is case; and this is because the act done is not of itself a direct interference with the tangible property of the plaintiff, but an indirect interference with his paramount right. It is like the building of a house upon a man's own land which shuts out a light which his neighbor has a prescriptive right to enjoy. The person who is to pay damages for a disturbance is not every one who had anything to do with the building, but the one who owns it." *United Nickel Co. et al. v. Worthington et al.*, 13 Fed. Rep. 392.—LOWELL, 1882.

273. By the court: "I am of opinion that the only persons who can be held for damages are those who should have taken a license, and that they are those who own or have some interest in the business of making, using, or selling the thing which is an infringement; and that an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented "improvement."—*Ib.*

274. Members of a partnership can be sued as infringers individually. *Tyler v. Galloway et al.*, 21 Blatch. 66.—BLATCHFORD, 1882.

275. The secretary of a voluntary association in the nature of a copartnership, who is not a shareholder in the association, is not individually liable for an infringement committed by the partnership.—*Ib.*

276. Complainant sold its patented cotton ties with the words "Licensed to use once only." Cotton manufacturers, in removing these ties from cotton bales, necessarily cut the ties in two. Defendants bought the ties in that condition, reconstructed the band, and sold them. Defendants were held to infringe. *Am. Cotton Tie Co. v. Simmons et al.*, 106 U. S. 89.—SUP. CT. 1882.

277. Although defendants may have a patent which is infringed by articles made under the plaintiff's patent, that fact does not entitle defendants to use upon defendants' structure improvements which are patented to plaintiff. *Clough v. G. & B. Mfg Co. et al.*, 106 U. S. 178.—SUP. CT. 1882.

278. The United States Government has no right to use a patented invention without permission of the patentee. *McKeever v. U. S.*, 14 Nott & Hop. 396.—SUP. CT. 1878.

279. Where a patentee submitted his patent-

ed cartridge to a board created for the purpose of adopting a cartridge for the use of the United States, and under recommendations of that board the Government proceeded to manufacture and use such cartridges, it was held that such act of the Government was not a tort, and that the patentee had not, by the submission of his cartridge to the board, granted the Government a license.—*Id.*

280. By the court: "The plaintiff is entitled to every use to which his invention may be applied. The defendant cannot have the benefit of plaintiff's holder, even though he may have improved it by the addition of a bar back of the stone." *Union Stone Co. v. Allen*, 14 Fed. Rep. 353.—BUTLER, 1882.

281. By the court: "I do not definitely understand that *Campbell v. James* [104 U. S. 356] definitely decided that a bill in equity will not lie against an officer of the United States for his unauthorized use of a patent solely in the service of the Government." *Forehand et al. v. Porter*, 15 Fed. Rep. 256.—SHIPMAN, 1883.

282. By the court: "In rebuttal of the defendant's testimony, the plaintiff called the defendant, and now insists that he, by one answer in regard to a data, established an infringement which had not been the subject of previous testimony, and that this answer is to overthrow his uniform denial of his having made the infringing device during the life of the patent without the knowledge and permission of the patentee. Such testimony is not sufficient to make out a case of infringement." *Reay v. Rau*, 15 Fed. Rep. 749.—SHIPMAN, 1883.

283. If defendant's device performs the same office as complainant's device, defendant does not escape being an infringer because his device performs some other function. *Zenn et al. v. Kalderberg*, 23 O. G. 2514.—WALLACE, 1883.

284. Where a patent is for a process, he who sells an article clearly intended for the practice of that process, and not for any other purpose, is an infringer. *Boyd v. Cherry*, 4 McCrary, 70.—MCCRARY, 1883.

285. The defendants' device may have a part answering to complainant's claim so far as the terms of the claim are concerned, and yet be no infringement, if it does not answer the purpose of complainant's device. *Backus Water Motor Co. v. Tuerk, Jr., et al.*, 24 O. G. 994.—BLDGETT, 1883.

286. Although defendants' device may have a part answering to complainant's claim, yet if such part is a mere incident of defendants' device, and does not substantially serve the purpose of complainant's corresponding part, it will not

be held to infringe. *Eclipse Windmill Co. v. May et al.*, 17 Fed. Rep. 344.—BLDGETT, 1883.

287. Where infringement is denied by defendants, complainant must affirmatively show infringement or fail. *Stessinger v. Buckingham et al.*, 8 Sawyer, 469.—SAWYER, 1883.

288. By the court: "The sale procured by and to another for the orators would not of itself, probably, be an unlawful infringement of which they could justly complain; yet, when made in the usual course of business, as of goods kept for sale, it might be evidence of sales of similar goods." *Dryfoos et al. v. Friedman et al.*, 21 Blatch. 563.—WHEELER, 1884.

289. Where the patented design was for the "shape or configuration of a series of patterns for gored skirts, printed upon a piece of fabric," the court said: "The cutting up of the fabric would undoubtedly be an unlawful use if the fabric cut up was an infringement."—*Id.*

290. Machines made in infringement of a patent can be enjoined after the expiration of the patent, and a right to an accounting follows. *Child v. Boston & Fair Haven Iron Works*, 19 Fed. Rep. 858.—LOWELL, 1884.

291. Though a defendant may improve upon complainants' patented thing, yet if he uses complainants' patented invention he is an infringer. *Bell et al. v. U. S. Stamping Co.*, 22 Blatch. 27.—WHEELER, 1884.

292. In an action for infringement of a patent, in the form of a suit against a company and two of its officers, if the officers have participated in the infringement they are liable as infringers, though acting simply as officers of the company in doing it. *Nat'l Car Brake S. Co. v. Terre Haute Car & M'g Co. et al.*, 19 Fed. Rep. 514.—WOODS, 1884.

293. A patent is infringed if either claim is infringed.—*Id.*

294. If defendant's machine is in substance, as to means and purpose, the same as complainant's patented machine, but fails to effect that purpose in its entirety, it is still an infringement. *Sewing Machine Co. v. Frame*, 28 O. G. 96.—BUTLER, 1884.

295. Additions to complainant's patented device do not avoid infringement. *Globe Nail Co. v. U. S. Horse Nail Co.*, 19 Fed. Rep. 819.—NELSON, 1884.

296. Additions to a patented device do not avoid infringement. *Roemer v. Simon et al.*, 20 Fed. Rep. 197.—WHEELER, 1884.

297. "The purchase of a patented article from the patentee or owner of the patent confers upon the buyer the right to use the article to the same extent as though it were not the subject of a pat-

ent; but the sale does not import the permission of the vendor that it may be used in a way that will violate his exclusive property in another invention. Where the article is of such peculiar characteristics that it cannot be dealt in as a trade commodity, and cannot be used practically at all unless as part of another patented article of the vendors, it would be preposterous to suppose that the parties did not contemplate its use in that way." *Rossvelt v. Western Electric Light Co.*, 20 Fed. Rep. 724.—WALLACE, 1884.

298. When the evidence leaves the court in doubt as to whether defendant is really an infringer, that doubt is to be resolved in favor of the defendant. *Royer v. Chicago M'fg Co.*, 20 Fed. Rep. 853.—DRUMMOND, 1884.

299. He who makes a part of a patented combination with the intent to have the other parts supplied by other parties is an infringer. *Schneider v. Pountney*, 21 Fed. Rep. 399.—NIXON, 1884.

300. "The first patentee is entitled to all the mechanism for every use of which it is capable." *New Process Fermentation Co. v. Koch*, 21 Fed. Rep. 580.—BROWN, 1884.

301. "The mere sale of the materials of a machine, capable and fit for operation, would not be an infringement of the patent on the machine unless the sale was for use." *Steam Stone Cutter Co. v. Sheldons et al.*, 22 Blatch. 484.—WHEELER, 1884.

302. Where it is sought to sue a receiver as an infringer, whereby the assets in his hands must respond to the judgment, permission to sue him must be first had of the court under which he is administering the assets entrusted to him. On the other hand, where he has taken possession of property not rightfully belonging to his trust, in an administrative capacity, whether as United States marshal, sheriff, administrator, or otherwise he is personally responsible for the trespass committed. When he acts under positive orders of a state court, the United States court will withhold its action for the making of an application to the state court for the proper modification of its order. *Curran v. Craig*, 22 Fed. Rep. 101.—TREAT, 1884.

303. "A sale of patented articles in the ordinary course of trade outside the territorial limits to which the right to sell is restricted by the patentee's grant is unwarrantable." *Hatch v. Adams*, 29 O. G. 776.—McKENNAN, 1884.

304. "It not infrequently occurs that an inventor fails to perceive all or even the best uses to which his invention may be applied. Nevertheless he is entitled to the benefit of all the uses to which it can be applied, no matter whether he

or another perceived them." *Oiel et al. v. Stout et al.*, 29 O. G. 862.—SAGE-MATTHEWS concurring, 1884.

305. An infringer does not, by paying damages for making and using a machine, in infringement of a patent, acquire any right himself to the future use of the machine. On the contrary, he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use; and when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed.

No more does one who pays damages for selling a machine in infringement of a patent acquire for himself or his vendee any right to use that machine. In the case of a license or a sale by the patentee, the rights of the licensee or the vendee arise out of contract with him. In the case of infringement, the liability of infringers arises out of their own wrongful invasion of his rights. The recovery and satisfaction of a judgment for damages against one wrong-doer do not ordinarily confer upon him or upon others the right to continue or repeat the wrong." *Birdsell et al. v. Shaliol et al.*, 112 U. S. 484.—SUP. CT. 1884.

306. Where complainant holds the legal title to a patent and defendant holds an equitable title thereto, the complainant's title must prevail over that of defendant unless complainant's right was acquired with notice of the equities of the defendant. *Davis Imp. Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 22 Blatch. 221.—WALLACE, 1884.

307. Where a patentee sells the patented articles in a foreign country without limitation, and the article is there bought and brought to this country, it is not an infringement of the patent to use or sell it in this country. *Halliday et al. v. Matheson et al.*, 30 O. G. 452.—WHEELER, 1884.

308. "Defendants are none the less infringers because of added improvements to the patented device." *Phillips et al. v. Carroll et al.*, 23 Fed. Rep. 249.—ACHESON, 1885.

309. "If the right of the patentee was acknowledged, and without his consent an officer of the Government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie within the jurisdiction of the Court of Claims. . . . And it may be that, even if the exclusive right of the patentee were contested, such an action might be brought in that

court involving all the questions relating to the validity of the patent." *Hollister v. Benedict & Burnham M'fg Co.*, 113 U. S. 59.—SUP. CT. 1885.

310. When the patentee of an article has sold the same article without restrictions or conditions in a foreign country, he who bought such an article and brought it home cannot be treated as an infringer. *Halliday et al. v. Matheson et al.*, 23 Blatch. 239.—WALLACE, 1885.

311. "When the owner sells an article without any reservation respecting its use or the title which is to pass, the purchaser acquires the whole right of the inventor in the thing sold—the right to use it, to repair it, and to sell it to others, and second purchasers acquire the rights of the seller, and may take the article wherever the first purchaser could have lawfully taken it if he had not parted with it."—*Ib.*

312. Where an inventor, employed by a firm, permits that firm to use the afterward patented machine before application, that machine is not within the afterward granted patent. *Duffy v. Reynolds et al.*, 24 Fed. Rep. 855.—NIXON, 1885.

313. Although the machine used by defendant may be a patented one, that, of itself, does not remove it from the category of infringements. *Filley v. Littlefield*, 25 Fed. Rep. 292.—TREAT, 1885.

314. "Each claim is, in effect, a separate and distinct patent, and the right to use one patent does not carry with it the right to use the others without a further license." *United Nickel Co. v. California Electrical Works*, 25 Fed. Rep. 475.—SAWYER, 1885.

315. A nickel-plating solution being covered by one claim of a patent and its use being covered by another claim, it was held that the mere purchase of the solution from one authorized to sell it did not carry the right to use it.—*Ib.*

316. Although one claim of the Adams patent for nickel plating specifies the mode of preparing "the double chloride of nickel and ammonia," he who buys the prepared nickel and uses it in accordance with the remainder of the claim is an infringer.—*Ib.*

317. Where the evidence of infringement is not certain, but points to defendant, then, in the absence of any evidence to the contrary, it will be accepted as sufficient against defendant. *Dreyfus v. Schneider*, 25 Fed. Rep. 481.—COLT, 1885.

318. As to evidence not thoroughly satisfactory which was accepted by a court as to who was the infringing party, see —. *Peterson et al. v. Simpkins*, 25 Fed. Rep. 486.—TREAT, 1885.

319. The court being of the opinion that de-

fendants' machine was in its mode of operation like that of complainant's patented machine, said: "The burden is on the defendants to clearly establish this point." *Nat'l Hat Pouncing Mach. Co. v. Thom et al.*, 25 Fed. Rep. 496.—COLT, 1885.

320. It does not follow from defendant's possession of a patent for his device that he has not infringed complainant's patent. *Tate v. Thomes*, 35 O. G. 258.—WALLACE, 1885.

321. Where the state of the evidence is such as to leave doubt in men's minds, the doubt will be resolved in favor of defendant, and defendant held not to infringe. *Mallory M'fg Co. v. Hickok et al.*, 25 Fed. Rep. 827.—SHIPMAN, 1885.

322. Defendants' machine may exhibit an improvement over complainant's patented machine, but that fact will not necessarily remove it from the category of infringements. *Wilson v. Culey et al.*, 26 Fed. Rep. 156.—BLODGETT, 1886.

323. Complainant's patent for an improvement in hammocks was for the combination of the hammock, the suspension ropes and certain detachable standing blocks. Defendants neither made nor sold hammocks, but made the blocks and sold them to dealers in hammocks. They were held to infringe. *Traverse v. Beyer et al.*, 23 Blatch. 423.—WALLACE, 1886.

324. "Two patents may both be valid when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent." *Cantrill et al. v. Wallick*, 117 U. S. 689.—SUP. CT. 1886.

325. Where there is a patent for an invention, and a subsequent patent for an improvement thereon, it does not lie in the mouth of an infringer of the second patent to set up the existence of the first patent as an excuse for infringing the second.—*Ib.*

326. Although defendant's device may be in some respects better than that of complainants, this cannot relieve defendant from the charge of infringement if the devices are substantially alike.—*Ib.*

327. He who sells a compound knowing that it cannot be applied without making the user a trespasser is himself an infringer. *Alabastine Co. v. Payne*, 27 Fed. Rep. 559.—COXE, 1886.

328. Where A owns certain territory under a patent and B owns certain other territory under the same patent, and A manufactures his goods within his own territory and sells and delivers them within B's territory, A is an infringer of B's rights. *Hobbie et al. v. Smith et al.*, 27 Fed. Rep. 656.—COXE, 1886.

329. Where A owns certain territory under a patent and B owns certain other territory under the same patent, and A sells the patented goods in his own territory to parties whom he knows will take them into the territory of B, he is not an infringer of B's rights.—*Ib.*

330. "The grantee of a particular territory is . . . at liberty to sell within that territory, and having the right, it cannot be curtailed, though the purchaser takes the goods beyond the prescribed limits. This is so, even though the vendor knows that the purchaser intends so to act."—*Ib.*

331. It is not necessary, in order to make a party an infringer, that his result should be the same in degree as that of complainant's patent, but it must be the same in kind. *May v. County of Fond du Lac*, 27 Fed. Rep. 691.—DYER, 1886.

332. One does not escape infringement simply by improving upon a patented invention. *Church v. Spaulding*, 28 Fed. Rep. 101.—COLT, 1886.

333. Where complainants' patent is for a combination, and the defendants sell only a part of that combination, which part is susceptible of a perfectly innocent use, and there is no direct proof that defendants ever put it to an infringing use by sale to any one, infringement is not proved. *Snyder et al. v. Brunnell et al.*, 29 Fed. Rep. 47.—COXE, 1886.

334. "The provision of the law that no person shall take, or use, or infringe the rights of a patentee does not depend upon the knowledge on the part of the public of the patent itself; that is to say, an actual knowledge." *Royer et al. v. Coupe*, 29 Fed. Rep. 358.—CARPENTER, 1886.

335. "In the case of a valid original patent for a machine, and a valid patent for a useful improvement upon that machine, the parties are in this position: that the first patentee cannot use the second machine without the consent of the second inventor, and the second inventor cannot use his own machine without the consent of the first inventor; and, if either of them violates these rules, he violates the law, and is liable to an action in consequence."—*Ib.*

336. Where a licensee has a license to sell only to persons who have a license to use, he is an infringer if he sells to other persons. *Willis et al. v. McCollin*, 38 O. G. 1017.—BUTLER, 1886.

337. Where a licensee repudiates his license he can be sued either on the contract or as an infringer. *Starling v. St. Paul Plough Works*, 32 Fed. Rep. 290.—NELSON, 1887.

338. "The patentee's exclusive right is to the manufacture, use, and sale of his invention, and for any and for all purposes." *Cincinnati Ice*

*Machine Co. v. Foss-Schneider Brewing Co.*, 31 Fed. Rep. 469.—SAGE, 1887.

339. Where two different parties make up the parts of a patented thing with knowledge of the purpose to be served, both parties are infringers. *Celluloid M'fg Co. v. Am. Zylonite Co. et al.*, 30 Fed. Rep. 437.—SHIPMAN, 1887.

340. *Adams v. Burke*, 17 Wall. 453, falls far short of holding that "the purchaser from the owner of a territorial right, within the territory, could not sell outside without infringing upon the rights of the owner of that territory." *Hatch et al. v. Hall*, 30 Fed. Rep. 613.—WHEELER, 1887.

341. The owner of a territorial right under a patent for making beds furnished "beds of the patent to dealers, to be sold outside, and" appeared "to have sought their custom for that purpose. They were infringers in making the sales, and he participated in the infringement by furnishing the means for it, and aiding and abetting it. Such a participant in the tort of infringement is liable for the whole."—*Ib.*

342. A suit was brought for an alleged infringement of a machine for counting and packing envelopes, the essence of the improvement being that the machine made no count unless an envelope passed. It was in proof that defendant had built certain machines which counted at every revolution. A witness who saw some of defendant's machines thought they counted with the passage of the envelope. An expert testified that he could not tell by seeing the operation of the machine whether it counted with every revolution or not. The evidence of infringement was held insufficient. *Hill v. Holyoke Envelope Co.*, 30 Fed. Rep. 623.—COLT, 1887.

343. "Where it is proved that what a party does is done for the purpose and with the intent of aiding infringement, he is liable under the doctrine of contributory infringement." *Bate Refrigerating Co. v. Gillett et al.*, 30 Fed. Rep. 683.—WALES, 1887.

344. A defendant company had not sold infringing instruments, but it had such in its office and advertised them for sale. It was held that the secretary and treasurer of the defendant company, its manager, and also its electrician were all subject to injunction. *Am. Bell Tel. Co. v. Globe Tel. Co. et al.*, 31 Fed. Rep. 729.—WALLACE, 1887.

345. It seems that the fact that defendants' machine is doing what complainant's machine will not is evidence tending to show that there is no infringement. *Good v. Bailey et al.*, 41 O. G. 935.—BUTLER, 1887.

346. The patent in suit was the Green driven-

well patent, and the claim in issue was : " The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water without removing the earth upward, as it is in boring, substantially as herein described." It was held that the use of a well driven in this manner was an infringement. *Beedie v. Bennett et al.*, 122 U. S. 71.—SUP. CT. 1887.

347. Where a defendant uses the patented combination of complainant, he does not escape infringement by adding another combination thereto. *Wirt v. Brown*, 30 Fed. Rep. 188.—BENEDICT, 1887.

348. Addition to a patented article does not avoid infringement. *Filley v. Littlefield Stove Co. et al.*, 30 Fed. Rep. 434.—COXE, 1887.

349. Mere additions to a patented machine do not avoid infringement. *Am. Box Mach. Co. v. Day et al.*, 32 Fed. Rep. 585.—BUTLER, 1887.

350. Complainant brought suit for an infringement of his patent on railroad car platforms, couplers, and buffers. The patentee had been in the habit of authorizing car-makers to put his patented improvements on cars, and afterward collecting for the use of the improvement of the railroad companies who used such cars. The use of such improvements on cars not thus authorized by the patentee was held to be an infringement. *Bates, Adm'r, v. St. Johnsbury & Lake Champlain R. R. Co.*, 32 Fed. Rep. 628.—WHEELER, 1887.

## INJUNCTION—PROVISIONAL.

### "INJUNCTION" IN THE PATENT ACTS.

Act approved February 19th, 1819.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the circuit courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries ; and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts in equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable. . . [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SECTION 17. *And be it further enacted*, That all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as in law, by the circuit courts of the United States, or any district court having the power and jurisdiction of a circuit court ; which courts shall have power, upon a bill in equity, filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable. . . [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 55. *And be it further enacted*, That all actions, suits, controversies, and cases arising under the patent laws of the United States shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court, or by the Supreme Court of the District of Columbia, or of any Territory ; and the court shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable. . . . [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 629. The circuit courts shall have original jurisdiction, as follows : . . .

*Ninth.* Of all suits at law or in equity arising under the patent or copyright laws of the United States.

SEC. 4921. The several courts, vested with jurisdiction of cases arising under the patent laws, shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable.

### CASES.

1. In equity the practice is to grant an injunction upon the filing of the bill if it state a clear right, and verify the same by affidavit. If the bill states exclusive possession, an injunction follows, though the court may have doubts as to the validity of the patent. If defects in the patent are glaring, injunction is not granted. Where the patent is modern, and objections are made to its validity or to the specification, the

court will wait for trial. *Isaac v. Cooper et al.*, 4 Wash. 259.—WASHINGTON, 1821.

2. On bill filed and injunction moved for, complainant was required to make a special affidavit as to his allegations, that he believed himself the first inventor, and that there had been no prior use or publication. Provisional injunction granted and issue at law directed. *Rogers v. Abbott*, 4 Wash. 514.—WASH. 1825.

3. It is not a matter of course to grant an injunction. There ought to be little, if any, doubt in the mind of the court as to the validity of the patent. Where the patent has age and exclusive possession in its favor, the injunction is granted at first; when recent and opposed, a trial at law must be had. *Sullivan v. Redfield et al.*, 1 Paine, 441.—THOMPSON, 1825.

4. Where the sworn bill states a clear right to the thing patented, and infringement, and the plaintiffs have been in the possession of the invention in whole and in part, provisional injunction will issue. But if there is reasonable doubt as to the plaintiffs' right or as to the validity of the patent, trial at law will be required before injunction. *Ogle et al. v. Ege*, 4 Wash. 584.—WASH. 1826.

5. "The jurisdiction exercised by a court of equity in granting an injunction is in aid of the common law, and should not be asserted where the right is doubtful." Exclusive possession under the patent will sometimes warrant injunction, but it is not warranted when the patent is recent, and real doubts are entertained of its validity. *Thomes v. Weeks et al.*, 2 Paine, 92.—THOMPSON, 1827.

6. A provisional injunction will not be granted if there is unnecessary delay in applying for the same after knowledge of the infringement. *Cooper v. Matthews*, 8 Law Rep. [O. S.] 413.—BALDWIN, 1842.

7. Affidavits may be read in support of an injunction, on a motion to dissolve it, on the coming in of the answer. *Brooks et al. v. Bicknell et al.*, 3 McLean, 250.—MCLEAN, 1843.

8. "In most cases the court will not enjoin until the right of complainant has been established at law. But where the injury would be irreparable, an injunction will be granted. A case of waste constitutes an exception to the general rule and also the infringement of a patent."—*Id.*

9. In lieu of provisional injunction, the court will sometimes order the defendants to give bond and security for any damages that may recover.—*Id.*

10. "Where a patent has been granted, and an exclusive possession of some duration under

it, the court will interpose its injunction without putting the patentee previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday [meaning that it is recent], and upon an application being made for an injunction it is endeavored to be shown, in opposition to it, that there is no good specification, or otherwise that the patent ought not to have been granted, the court will not, upon its own notions respecting the matter in dispute, act upon the presumed validity or invalidity of the patent, without the right having been ascertained by a previous trial at law; and will send the patentee to law and oblige him to establish the validity of his patent in a court of law before granting him the benefit of an injunction." *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

11. "The continuance or dissolution of an injunction is entirely within the sound discretion of the court. If the court consider the right of the patentee doubtful, it is not simply on that account required to dissolve the injunction. Other circumstances must be considered." *Orr v. Badger*, 7 Law Rep. 465.—SPRAGUE, 1844.

12. For an example of a case where there was a contract between the contending parties and the court, under penalty of injunction, ordered defendant to pay royalty according to his contract, etc., see —. *Brooks et al. v. Stolley*, 3 McLean, 523.—MCLEAN, 1845.

13. "A bill will lie for an injunction if the patent right is admitted or has been established upon well-grounded proof of an apprehended intention of the defendant to violate the patent right." *Woodworth et al. v. Stone*, 2 Story, 749.—STORY, 1845.

14. For the purposes of a provisional injunction, a reissued patent may be taken to be for the same invention as the original upon the authority of the Commissioner.—*Id.*

15. To obtain a provisional injunction, the mere issue of the patent does not suffice. "Complainant must furnish some further evidence of a probable right, though it need not be conclusive." "If the patentee . . . proceeds to put that right into exercise or use for some years, without its being disturbed, that circumstance strengthens much that the patent is good." "Seldom has a court refused an injunction on account of the shortness of time after the grant, however brief, if long enough to permit articles or machines to be constructed by the patentee . . . and to be sold publicly and repeatedly, and they have been sold and used under the patent without dispute." "Another species of evidence . . . is the fact that if the

patent becomes disputed the patentee prosecutes for a violation of his patent and recovers."

"Evidence of this character . . . is not contradicted nor impaired at all by the judgments having been given on verdicts and defaults under agreements." Affidavits attacking the novelty of the patent, met by counter affidavits, do not make against the injunction. It is "within the sound discretion of the court whether to issue the injunction or refuse it." *Orr v. Littlefield et al.*, 1 W. & M. 13.—WOODBURY, 1845.

16. After a patent has been sustained in various litigations the question of its utility is not open on motion for provisional injunction. *Smith et al. v. Mercer et al.*, 3 Penn. L. J. Rep. 526.—KANE, 1846.

17. "A special injunction in equity, like the arrest of the process of the law may be abused to the injury of the opponent; but it is no less, on that account, the duty of the judge to further them both when, in the exercise of his best discretion, he believes they are called for by the amount of the exigency."—*Id.*

18. Where complainant has owned and operated under a patent for many years, where the infringement is clear, and where he has brought two suits at law against the same defendants for infringement in which the jury failed to agree, provisional injunction will be granted. *Buck v. Cobb et al.*, 9 Law Rep. [O. S.] 545.—CONKLING, 1846.

19. After the validity of a patent has been sustained in numerous trials on the merits, that question may be considered settled for the purposes of provisional injunctions. *Van Hook v. Pendleton et al.*, 1 Blatch. 187.—BETTS, 1846.

20. Defendants contended against a provisional injunction on the ground of laches on the part of complainant in bringing suit. Complainant meanwhile had been busy with another suit and was held not guilty of laches.—*Id.*

21. After a patent has been sustained in a number of decisions, a court will not, on a motion for a provisional injunction, inquire into its validity. *Gibson v. Betts et al.*, 1 Blatch. 163.—NELSON, 1846.

22. Where a provisional injunction has been granted, it may be dissolved unless the complainant will institute a suit at law, before a certain time, to try the validity of the patent. *Orr v. Merrill*, 1 W. & M. 376.—WOODBURY, 1846.

23. "An injunction, when asked before a trial and resisted, is never to issue as a matter of course till the trial. There must, in such case, in order to obtain it in advance, be proof not only of a patent, but also of some length of use under it, or some considerable sales of it, or

some recovery establishing the validity of the patent, so as to impart to it weight or strength as valid, beyond the mere issue of it."—*Id.*

24. It is doubtful whether a misjoinder of parties as plaintiffs can defeat a prayer for an injunction against the use of a machine in which any such parties are interested. *Woodworth et al. v. Hall et al.*, 1 W. & M. 248.—WOODBURY, 1846.

25. "In relation to the technical objections . . . though they are to be weighed and examined, and allowed to prevail, as they must in other cases in equity, if legal, yet they ought to be treated with no particular indulgence. In all inquiries in equity the leaning in doubtful points must certainly be rather against than in favor of them; and more especially must it be so in preliminary injunctions where the decision is only temporary, and may be dissolved on motion at any time, on showing fuller proof as to anything affecting the merits of the controversy."—*Id.*

26. Where a provisional injunction has been granted against the infringement of a patent, it will not be dissolved upon raising doubts based upon technical objections.—*Id.*

27. It would be sporting with the faith and confidence due to judicial proceedings in our tribunal, to permit a machine to be used by a person claiming under another person against whom an injunction is in full force. *Woodworth et al. v. Edwards et al.*, 3 W. & M. 120.—WOODBURY, 1847.

28. On a motion for provisional injunction "the defendant will be permitted to file his answer, and affidavits in behalf of both parties will be examined on the motion for injunction." *Wilson v. Stolley*, 4 McLean, 273.—MCLEAN, 1847.

29. After an injunction has been granted it is to be presumed that it was rightly granted, and the burden of proof is on defendants to overcome that presumption. *Woodworth et al. v. Rogers et al.*, 3 W. & M. 135.—WOODBURY, 1847.

30. "The power exercised under injunctions has existed from the early ages of chancery jurisdiction, and is remedial and useful as a preventative of injury and multiplicity of law-suits when it is properly exercised. It is also a power conferred upon this court in one of the earliest acts of Congress, passed after the adoption of the Constitution."—*Id.*

31. A verdict in a patent suit is admissible in evidence in a suit between different parties upon the same patent on a motion for provisional injunction. *Buck et al. v. Hermance*, 1 Blatch. 322.—NELSON, 1848.

32. The court will not grant a provisional in-



junction when the effect thereof will be to enforce a forfeiture. *Morse v. O'Rielly*, 4 Penn. L. J. Rep. 75.—KANE, 1848.

33. "An injunction cannot be awarded at the instance of a stranger; and a patentee who has assigned his interest is nothing more."—*Id.*

34. "The special injunction in equity, like the arrest of mesne processes at law, may be abused to the injury of an opponent; but it is no less on that account the duty of the judge to further them both when, in the exercise of his best discretion, he believes that they are called for by the merits and the exigency." *Wilson v. Barnum*, 1 Wallace, Jr., 347.—KANE, 1849.

35. For an example of bond for an accounting ordered to be substituted for a provisional injunction, see —. *Id.*

36. The possession by defendant of a patent for his device will not prevent the issue of a provisional injunction against the device of that patent. It simply indicates the opinion which the highly respectable and skilled officers of the Patent Office have formed on an *ex parte* examination. *Wilson v. Barnum*, 1 Wall., Jr., 347.—KANE, 1849.

37. Where a case is appealed from the Circuit Court to the Supreme Court, and injunction by the court below has stopped defendant's machine to his great damage, and left him without remedy, such hardship "is an unanswerable objection to the operation of the injunction until the matters shall finally be adjusted." *Barnard et al v. Gibson*, 7 Howard, 650.—SUP. CT. 1849.

38. "It (an injunction) is either provisional or perpetual. The first being common or special—common, such as are granted upon the defendant's default, either in appearing or answering, and are only applicable to restrain proceedings in the courts of common law—special, when granted upon the special grounds arising out of the circumstances of the case. Injunctions of this description are issued sometimes on the merits disclosed by the answer, sometimes on affidavits before the answer is filed, and sometimes even without notice and before defendant has appeared." *Mott v. Bennett*, 2 Fish. P. C. 642.—WAYNE, 1849.

39. The rule of comity between courts has no application to motions for injunctions where error may be followed by irremediable mischief. *Many v. Sizer et al.*, 1 Fish. P. C. 31.—SPRAGUE, 1849.

40. Where defendants have been ordered to render a monthly account in lieu of an injunction, if they fairly comply with the terms of the order, an injunction will not be substituted

therefor. *Wilder v. Gayler et al.*, 1 Blatch. 511.—NELSON, 1849.

41. A complainant having prevailed on his patent in one circuit, having been defeated thereon in another circuit, and at a third trial the jury having been divided, in a fourth case provisional injunction was denied and account ordered, and an issue made up for a jury. *Allen v. Sprague et al.*, 1 Blatch. 567.—NELSON, 1850.

42. After a patent has been sustained in various litigations, and defendants adjudged to infringe, a bond and accounting will not be substituted for an injunction. *Gibson v. Van Dresar et al.*, 1 Blatch. 532.—NELSON, 1850.

43. Where, upon a motion for provisional injunction, the validity of plaintiff's patent has been established by numerous verdicts, the only inquiry will be whether the defendants infringe. *Blanchard v. Reeves et al.*, 1 Fish. P. C. 103.—GRIER, 1850.

44. A court will not grant a provisional injunction on evidence which, though formally sufficient, has not produced conviction on the mind.—*Id.*

45. It is a proper rule to consider an affidavit and answer, especially if accompanied by one or two depositions of witnesses, denying the infringement as conclusive against motion for provisional injunction. But this is not the case where the answers or affidavits are equivocal or evasive, or disclose facts showing the conclusions to be clearly erroneous. *Parker v. Sears et al.*, 1 Fish. P. C. 93.—GRIER, 1850.

46. "No interlocutory injunction should issue unless the complainant's title and the defendants' infringement are admitted, or are so palpable and clear that the court can entertain no doubt on the subject. . . . The court is not bound in this stage of the cause to decide doubtful and difficult questions of law, or disputed questions of fact, nor exercise this high and dangerous power [if exercised rashly] in doubtful cases, before the alleged offender shall have an opportunity of a full and fair hearing."—*Id.*

47. It is a sufficient reason for refusing provisional injunction that the question of infringement, even when the facts are admitted, is far from being clear and devoid of doubt.—*Id.*

48. Among reasons for refusing provisional injunction are [1] "because the verdicts establishing the complainant's title have been obtained on inconsistent and contradictory claims, so that the court cannot say with certainty, what is or what is not an infringement of the patent," [2] because allegations of exclusive possession on the complainant's part are met and avoided by

allegation and proof of a more peaceable possession by defendants.—*Ib.*

49. "The chief object of issuing such writs [provisional injunctions] before the final hearing of the cause, is to prevent irreparable mischief, not to give the complainant means of effecting a compromise on his own terms, from the inevitable injury that defendants must suffer by the stoppage of their mills and manufactories."—*Ib.*

50. "There may be, and often are, cases where the patent is for a machine to make some articles of manufacture or merchandise in a cheaper method than was before known, and where the source of profit to the patentee arises from his monopoly of the articles, and having no competition in the market. In such a case, the damages to the patentee by a piracy of his invention might be very great, and the court would issue an injunction on a plain case in the last month or week of the patent's life, or even after the time limited for its expiration, to restrain the sale of the machines or articles piratically manufactured in violation of the patent while it was in force."—*Ib.*

51. The standing-by of a patentee for "many years, without complaint or demand of compensation, is conclusive evidence that a continuance of a use of his invention, for a few weeks or even months longer, if paid for in the end, will not be an injury of such an irreparable nature as to require this sharp and hasty remedy."—*Ib.*

52. "The issuing of an interlocutory injunction is always a matter of discretion with the court, and depends upon the peculiar circumstances of each case; to suspend the operation of a single mill or manufactory, but for a week or two, because some wheel, bucket, or other small portion of its machinery may chance to infringe some dormant patent, would be a doubtful exercise of discretion where the benefits to result from it to the complainant are so comparatively trifling, and his loss, if any, so perfectly capable of compensation. How much more so when we are called upon to stop the operation of one hundred."—*Ib.*

53. Upon a motion for a provisional injunction, where a prior adjudication is relied upon, the bill of complaint must make averment thereof. The averment may be added by amendment. *Parker v. Brant et al.*, 1 Fish. P. C. 58.—GRIER, 1850.

54. Where the original term of a patent has expired, and it has been extended, and it has been sustained in hotly-contested litigations, it passes into the category of those which equity exerts its preventive interposition to protect

against infractions, even though the defendants may strongly traverse its validity.—*Ib.*

55. "It has been a matter of grave question whether the writ of injunction should ever be employed to compel a defendant to perform his contract, and there is certainly no case in which such a writ has been awarded without exacting as preliminary the full performance of equity by the complainant. To issue it while there is a substantial controversy as to the equities of the parties, and upon a simple motion which does not permit those equities to be inquired of and defined, according to the approved usages of chancery, would be to go further than . . . it has ever been contended that a chancellor ought to go." *Smith v. Cummings et al.*, 1 Fish. P. C. 152.—KANE, 1852.

56. An exclusive possession for eight years presumptively asserts the validity of a patent for the purpose of a provisional injunction. *Foster v. Moore*, 1 Curtis's C. C. 279.—CURTIS, 1852.

57. "It is not possible to fix any precise terms of years during which the exclusive possessor must bring suit. The reason of the presumption in favor of the validity of the grant is the acquiescence of the public in the exclusive right of the patent, which it may be reasonable to assume, would not exist unless the right was wholly valid, and it is obvious that this public acquiescence is entitled to more or less weight, according to the degree of utility of the machine, and the number of persons whose trade or business is more or less affected by it."—*Ib.*

58. A considerable exclusive possession under a patent, is, of itself, a proper basis for the issue of provisional injunction. *Goodyear et al. v. Central Railroads of New Jersey*, 2 Wall., Jr., 356.—GRIER, 1853.

59. "Where a question of infringement is one that admits of doubt, or where the facts are in dispute, the court will not decide it summarily on the motion for a preliminary or interlocutory injunction." Where defendant is amply able to respond in damages, an injunction is not necessary on the ground of irreparable injury to the complainants likely to occur before final decree. But where the facts are admitted, and the action of the court depends upon the construction of the patent, the matter is as fully before the court as it can be on final hearing and will be disposed of.—*Ib.*

60. For an example of a case where the court found the complainants technically entitled to provisional injunction, but withheld it, because to issue it would stop the running of defendant's railway cars, and because the court deemed the

question of the settlement of the right the more important thing, see —. *Ib.*

61. Although assignees and licensees may in some cases be necessary parties to an accounting, the same parties need not always be necessarily joined in a motion for a provisional injunction.—*Ib.*

62. Where, by granting an injunction, there would be a greater probability of producing irremediable mischief than there would be of preventing it, neither an absolute nor conditional injunction ought to be granted. *Day v. Candee et al.*, 3 Fish. P. C. 9.—INGERSOLL, 1853.

63. In case of doubt provisional injunction will be refused. *Byam et al. v. Eddy*, 2 Blatch. 521.—PRENTISS, 1853.

64. As a rule, upon a motion for a provisional injunction, the complainant is not entitled to file affidavits in the nature of rebuttal. *Day v. Boston Belting Co.*, 16 Law Rep. 329.—SPRAGUE, 1853.

65. If there exist any reasonable doubt about the novelty of the patented thing, or about the substantial identity of the defendants' device therewith, provisional injunction cannot issue. *Winans v. Eaton et al.*, 1 Fish. P. C. 181.—NELSON, 1854.

66. Although a patent may have been sustained in a prior adjudicated case, yet if on a subsequent motion for a provisional injunction in another case, new and strong evidence impugning the novelty of the patented thing is introduced and is not overcome, a provisional injunction will be refused.—*Ib.*

67. Where defendants were *bona fide* purchasers of the article complained of, without notice of plaintiff's claim to it, a provisional injunction was refused, and a five thousand-dollar bond ordered in lieu thereof. *United States Annunciator Co. v. Sanderson et al.*, 3 Blatch. 184.—BETTS, 1854.

68. It is "not necessary for the defendant to give to the plaintiff previous notice of its defence. It is entitled to make it by answer or depositions when the motion for injunction is brought on. But then, on its part, the defence must be complete and final as to the interlocutory proceeding." *Day v. New England Car Spring Co.*, 3 Blatch. 154.—BETTS, 1854.

69. At a hearing of a motion for provisional injunction, after respondent had read its affidavits, complainant proposed to read rebuttal affidavits. Respondent objected thereto and the court held that, under Rule 107 of the Southern District of New York, complainant might do this and respondent was not entitled to offer answering affidavits.—*Ib.*

70. While, "strictly speaking, there can be no possession of the exclusive right before the date of the patent, because the patent grants that right," yet such possession, coupled with exclusive possession subsequent to the patent, strengthens the latter and aids the granting of provisional injunction. *Sargent et al. v. Seagrave*, 2 Curtis's C. C. 553.—CURTIS, 1855.

71. "An unsuccessful attempt to interrupt a possession strengthens the presumption which arises from it. It tends to show that persons for a time have refused to submit to it, but on inquiry have submitted. Such submission is the most persuasive kind of acquiescence."—*Ib.*

72. "Of several persons who have a right to contest a title, one may have a better defence on an application for a preliminary injunction than another. The court looks to the peculiar circumstances, to see what degree of inconvenience would be occasioned to one party or the other, by granting or withholding the injunction, and whether the defendant has voluntarily placed himself in the position to be subject to that inconvenience."—*Ib.*

73. On a motion for provisional injunction the court will not look into a case further than to ascertain whether or not a case has been made which, upon established principles of equity, to prevent irreparable injury, requires the court to interfere pending litigation. *Sickles et al. v. Youngs et al.*, 3 Blatch. 293.—NELSON, 1855.

74. A mere denial of complainant's title will not prevent the issue of a provisional injunction. *Clum v. Brewer et al.*, 2 Curtis's C. C. 506.—CURTIS, 1855.

75. "A mere denial, by the answer, of the equity of the bill, does not prevent the court from looking into the law of the facts of the case where a special injunction is moved for, and granting or refusing it according to its discretion. And where the title to the injunction depends upon an interpretation of doubtful facts," the court will "so interpret on such motion, and grant or refuse it according to the result of that interpretation."—*Ib.*

76. The exclusive possession of the market by the complainants of such a patented machine as an apple-parer, and the sale of upward of eighty thousand of such machines, makes in complainants' favor on a motion for provisional injunction. *Sargent et al. v. Carter*, 11 Mo. Law Rep. 651.—CURTIS, 1857.

77. Although the patented device in question may be a steam-engine cut-off, and used by defendant upon a steamboat, when defendant refuses to make just compensation, the "consideration of either public or private convenience

should have little weight" to prevent the issuing of a provisional injunction. *Sickles v. Titecon*, 4 Blatch. 109.—INGERSOLL, 1857.

78. Where a patent has not been established in a trial at law or in equity, nor the exclusive rights of the patent owner acquiesced in by the public, in order to authorize the issuing of a preliminary injunction the right of the patent owner must be clear and free from doubt and the infringement equally clear. *North et al. v. Kershaw et al.*, 4 Blatch. 70.—INGERSOLL, 1857.

79. "There is no necessity that the validity of a patent should be established in a trial at law before an injunction can be granted." *Sickles v. Mitchell*, 3 Blatch. 548.—INGERSOLL, 1857.

80. "It is too much for a defendant, in a clear case, to insist upon having the privilege of using a patented invention, for the reason that he is able to pay the damages which may be awarded against him at the end of a protracted litigation to ascertain their amount."—*Id.*

81. Where a defendant has been using complainants' invention with complainants' knowledge for quite a period of time, the only question open being that of compensation, a provisional injunction will not be granted. *Smith et al. v. Sharps Rifle M'fg Co.*, 3 Blatch. 545.—INGERSOLL, 1857.

82. Complainants' basis for asking for a provisional injunction was "the issuing of patents, the quiet enjoyment under them for a considerable time, several judgments at law as well as decrees in equity, in which parties have been already enjoined, and the affidavits of several persons qualified to know, who testify that the invention was new." The alleged anticipatory devices set up by defendant were held not sufficient by the court, and the injunction was granted. *Potter et al. v. Holland*, 4 Blatch. 238.—INGERSOLL, 1858.

83. In an action at law between the parties, plaintiffs' patent had been sustained. Plaintiffs then applied for a provisional injunction. The patented thing was an improvement in looms which defendant had running on a large number of looms. Injunction denied and account ordered. *Furbush et al. v. Bredford*, 11 Mo. L. R. 471.—CURTIS, 1858.

84. "In acting on applications for temporary injunctions to restrain the infringement of letters-patent, there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions of making or refusing the order. And the state of the litigation, where the plaintiffs' title is denied, the nature of the improvement, the character and extent of

the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties, by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused, and if at all, whether absolutely or upon some and what conditions."—*Id.*

85. "The writ of injunction is a remedial writ, in the nature of a prohibition." "It is not necessary before a writ, to prevent a wrong issue, that the wrong should have been actually committed. If it was, the remedy by injunction would be a very inadequate one." *Poppenhusen v. New York Gutta Sercha Comb Co.*, 4 Blatch. 184.—INGERSOLL, 1858.

86. "When the rights of a party under a patent have been clearly and distinctly established, and an infringement of such rights is threatened; or, when they have been infringed, and the party has good reason to believe that they will continue to be infringed, an injunction will issue. It issues for the reason that there is good ground to believe that in future they will be infringed. And when a trial at law has been had, resulting in a verdict in favor of the patentee, in which the right to the improvement patented has been fully established to the satisfaction of the court, and the infringement of right made clear, such trial, resulting in such a verdict, is sufficient, without any other proof, to authorize the court to grant an injunction to prevent any future violation of right. Such trial, with such a result, affords sufficient proof that in future there will be an infringement, unless such infringement is restrained by injunction. 'It is, under such circumstances, almost a matter of course that the injunction shall be allowed.'"—*Id.*

87. Where defendants had a patent, and claimed to be manufacturing under it, and there was no allegation of insolvency, and a recovery in damages would remunerate the complainants, motion for provisional injunction was refused, but defendants were ordered to keep an account of their manufacture and sale. *Goodyear et al. v. Dunbar et al.*, 3 Wall., Jr., 283.—GRIEB, 1859.

88. "The remedy by injunction, though necessary in certain cases, to do complete justice, is, nevertheless, one which should always be cautiously granted, and more especially where it is demanded before a decree of the court, or final hearing on the merits. If defendants show a belief that they have a just defence, and are not wilful pirates of the plaintiffs' invention, it should be a case of evident mistake of law or fact, or both, in the defence which they set up

which will justify the court in using their *festinum remedium*.”—*Ib.*

89. “There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction; it is the strong arm of equity that never ought to be extended unless in cases of great injury, when courts of law can afford adequate or commensurate remedy in damages.” *Hall v. Speer*, 6 Pittsb. Rep. 513.—McCANDLES, 1859.

90. “It is not sufficient for a plaintiff, in order to make out a *prima facie* case, merely to produce his patent. The court will not, upon the mere production of a patent, entertain this motion for a preliminary injunction. The *prima facie* right under the patent must be strengthened, and that is done in one of two ways: by a judgment or decree after a judicial investigation, or by exclusive possession for some time, or, in other words, by the acquiescence of the public in the claims which the plaintiff has set up under his patent to a monopoly.” *Grover & Baker Sewing Mach. Co. v. Williams et al.*, 2 Fish. P. C. 133.—SPRAGUE, 1860.

91. A prior decree, by consent, in favor of complainant, does not furnish a basis for provisional injunction.—*Ib.*

92. “Acquiescence is taken as evidence of the plaintiff’s right, and may, in some cases, in a great degree, strengthen the presumption created by the patent itself. If a party sets up an exclusive right to the manufacture and use of an article which others are desirous of using or manufacturing, and it would manifestly be for their interest to do so, and they would do so, did they not think themselves prohibited by the patent right of another, then, their acquiescence, their abstaining from making that which it is morally certain they would do, but for such patent, shows the conviction of those who are interested adversely to it—and who from being interested in it may be presumed to have knowledge on the subject—shows that they are convinced of the patentee’s right, and that they have sacrificed their interest to their conviction. But if there be no adverse interest, no person who would be desirous of using it, whether it were patented or not, their not using it cannot afford a presumption of the right, and would not strengthen it.”—*Ib.*

93. “Submission in three cases out of numerous cases of infringement cannot show a general acquiescence; . . . and the fact that these suits were founded upon other patents must diminish the force of the submission to this patent, because

in the agreement that the judgment should be entered and the decrees rendered, there is no distinction made between patents.”—*Ib.*

94. “It would not necessarily follow because there were certain persons carrying on an art or manufacture at their own manufacturing establishment, and others did not enter into competition with them, that that abstaining from competition was owing to the belief that they had the exclusive right. It may be so and it may not be. Persons set up the manufacture of a new article; others may not enter into competition because they do not believe it is for their interest; they may not believe it to be profitable, and in that case there would be no evidence that they believed they were excluded from it by a monopoly in possession of these persons.”—*Ib.*

95. “Undoubtedly there may be cases in which the original patent relates to and covers precisely the same thing that is in the reissued patent; and if it does, and the public have acquiesced in the claim made in the original patent, or the same thing that is claimed in the reissued patent, it is evidence to show that they believe that the patentee had an exclusive right to it. But if the original patent did not claim the same thing, and, therefore, the public had no notice that it was the patentee’s invention, and, if it was his invention, had no notice that he claimed it—or, at all events, that he had any exclusive right to it—then the acquiescence in the original patent cannot be construed as acquiescence in that which he did not then claim, but which some time afterward he did.”—*Ib.*

96. “It cannot be said that the court is called upon, under the general rules which govern this class of inquiries—summary inquiries—to go into the merits of the case, and certainly not to grant an injunction, if, upon the merits, there are substantial doubts either as to the validity of the plaintiffs’ right, or as to the alleged infringement by the defendants.”—*Ib.*

97. A previous order for a provisional injunction, made by the same court, “must be viewed as conclusive of the facts which it recites.” *Hussey v. Whiteley et al.*, 1 Bond, 407.—LEAVITT, 1860.

98. Evidence for defendants, merely cumulative of that which was before the court on the granting of a provisional injunction, will not avail to effect a dissolution of the injunction.—*Ib.*

99. In that case, where a patent has been granted, where there has been undisturbed possession of it for ten years with large sales of the patented thing, where the patent has been sus-

tained in a prior genuine contest, and other courts subsequently have granted provisional injunction, "the authorities are numerous to support the position, that when such grounds of presumption exist in favor of the novelty of an invention covered by a patent, courts will not refuse an injunction, or, if granted, will not dissolve it unless the patent is impeached by the most conclusive evidence."—*Ib.*

100. Where it is sought to dissolve a provisional injunction on the ground of a prior machine, any doubt as to whether the prior machine is identical with the patented machine will prevent the dissolution of the injunction.—*Ib.*

101. Although a provisional injunction which has been granted has the serious effect of stopping the operations of respondents' factory, still, where the infringement was entered upon with due notice of its nature and against warning, the injunction will not be dissolved.—*Ib.*

102. A provisional injunction will be refused, "if, upon the facts presented, there is a fair doubt whether the defendant has infringed." *Dodge et al. v. Card*, 1 Bond, 393.—LEAVITT, 1860.

103. Upon a motion for provisional injunction the court will not decide simply from its own inspection of such machines as sewing-machines, that infringement has or has not taken place. *Hove v. Morton et al.*, 13 M. L. R. 70.—SPRAGUE, 1860.

104. Where the complainant patentee is not a manufacturer, but makes his patents profitable by granting licenses, and the defendants are manufacturers, and the patent will soon expire, provisional injunction will not be granted if bond with surety is furnished.—*Ib.*

105. "Injunctions are granted both in England and in the United States when there are grave doubts, and are granted on condition that suit at law shall be brought to try some fact or title." *Ely v. Monson & Brimfield M'fg Co.*, 4 Fish. P. C. 64.—SPRAGUE, 1860.

106. For an example of a provisional injunction granted where the effect was to stop the defendant's machinery, see —. *Ib.*

107. "This extraordinary relief is never granted as a matter of course. It is never granted on filing a bill and producing a patent. The patent itself, although in a certain sense it is *prima facie* evidence of the validity of the grant, is never sufficiently strong *per se* to warrant the relief asked for in the motion. The title of the patentee must, in order to obtain this relief, always be strengthened by exclusive possession for some period of time, or by an adjudication in which the validity of the patent has been sus-

tained. This patent never having been litigated, of course no judgment has been pronounced in its favor." The exclusive enjoyment in this case was only about two months. Exclusive possession before patent granted was not counted. Provisional injunction was refused. *Tappan v. National Bank-Note Co.*, 4 Blatch. 509.—SHIPMAN, 1861.

108. As to alleged acquiescence "of course the use, in such a case, must be a public use under an avowed claim of a right to a patent; otherwise there is no exclusive possession as against the public, and no claim in which the public can acquiesce."—*Ib.*

109. A doubt in the mind of the court as to whether a reissued patent is for the same invention as its original, is proper ground for denying a provisional injunction. *Poppenhusen v. Fulke et al.*, 4 Blatch. 493.—SHIPMAN, 1861.

110. Where an invention, as described in a reissue, covers a wider space than that as described in the original, and the respondents have entered into the disputed territory, the court may refuse on a motion for a provisional injunction to decide upon the validity of the new matter.—*Ib.*

111. "To warrant the exercise of this extraordinary power of the court in granting a preliminary injunction, the case should be free from ambiguity or confusion; especially should this rule be applied" "in a case where the difficulty or uncertainty arises from the difference between an original and reissued patent."—*Ib.*

112. Where, after contest, there have been adjudications sustaining complainants' patents, sufficient basis is laid to warrant the grant of a provisional injunction, "unless the evidence introduced upon the part of the respondents clearly overthrows these various adjudications in favor of the validity of these patents." *Potter et al. v. Stevens et al.*, 2 Fish. P. C. 163.—SMALLEY, 1861.

113. A patent granted to an alleged prior inventor, after eleven years of unexplained delay, is not sufficient to prevent the issue of a provisional injunction upon other patents which have been sustained after contest in different adjudications.—*Ib.*

114. "It is true that injunctions are now more liberally granted than in former times, yet the granting or refusing of them rests in the sound discretion of the court. A rash or indiscreet exercise of this power may be very oppressive, of no use to the complainant, and ruinous to the defendants. As a remedy it should be administered only for prevention or protection. Where it is not necessary for this purpose, it is merely

vindictive, injuring one party without benefit to the other. There are many cases of patents where it is the only efficient remedy to protect the patentee and prevent continuing trespasses upon his rights. But there are others in which it answers neither purpose, and is only used for extortion or vengeance. A chancellor who should issue an injunction to stop a mill, manufactory, locomotive, or steam-engine, because in their construction some patented device or machine has been used, would act with more than doubtful discretion. Stopping the mill or steam-engine might inflict irreparable injury, but could not benefit the inventor. The compensation to him for this trespass on his rights is the price of a license. The wrong done him is not the use of his invention, but the non-payment of a given sum of money. To issue an injunction in such a case, where neither prevention nor protection is sought nor required, but only compensation, would be an abuse of power. An injunction is not to be used as an execution or for extortion." *Sanders v. Logan et al.*, 9 Am. Law Rep. 475.—GRIER, 1861.

115. Although a machine has been adjudged to be an infringement of a patent, yet, if there have been important improvements added to the machine, the stoppage of which might work great damage to defendant, provisional injunction may be refused and the keeping of an account ordered. *Stainthorp et al. v. Humiston*, 2 Fish. P. C. 311.—HALL, 1862.

116. Where suit for infringement is brought against a party for selling an infringing article which is manufactured in another circuit, provisional injunction will not be refused on the ground of irreparable damage to the manufacturer. *Potter et al. v. Fuller*, 2 Fish. P. C. 251.—SMALLEY, 1862.

117. "Where the validity of the patent is fully established, and the infringement is clear, a party has a right to protection by injunction, although it may cause great injury to the infringer."—*Ib.*

118. It is not a ground for refusing a motion for provisional injunction that the complainants might previously have had a trial in another case, in another circuit, in an action at law.—*Ib.*

119. It is not a ground for refusing a provisional injunction that it is sought at the instance of parties who have combined to prosecute infringers.—*Ib.*

120. It is hardly to be presumed that a court, on a motion for a provisional injunction, will practically overrule the decisions of other courts made after full considerations.—*Ib.*

121. Pending an interference proceeding in

court, the court may order a provisional injunction against the sale or use of a patent involved in the interference. *Potter et al. v. Dixon et al.*, 5 Blatch. 160.—NELSON, 1863.

122. Where an infringement is one growing out of a misunderstanding under a license, and the patented improvement is embodied in such a machine as a loom, injunction is not an appropriate remedy. *Lowell M'fg Co. et al. v. Hartford Carpet Co.*, 2 Fish. P. C. 472.—NELSON, 1864.

123. "The rule as to granting or continuing injunctions in patent right cases is now well settled by the modern usages of the courts of the United States. They are now granted without a previous trial at law in cases where the owner of the patent shows a clear case of infringement, and has been in the possession and enjoyment of the exclusive right for a term of years without any successful impeachment of its validity. Such possession and enjoyment, aided by the presumptions arising from the patent itself, are usually regarded as sufficient to warrant an injunction to restrain infringement. And there is no fixed rule as to the length of time the possession and enjoyment of the right under a patent shall have continued. It must be sufficient to justify a presumption in favor of its validity." *Potter et al. v. Muller*, 2 Fish. P. C. 465.—LEAVITT, 1864.

124. "To justify the stringent remedy of injunction, the party seeking it should clearly establish his right, yet, when so established, it is not only a rightful, but often the only remedy which is available for him."—*Ib.*

125. "One of three things must always exist in order to entitle a complainant to a preliminary injunction, and they are these: either there must have been an exclusive possession of the monopoly, as against the public, for some period of time; we might say for some considerable period of time, but we do not choose to use any limiting terms upon that subject. But for some time there must have been an acquiescence of the public in the exclusive monopoly of the patentee or his assignees. That exclusive possession acquiesced in by the public, as it must be, if exclusive, raises the presumption, it being an adverse claim to the public, that the patentee has a valid title to the invention which purports to be secured by the patent. The length of time necessary to make the exclusive possession available on a motion for a preliminary injunction must, of course, depend somewhat upon the nature of the invention, the extent to which it would be used, and the acquiescence of the public, must, of course, depend upon what portion

of the public would have any occasion to use it ; because the ' public ' means that class of persons who would be likely to use the invention. . . . There must be, either, first, exclusive possession of some kind by the patentee or his assignee ; or, second, there must have been a judgment at law, approved by the judge who tried the case ; or, third, there should have been a final hearing in equity, which is quite equivalent to a judgment at law with the approval of the court." *Doughty v. West et al.*, 2 Fish. P. C. 553.—SHIPMAN, 1865.

126. For circumstances under which a court ordered a temporary injunction, subject to dissolution on tender of reasonable security, see —. *Goodyear et al. v. Hills*, 3 Fish. P. C. 134.—CARTER, 1866.

127. " Where the injury is not only *past*, but cannot, from the nature of the case, be renewed or continued, no injunction would be granted, for the well-recognized principle should in such case prevail that *past injuries* are not in themselves ground for injunction ; and because the restraining power of a court of equity can only be evoked not to remedy injuries already done, but to prevent injury." *Potter et al. v. Crowell et al.*, 1 Abbott, 89.—WITHEY, 1866.

128. Discontinuance of infringement after service of process, and expression of intent not to further infringe, will not prevent the issue of an injunction.—*Id.*

129. " Every case presented to a court for the exercise of its restraining power must necessarily depend to a great extent upon the peculiar circumstances of the individual case, and the judge must so apply principles as to accomplish the ends of justice and the purposes of jurisdiction."—*Id.*

130. " An injunction is the strong arm of equity. It often lays its hand upon a man's business and stops it entirely. It ought not ever to be granted without the most complete conviction on the part of the court of its urgent necessity." *Potter et al. v. Schenck et al.*, 1 Bissell, 575.—DRUMMOND, 1866.

131. " The principles which govern courts in granting or refusing preliminary injunctions in patent cases are well established. As a general rule, if the plaintiff has made out a clear title, and the question of infringement presents no difficulty, an injunction will be granted. The hearing is had upon *ex parte* affidavits, and if the questions to be decided are difficult and complicated, especially if they involve disputed facts which have never been passed upon by a court or jury, then, although the court may be inclined to think the complainant is right, yet it

will not interfere at this stage of the cause, whether the questions relate to title or to infringement. And even when the title is clear, yet if there are peculiar circumstances which show that defendant's interests would be very seriously affected by an injunction, while those of the plaintiff would not be so affected by refusing it, it may be refused." *Potter et al. v. Whitney*, 1 Lowell, 87.—LOWELL, 1866.

132. " There is . . . always an element of discretion entering into the consideration of this question, and all that a complainant is entitled to is the best judgment of the court upon a question of judicial discretion, and not absolutely to an injunction on any given state of facts."—*Id.*

133. " The ground on which acquiescence is important is that it shows exclusive possession, which, if it had been of long standing, open and notorious, is a clear foundation of a presumption of title. It is not always, however, so satisfactory as positive adjudications, because it may have arisen from the comparative small commercial value of the invention, and in that case shows only that no one has thought it worth infringing."—*Id.*

134. " Although it is the duty of the judge in every case of this nature, where the defendant has not been a party to any former suits, to examine the case anew and exercise his discretion upon the questions presented, yet when questions are in fact the same as in former cases, he cannot but admit those decisions as having great weight, as much as in any other case arising, for instance, in admiralty or at common law, in which the point in controversy has been passed upon and decided."—*Id.*

135. " In granting or refusing a preliminary injunction, the court will carefully consider the situation of the parties. Its important office is to preserve the rights of the patentee pending the litigation of his title. If the title has already been fully established, or is otherwise so clear that no reasonable doubt of its validity remains, a court of equity would, in many cases, grant such an injunction as it would a final injunction, notwithstanding the injury which might result to the defendant. But where there is no danger of loss to the plaintiff, and great loss will result to the defendant, the case must be substantially free from doubt to require such action." *Morris et al. v. Lowell Mfg Co.*, 3 Fish. P. C. 67.—LOWELL, 1866.

136. " An injunction is of great use in preventing multiplicity of suits, repeated actions for successive infringements ; but it is no part of its legitimate office to stop litigation in the suit in which it is granted to force the compromise of a



disputed right. On the other hand, there are cases so clear that a court of equity will not permit further litigation; and there are others in which, upon a balance of the equities and of the danger of serious injury, the plaintiffs' rights decidedly preponderate. In such case the result which would indirectly follow the granting of an injunction which equity called for could not be regarded."—*Ib.*

137. "The object of all injunctions is to prevent anticipated mischief. They are not intended as a remedy for past evils or grievances." *Brammer v. Jones et al.*, 2 Bond, 100.—LEAVITT, 1867.

138. Where, before the filing of the bill, one of the defendants had sold out his interest in the infringing machine to the other, it was held such seller could not be enjoined.—*Ib.*

139. Where a party has had a full month to read a motion for a provisional injunction, and is represented by counsel at the hearing, his allegation of inability to procure other counsel will not avail him in procuring further time. *Goodyear et al. v. Hullihen et al.*, 2 Hughes, 492.—JACKSON, 1867.

140. Where a patent has been sustained in different prior suits, its validity will be taken as established on motion for provisional injunction.—*Ib.*

141. Where a patent has been sustained in previous litigations, it will be taken as good upon a motion for a provisional injunction in another case between other parties. *Goodyear et al. v. Honsinger*, 2 Bissell, 1.—DRUMMOND, 1867.

142. The owner of the Goodyear patent for the hard rubber product, for years sold in the market a plastic compound ready for vulcanization. More or less of these sales were to parties known to have no license under the patent, creating, on the part of the company, a continued acquiescence in infringement. Under these circumstances a provisional injunction was ordered against the defendant, "with leave to him, at a future time, to come in and have the injunction dissolved, upon giving adequate security to the plaintiffs."—*Ib.*

143. "When the patentee has stood by, for a series of years, and permitted, or not objected, in any way in which the law authorizes him to object, to the use of the article claimed under the letters-patent, . . . such conduct ought to be visited to some extent upon the patentee."—*Ib.*

144. Where, on a motion for a provisional injunction, the patent in suit has been sustained in various prior contests, its validity will be taken as established. *Potter et al. v. Empire Sewing Machine Co.*, 3 Fish. P. C. 474.—NELSON, 1868.

145. Where, on a motion for a provisional injunction, the patent in suit has been often previously sustained, no question will be considered except that of infringement. *Goodyear et al. v. Rust*, 6 Blatch. 229.—SHIPMAN, 1868.

146. A bill of complaint need not contain a special prayer for a provisional injunction in order to enable the complainants to have one. *Goodyear et al. v. Mullee et al.*, 3 Fish. P. C. 420.—GRIER, 1868.

147. Upon a motion for provisional injunction, where the patent in suit has been sustained, in various prior contested cases, for the purpose of the motion, all questions will be taken as settled except that of infringement. *Goodyear Dental Vulcanite Co. et al. v. Evans*, 6 Blatch. 121.—BLATCHFORD, 1868.

148. The issue of a patent to defendant for the improvement he practises will not necessarily prevent the issue of a provisional injunction.—*Ib.*

149. On a motion for provisional injunction on a patent which the same court has sustained, an affidavit by defendant stating a general dissimilarity, and alleging that the dissimilarities will be specifically pointed out if more time is given, will not prevent the issue of the injunction. *Conover v. Mers*, 3 Fish. P. C. 386.—BLATCHFORD, 1868.

150. On a motion for provisional injunction on a patent already previously sustained by the same court, defendant's allegation that he is perfectly responsible and willing to give ample security will not prevent the issue of the injunction.—*Ib.*

151. Where a patent has been sustained and an infringement is clear, "a plaintiff has a right to protection by injunction, although a great injury may thereby be caused to the infringer." *Hodge et al. v. Hudson River Railroad Co.*, 6 Blatch. 165.—BLATCHFORD, 1868.

152. Where plaintiffs' title to an injunction does not depend upon any controverted or doubtful facts, but upon the interpretation to be put by the court upon a license, in such case it is the duty of the court to interpret the instrument on the motion for the injunction, and to grant or refuse the injunction according to the result of such interpretation.—*Ib.*

153. "In acting on applications for temporary injunctions to restrain the infringement of patents, there is much latitude of discretion, and the application may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for granting or refusing the injunction."—*Ib.*

154. Where the patent owner has a license-fee,

and the defendant is willing to pay it, provisional injunction will not issue.—*Ib.*

155. Where defendants have been openly using an alleged infringing device for nearly three years without claim by the patent owner, and defendants have pecuniary responsibility and a large amount of money [\$75,000] invested in the business, provisional injunction will not issue, but defendants will be ordered to keep an account. *Sykes v. Manhattan Elevator & Grain Drying Co. et al.*, 6 Blatch. 496.—BLATCHFORD, 1869.

156. Where, on a motion for provisional injunction, the claim of complainant's patentee was found to include and cover what was described in a prior foreign patent, and the claim of the patent in suit did not sufficiently distinguish between what was new and what was old, a provisional injunction was refused. *Jones v. Osgood et al.*, 6 Blatch. 435. BLATCHFORD, 1869.

157. Complainants' patent for pens was granted January 14th, 1868. In March, 1869, a provisional injunction was granted against defendant, there being no prior adjudication on the patent, there being affidavits of non-infringement, the court deciding that question on inspection. *Morse Fountain Pen Co. v. Esterbrook Steel Pen M'fg Co.*, 3 Fish. P. C. 515.—FIELD, 1869.

158. For an example of a provisional injunction ordered on a patent never previously litigated, with leave to the defendant to move for an injunction bond on the part of complainant, see —. *Shelley v. Brannan*, 2 Bissell, 315.—DRUMMOND, 1870.

159. On motions for provisional injunctions, previous adjudications sustaining the patent in suit must be held, as to matters directly adjudicated by them, to make a *prima facie* case against the defendants. *Am. Nicholson Pavement Co. v. City of Elizabeth et al.*, 4 Fish. P. C. 189.—STRONG, 1870.

160. "A preliminary injunction is always an extraordinary exercise of judicial powers. Its purpose is to preserve the existing state of things until the rights of the parties can be fairly investigated. It is not to be used for any other purpose. It looks forward to a trial, and when it is of no importance to preserve things as they are when the injunction is asked for, it will not be granted. It ought never to be issued unless the right of a patentee is an established or admitted one, and unless the alleged invasion of the right is proved beyond reasonable doubt."—*Ib.*

161. On a motion for provisional injunction, the possession by defendants of a patent for the

improvement they practise is virtually a decision of the Patent Office that there is a substantive difference between the device of complainant's patent and that of defendants' patent. Defendants' patent raises the presumption that the act of the defendants is not an infringement. Such presumption is not to be disregarded on a motion for provisional injunction.—*Ib.*

162. For an example of a provisional injunction refused where complainant's patent had been sustained, and the court was in doubt about the question of infringement, upon a bond filed by defendants, see —. *Ib.*

163. Complainants made motion for provisional injunction to prevent defendant from completing and using a dredging machine which he had in process of construction. The patents in suit had never been adjudicated. Public acquiescence was denied. There was no evidence of the extent of use of complainants' patent, and provisional injunction was withheld, conditioned that defendant give bond for security. *Morris et al. v. Shelbourn*, 8 Blatch. 266.—BENEDICT, 1871.

164. "The same rule obtains in patent cases as in other equitable cases. The granting of a preliminary injunction is a matter of judicial discretion to be determined by the circumstances under which the case is presented." *Irwin et al. v. Dane et al.*, 2 Bissell, 442.—BLODGETT, 1871.

165. Where the refusal of a provisional injunction will work more injury to the complainants than the granting thereof will work to defendants, such fact makes in favor of the grant.—*Ib.*

166. "On a preliminary hearing the court should not commit itself so definitely to any particular view in regard to the patent as to prejudice the hearing. It is better always to reserve all final conclusions and determinations until all testimony is in and the case is ready for final hearing."—*Ib.*

167. Complainants had an established business under their patents. Defendants had but just begun, and had but little invested. Provisional injunction was granted.—*Ib.*

168. Where, on a motion for provisional injunction, the patent has been recently sustained on final hearing, its validity is established for the purposes of the motion. *Thompson et al. v. Mendelsohn*, 5 Fish. P. C. 167.—McKENNAN, 1871.

169. "A preliminary injunction in patent cases ought not to be granted where there are new and difficult questions to be decided, or where there is anything in the position or relations of the

parties which would cause it to operate unjustly.' *Union Paper Bag Mach. Co. et al. v. Binney*, 5 Fish. P. C. 166.—LOWELL, 1871.

170. "A delay of three months in filing the bill, the defendant not having been induced to change his position, or, so far as appears, having had any communication with the plaintiffs in the interval, is no ground for refusing the injunction" [provisional].—*Ib.*

171. In its opening affidavit the complainants produced a model as representing defendant's machine; after the affidavits in chief were filed, complainants introduced a patent then lately issued to defendant, with evidence tending to show that it was for the same machine which defendant was using. Defendant objected to the introducing of these papers at this time as not being in reply to his case. Thereof the court said: "This objection is sound. There would be great danger of surprise if the plaintiffs could strengthen their own case on the question of infringement under the guise of a reply. The evidence was not accessible when the plaintiffs' case was made up, but that is no reason for permitting it to be brought in irregularly, though it might have been cause for varying the order of proof on suitable terms, giving the defendant an opportunity to answer the new matter. It is admissible in reply to the defendant's own affidavit, as tending to contradict his description of the machine by showing that he has made a different statement to the Patent Office."—*Ib.*

172. "Where, on a motion for a provisional injunction, a serious and doubtful question of fact is raised, the court will not grant the injunction. *Wells v. Jacques et al.*, 5 Fish. P. C. 136.—NIXON, 1871.

173. Repeated adjudications in favor of a patent entitle complainants to the relief of a preliminary injunction against what seems to be a clear infringement. *Thayer et al. v. Wales et al.*, 9 Blatch. 170.—BENEDICT, 1871.

174. By the court: "The motion is one of that class addressed, in technical parlance, to the discretion of the court. For precedents, in any recognized sense of the word, it is therefore idle to search. By one judge an injunction may be granted to-day under a given state of facts, and by another be refused to-morrow upon identically the same state of facts, and yet neither functionary be chargeable with even error in judgment. The law makes the judge's discretion the rule, not unheedful that, in the qualities of mind which give character to an exercise of discretion, individuals differ scarcely less than in form and feature. The judge is bound to decide a question of this kind as, in his judgment

of the particular case before him, the principles of equity and the practice of its courts warrant or dictate; and this, whether his decision be in accord or at variance with that of his brother officer, of whatever grade or whatever locality. The largest liberty imaginable is his, 'with no rules to restrain—no after reckonings to dread.' Neither upon appeal, nor by writ of error, nor even by petition for revisory action can a judge's rulings or findings upon a motion for a preliminary injunction be subjected to correction or even criticism on the part of his superiors in official rank or in judicial acumen." *Earth Closet Co. v. Fenner et al.*, 5 Fish. P. C. 15.—KNOWLES, 1871.

175. "In the decisions of the Supreme Court . . . are found neither authoritative rules nor even suggestive dicta bearing upon the subject of preliminary injunctions. But this want, if such it be, we find supplied in the reports of decisions in the circuit courts of the several districts—decisions, in most instances, by judges of the Supreme Court, sitting as circuit judges—and from these, as would naturally be supposed, may be deduced some propositions entitled to grave consideration upon the part of the inexperienced judge called to pass upon a motion of this character."—*Ib.*

176. The question which is presented to a judge on a motion for a provisional injunction is whether a case is made "which, upon established principles of equity to prevent an irreparable injury, requires the court to interfere, pending litigation, and restrain the defendants from further use of the apparatus or machinery charged with infringement until the right is finally determined. And upon these principles it is well settled that, unless the right is clear upon the papers and proofs presented, and upon which the motion is founded in favor of the plaintiffs, the injunction will be withheld."—*Ib.*

177. On a motion for provisional injunction the extension of the patent in issue, after contest, is a fact that tends to sustain the validity of the patent. *McComb v. Ernest et al.*, 1 Woods, 195.—WOODS, 1871.

178. By an "undisturbed possession" is not meant that the patent has never been infringed.—*Ib.*

179. Doubts as to the validity of patent in suit will prevent the granting of a provisional injunction. *Jones et al. v. Hodges et al.*, 1 Holmes, 37.—LOWELL, 1871.

180. Where the court is satisfied of validity and infringement, and the public have acquiesced in complainant's rights for a considerable time, it will grant provisional injunction.

*Miller v. Androscoggin Pulp Co.*, 1 Holmes, 142.—SHEPLEY, 1872.

181. Where a court has a doubt about the validity of a broadened reissue, it will refuse provisional injunction. *Fales et al. v. Wentworth*, 1 Holmes, 96.—SHEPLEY, 1872.

182. For an example of bond substituted for provisional injunction, see —. *Ib.*

183. Prior adjudication sustaining complainant's patent establishes its validity for the purposes of a provisional injunction. *Roberts v. Roter*, 5 Fish. P. C. 295.—MCKENNAN, 1872.

184. On an application for provisional injunction, defendants objected that the plaintiff had not made affidavit that he believed his inventor to be the original and first, etc. This allegation was found in the bill of complaint, and held sufficient. *Young v. Lippman et al.*, 9 Blatch. 277.—BLATCHFORD, 1872.

185. Where, after grant of provisional injunction, evidence is presented which, if originally presented, would have prevented the grant of injunction, thereupon the injunction will be dissolved.—*Ib.*

186. "Ordinarily a verdict and judgment sustaining a patent are controlling over the discretion of the judge when he is asked to award a provisional injunction. They relieve him from the necessity of inquiring into the validity of the patent, and if he is satisfied that there has been an infringement, the injunction may be said to be almost a thing of course." *Wells v. Gill et al.*, 6 Fish. P. C. 89.—STRONG, 1872.

187. For an example of refusal of provisional injunction upon the filing of a bond, see —. *Ib.*

188. "The rules by which the courts of the United States are governed in applications of this class are well settled, and need not be restated here. The first question arising upon such a motion, where . . . the patent in question has never been adjudged valid in any action, is whether the plaintiff shows such a public acquiescence in his claim as raises a presumption in favor of the validity of the patent. . . . In determining whether . . . facts are sufficient to show such a public recognition of the plaintiff's claim as the law demands, it is to be considered that the mere lapse of time is not sufficient. The acquiescence in the patent must be attended with circumstances indicating that such acquiescence would not have occurred if any fair doubt had existed as to the validity of the patent." *Guidet v. Palmer et al.*, 10 Blatch. 217.—BENEDICT, 1872.

189. The patent in suit was for a pavement. Motion for provisional injunction was made

against the Department of City Works of the city of Brooklyn. The motion was based on alleged acquiescence of the public occurring in New York and Brooklyn. Defendants being amply responsible, provisional injunction was refused.—*Ib.*

190. Defendants sought to have provisional injunction prevented on the ground that they had tried to take out a license. In trying to take this license, defendants attempted to impose conditions on the licensors. The injunction was granted. *Baldwin v. Bernard et al.*, 5 Fish. P. C. 442.—BLATCHFORD, 1872.

191. "Undisturbed possession" does not mean that the patent in suit has not been infringed by the defendants and others. *Cook et al. v. Ernest et al.*, 5 Fish. P. C. 396.—WOODS, 1872.

192. A patent to defendants avails to help them on the question of infringement on a motion for provisional injunction only when defendants' patent is for the same thing as complainants'.—*Ib.*

193. Complainants supported their motion for provisional injunction, "first, by the production of the patent itself; second, by the use of the patented article for three years immediately after the date of the patent, followed by the uninterrupted use by the assignee, without infringement, for eight years more; then by an action at law in which the patent was sustained, in which every defence known to the law might have been set up; and, finally, on the expiration of the original term of fourteen years, by proof of the extension of the patent in the face of vigilant and interested opposition." Motion granted.—*Ib.*

194. Unsettled questions in reissues which require a full investigation on a final hearing will prevent the issue of a provisional injunction. The pecuniary responsibility of the defendants has a bearing on the question of issuing or withholding a provisional injunction. *Gear v. Holmes et al.*, 6 Fish. P. C. 595.—SHEPLEY, 1873.

195. Where a complainant has been long in enjoyment of his rights under a patent, and there is no doubt upon the question of infringement, provisional injunction will issue. *Chase v. Wesson*, 1 Holmes, 274.—SHEPLEY, 1873.

196. On motion for provisional injunction, where the patent has been previously litigated and sustained, its validity is taken as settled for the purposes of the motion. *Blake v. Robertson et al.*, 11 Blatch. 237.—HUNT, 1873.

197. The patent in suit was for a stone breaker. The machines were expensive and bulky. Account with security ordered.—*Ib.*

198. The court will more readily grant an

injunction to preserve the status than one to break it up. *Singer M'fg Co. v. Union Button-hole & Embroidery Co.*, 1 Holmes, 253.—LOWELL, 1873.

199. "The court will often interfere by injunction when it cannot decree performance."—*Ib.*

200. "The granting or refusing an injunction is scarcely ever a matter of strict right, and . . . any attempt to lay down precise and invariable rules on the subject must necessarily fail."—*Ib.*

201. "If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, though it may be unable to enforce a specific performance of it."—*Ib.*

202. "The remedy by injunction is a very elastic and adaptable one, and there is no sort of difficulty in granting it, until by a change of circumstances it shall appear that it ought to be dissolved. A bill may be retained for that purpose for any number of years that may be requisite."—*Ib.*

203. Where the validity of a patent has been established and confirmed in at least three cases, "on a motion for a preliminary injunction, the court very seldom hears any evidence except on the question of infringement. Under such circumstances the party, by the established rules of equity, is entitled, as a matter of course, to the preliminary injunction without a trial at law and without further trial of the cause." *Robertson v. Hill*, 6 Fish. P. C. 465.—SHEPLEY, 1873.

204. For an example of a bond allowed to be substituted for provisional injunction, see —. *Kendrick v. Emmons*, 1 Holmes, 234.—SHEPLEY, 1873.

205. "To entitle a patentee to the extraordinary writ of injunction, it is not sufficient for him merely to show his patent and an infringement of it. His right must be further substantiated in one of two ways: First, by a possession accompanied by an actual use and enjoyment of it for a sufficient length of time to afford a reasonable presumption of the acquiescence of the public in its validity; or, second, by a judgment in its favor in a trial at law. The latter, however, is never necessary when the former exists; but . . . it . . . is "essential in all cases that there should be a trial at law in the absence of such use and enjoyment. This has been the rule in

England for more than a century, and it has always been the rule in the United States." *Brown v. Hinkley et al.*, 6 Fish. P. C. 370.—LONGYEAR, 1873.

206. Where a patent is only two months old, with no adjudication under it, there is no basis for a provisional injunction.—*Ib.*

207. To warrant a provisional injunction, something more than a grant of letters-patent must be shown, "something which, in the absence of a trial at law, may take its place in establishing or presumptively establishing the validity of the patent. This may be done by showing the exclusive possession and exercise of the right granted." In the absence of some such proof provisional injunction will not issue. *Hockheljar et al. v. Eager et al.*, 2 Sawyer, 361.—HILL-YER, 1873.

208. Eighteen months' knowledge of defendants' infringement, without proceeding against them, creates laches which prevent provisional injunction.—*Ib.*

209. The establishment of a patent on a motion for a provisional injunction is not such an adjudication as warrants provisional injunction in a subsequent case. *Sargent M'fg Co. v. Woodruff et al.*, 5 Bissell, 444.—HOPKINS, 1873.

210. Where defendants have letters-patent, and plead them on a motion for provisional injunction, the presumption is that they are not infringers of a prior patent.—*Ib.*

211. "The granting of a provisional injunction in patent cases is discretionary, as in other equity cases; and where the equity of the bill is fully denied, it is not usual to grant one."—*Ib.*

212. Bill of complaint for infringement of patent was filed May 13th, 1873; answer was filed July 7th, 1873; replication was filed August 25th, 1873; complainants took proof and rested their case November 6th, 1873. November 26th, 1873, after full hearing of both parties, provisional injunction was granted. Afterward, on affidavits, defendants sought to have the provisional injunction dissolved, the affidavits setting up two years' public use prior to the application for patent, and also that complainants' patentee was not the original and first inventor. These defences had not been regularly made in the answer filed July 7th, 1873. Complainants contended that defendants could not, at this stage of the case, by affidavits avail themselves of this defence, and the court sustained the contention. *Union Paper Bag Mach. Co. et al. v. Newell et al.*, 11 Blatch. 549.—BLATCHFORD, 1874.

213. A bill of complaint set up that the com-

plainant had brought its suit in another court to have a certain license under which defendants claimed declared void ; that the rights of defendants were acquired *pendente lite*, and that defendants had actual notice of the pendency and character of the said suit. An injunction was granted. Defendants sought to have it modified so as to permit them to execute unexecuted contracts for the patented goods. Modification of the injunction denied. *Consolidated Fruit Jar Co. v. Whitney et al.*, 1 Bann. & Ard. 356.—NIXON, 1874.

214. "Where a case reveals the right in the complainant to the protection afforded by an injunction, the defendants cannot defeat it by tendering security for damages."—*Ib.*

215. "In patent cases, especially where the owner depends upon the use of the invention and the monopoly which the ownership affords for his gains and profits, and not upon the sales of licenses to others, it is impossible to afford adequate protection by a bond of indemnity, because there are no sufficient data existing on which the damages or profits can be estimated."—*Ib.*

216. Where complainant's right upon certain legal questions that are raised is not clear, and defendants are pecuniarily responsible, provisional injunction will not be awarded.—*Ib.*

217. "If a desire by a defendant is expressed to test in a superior court the rectitude of what has been already adjudicated, and a complainant should refuse to stipulate that the proofs taken in another cause might be filed in the one pending, the usual rule would not be followed in the granting of preliminary injunction." *Goodyear Dental Vulcanite Co. et al. v. Willis*, 1 Flippin, 388.—EMMONS, 1874.

218. Where a patent has already been sustained in one circuit, the point settled in that case will be taken as settled on a motion for provisional injunction in another circuit, although defendant may claim to have additional witnesses. *Birdsell v. Hagerstown Agricultural Implement Mfg Co.*, 1 Bann. & Ard. 426.—BOND, 1874.

219. Evidence of a loose and inconclusive nature will not be allowed to prevail, on a motion for a provisional injunction, against a patent of long standing which has been sustained on final hearing, and extended and reissued. *Lyman Ventilating & Refrigerator Co. v. Lator*, 12 Blatch. 303.—BLATCHFORD, 1874.

220. Complainant sought a provisional injunction, the patented subject-matter being carbolized rubber hose. Complainant offered the affidavit of one Taylor to the effect that he had been engaged in selling rubber hose for a long

time, and that he judged from the appearance of defendants' hose that it was made with pure carbohc acid. Defendants offered the affidavit of a person to the effect that he was a manufacturer of hose and was acquainted with the manufacture of the particular hose used by the defendants, and that pure carbohc acid had not been used in defendants' manufacture, but coal-tar and dead oil had been used, which latter were outside the patented invention. Provisional injunction was denied. *Gutta-Percha & Rubber Mfg Co. v. Goodyear Rubber Co. et al.*, 3 Sawyer, 542.—SAWYER, 1875.

221. Where a bill of complaint does not allege that the matter in question had ever been before litigated nor acquiesced in by the public, the bill is defective on a motion for provisional injunction.—*Ib.*

222. A provisional injunction will not be dissolved by reason of a change in the ownership of the patent. *Thompson et al. v. Barry et al.*, 2 Weekly Notes, 100 ; *per curiam*, 1875.

223. Where defendants claim under a license, and complainant urges that the license was procured by fraud, and the determination of this question rests in doubt, a provisional injunction will be denied. *Beane v. Orr et al.*, 2 Bann. & Ard. 176.—LOWELL, 1875.

224. Delay in bringing suit for a number of years against a known infringer will prevent the issue of a provisional injunction. *Whitney et al. v. Rollstone Mach. Works et al.*, 2 Bann. & Ard. 170.—SHEPLEY, 1875.

225. Where a patent is only five months old, where exclusive possession is not shown, where defendants are pecuniarily responsible, and defendants' affidavits raise a doubt as to the novelty of the invention, injunction provisional will be refused. *Jones v. Field et al.*, 12 Blatch. 494.—BENEDICT, 1875.

226. On a motion for provisional injunction, defendants' answer is to be taken as truthful in its allegations. *Consolidated Fruit Jar Co. v. Whitney et al.*, 2 Bann. & Ard. 30.—NIXON, 1875.

227. "Courts of equity do not look with favor upon those who slumber over their rights." *Whortendyke v. White*, 2 Bann. & Ard. 25.—NIXON, 1875.

228. "There must be satisfactory proof of knowledge, or means of knowledge, before laches can be imputed."—*Ib.*

229. "If it be true that the suspicions of the complainant in regard to the defendant's infringement were allayed by the direct misrepresentations of the defendant, the court cannot give to him any advantage resulting from the

lapse of time. . . . In such an issue the burden is on the defendant."—*Ib.*

230. "Where acquiescence alone is relied upon as a basis for the motion for a preliminary injunction, the infringement must be palpable." *Burleigh Rock Drill Co. v. Loddell et al.*, 1 Holmes, 450.—SHEPLEY, 1875.

231. Where a defendant is using a machine openly made and sold under patents, the device of which the manufacturer honestly believes is not an infringement, and there is no suggestion of irremediable injury or lack of ability to respond to any judgment, a provisional injunction will be denied. *Gilbert & Barker M'fg Co. v. Bussing*, 12 Blatch. 426.—WOODRUFF, 1875.

232. A former decision in another circuit sustaining a patent will be held controlling in an application for provisional injunction, unless cogent evidence is presented in addition to that which was found insufficient upon the final hearing. *Jones et al. v. Merrill et al.*, 8 O. G. 401.—WALLACE, 1875.

233. Where a patent owner has known of the infringement for some years and delayed to bring suit, his laches will prevent provisional injunction.—*Ib.*

234. "It is a general principle of equity jurisprudence that the court will not lend its extraordinary aid to any claimant who has encouraged or acquiesced in an infringement of his right, or unreasonably delayed in prosecuting for its violation. Compensation for damages accrued and protection from future damages is all such a complainant is entitled to."—*Ib.*

235. "Where no question is made as to infringement or priority, or as to the novelty or patentability of the invention, and where the public generally have acquiesced in the claim of the patentee to a monopoly, an adjudication by a court of law or of equity is not required before a preliminary injunction will be granted." *Weston v. White et al.*, 13 Blatch. 447.—SHIPMAN, 1876.

236. "A preliminary injunction cannot be granted when it is conceded that the plaintiff must finally fail in his action." *Celluloid M'fg Co. v. Goodyear Dental Vulcanite Co.*, 13 Blatch. 375.—HUNT, 1875.

237. "A decision on a preliminary application for an injunction is not of controlling right in another circuit." *Cornell v. Littlejohn*, 2 Bann. & Ard. 324.—JOHNSON, 1876.

238. Where, in an infringement suit by A against B, A prevails, and then brings suit against C, who supplied the infringing goods to B and assumed the defence of the suit, provisional injunction will be granted against C.

*United States & Foreign Salamander Felting Co. v. Asbestos Felting Co.*, 10 O. G. 828.—BLATCHFORD, 1876.

239. Where there is doubt of infringement, provisional injunction will not be granted, although the validity of the patent in suit is undoubted. *Goodyear Dental Vulcanite Co. et al. v. Flagg*, 9 O. G. 153.—BLATCHFORD, 1876.

240. In general a party is bound by an order for injunction of which he has notice, though no writ is taken out. *Sullings v. Goodyear Dental Vulcanite Co.*, 36 Mich. 313.—COOLEY, 1877.

241. While A and B were in partnership A took a patent for improvement in bungs, and the partnership represented and sold it as patented. The partnership dissolved, when B attempted to get a patent as inventor for the same thing. In an interference between A and B in the Patent Office, A prevailed. A then brought suit against B for infringement, and the facts stated were held to warrant provisional injunction against B. *Pentlarge v. Beeston et al.*, 14 Blatch. 352.—BENEDICT, 1877.

242. The patent in suit was for a Blake stone-crusher. In a former action brought against the maker of the machine, the damages were fixed at one dollar in pursuance of a stipulation between the parties. The present defendant contended that it was, by reason of said former recovery, entitled to use the machine without further payment. On motion for provisional injunction it was held that defendant was entitled to have this question determined on final hearing. *Blake v. Greenwood Cemetery*, 14 Blatch. 342.—BENEDICT, 1877.

243. The patent in suit was for a Blake crusher. The defendant was the Greenwood Cemetery, which used the machine on its roads. Complainant had an established license fee. It was held that the case was not one calling for a provisional injunction.—*Ib.*

244. "In patent cases, where the emergency was urgent, the court might grant injunctions without previous notice before the law of 1872. The passage of the Judiciary Act of June 1st, 1872, has given this power in all cases, and now injunctions may be granted in any case deemed exigent by the court, whether it be a patent case or not." *Yuengling v. Johnson*, 1 Hughes, 607.—HUGHES, 1877.

245. "The action of the Patent Office is sufficient to make such a *prima facie* case as to justify the action of a court on almost any motion for a preliminary injunction."—*Ib.*

246. "A motion for a provisional injunction is always an appeal to the discretion of the court." *Bailey Wringing Mach. Co. v. Adams*

*et al.*, 3 Bann. & Ard. 96.—MCKENNAN, 1877.

247. "Without an opportunity for a full hearing, the court ought not to undertake the decision of fairly disputable questions of law and fact, if there be any such."—*Id.*

248. Although, upon a motion for a provisional injunction, a court will give great weight to a former decision establishing a patent, yet if new evidence is produced of apparent strength the former decisions will not necessarily govern.—*Id.*

249. After a suit has been pending for nearly a year, and it is about to be argued and submitted upon the merits, a sound discretion does not call for a provisional injunction. *Andrews et al. v. Spear*, 3 Bann. & Ard. 82.—NELSON, 1877.

250. Where a patent has been twice sustained, its validity will be taken as established for the purpose of a provisional injunction. *Adams & Westlake M'fg Co. v. St. Louis Wire Goods Co.*, 3 Bann. & Ard. 77.—TREAT, 1877.

251. "The uniform course of decisions in the courts of the United States, where a previous decision has been had by a circuit court with regard to the validity of a patent, has been to treat it as of the very highest nature, and as almost conclusive in an application for injunction in another case founded on the same patent." *Am. Middlings Purifier Co. v. Christian et al.*, 4 Dillon C. C. 448.—MILLER and DILLON, 1877.

252. By the court: "I am not aware—I do not believe—that any case exists or can be found in which an inferior court has held, on an application for a preliminary injunction, that the decision of the Supreme Court of the United States establishing the validity of a patent can be assailed in the court below."—*Id.*

253. Previous use of a patented invention is not an absolute and indispensable element of granting an injunction under a patent.—*Id.*

254. "It is to be presumed that, when a party has used publicly and notoriously for a considerable length of time a patent, claiming exclusive right to it, the public have acquiesced in that claim; and against a man who comes to infringe it and to contest the rights of the plaintiff there arises a presumption in consequence of that use which is a very strong one."—*Id.*

255. "If a man has a patent . . . and he sees the world at large using it for eight or ten years, takes no steps to arrest it, sues nobody, sets up no claim, gives no warning, it is a very natural and strong reason why, under these circumstances, he should not be permitted to come sub-

sequently and arrest everybody by process of injunction."—*Id.*

256. For an example of a bond for \$250,000 permitted to be substituted in place of a provisional injunction, see —. *Id.*

257. "The suggestion that an injunction will work injury in an indirect way to third parties affords no ground for denying the plaintiff's application." *Rumford Chemical Works v. Vice*, 14 Blatch. 179.—BENEDICT, 1877.

258. Past infringement is proper ground for injunction against future infringement.—*Id.*

259. Where a patent has been sustained in prior litigations, and the public has long acquiesced in complainant's rights, the existence of such facts "is, *prima facie*, a sufficient reason for the court to interfere, by injunction, pending litigation, only in those cases where the infringement is palpable. If any reasonable doubt exists upon that point, and especially if the defendant is acting under the authority of a patent, there should be no interference by the court until after the examination and decision in regard to the claims of the conflicting patents upon the merits of the case." *Am. Shoe Tip Co. v. National Shoe-Toe Protector Co.*, 2 Bann. & Ard. 551.—NIXON, 1877.

260. "It is hardly proper to grant a motion for a preliminary injunction upon a theory which, although it may be true, is not supported by affidavits." *Am. Diamond Rock Boring Co. v. Sullivan Mach. Co. et al.*, 14 Blatch. 119.—SHIPMAN, 1877.

261. Where, on a motion for provisional injunction, there is no allegation of present or threatened insolvency on the part of defendant, and when substantial precautionary justice can be fully attained by requiring the defendant to keep an account and report monthly under oath, and submit to a thorough examination of his mills when in operation, provisional injunction will be denied and such order made. *Am. Middlings Purifier Co. v. Atlantic Milling Co.*, 4 Dillon, C. C. 100.—MILLER and DILLON, 1877.

262. The patent in suit had been thoroughly litigated and sustained in the first circuit. In a subsequent suit in the same circuit provisional injunction was asked for. Defendant showed that a litigation over the same question was pending in the second circuit, and urged that comity required a withholding of the injunction until the termination of the suit in the second circuit. The court granted injunction. *Atlantic Giant Powder Co. v. Goodyear*, 3 Bann. & Ard. 161.—SHEPLEY, 1877.

263. Where a patent has been upheld by the decisions of two courts, such fact is, in ordinary



cases, sufficient to authorize a provisional injunction. *Phillips et al. v. City of Detroit*, 2 Flippin, 92.—BROWN, 1877.

264. An examination of the validity of a patent in suit is always to be avoided, if practicable, until the final hearing. *Sperry v. Ribbans et al.*, 3 Bann. & Ard. 260.—NIXON, 1878.

265. The complainant's patentee learned in the spring of 1876 that the defendants were manufacturing, and claimed the right to manufacture, the articles complained of. Complainant warned defendants to desist. They did not desist, but became, with complainant's knowledge, the largest producers of these wares in the market. Complainant quietly acquiesced for nearly two years, and did not serve defendants with notice of his motions until March 6th, 1878. Provisional injunction was refused because of complainant's laches.—*Id.*

266. Where, on a motion for provisional injunction, the court has doubts about the patentability of complainants' improvement, it will be very cautious in granting a provisional injunction. *Wilson Packing Co. et al. v. Clapp*, 8 Bissell, 154.—BLODGETT, 1878.

267. On a motion for provisional injunction, it does not make in complainants' favor to have issued a threatening notice to persons who were simply dealers in the patented thing.—*Id.*

268. "It is not the practice to grant a preliminary injunction, which often operates as a final determination of the cause, when the patent has never been passed upon unless there has been acquiescence equivalent to a general admission of its validity, or there are some other strong reasons for such summary action, if it appears that the defendant in good faith intends to litigate the validity of the patent." *Crowell v. Harlow*, 3 Bann. & Ard. 478.—LOWELL, 1878.

269. Defendant was the licensee of the complainant under a royalty. Defendant declined to pay royalty, and was sued as an infringer. Provisional injunction was asked for. It appeared that the licenser, in violation of his agreement, had sold other parties licenses at a less price than that paid by defendant. Provisional injunction was refused for that reason. *Crowell v. Parmenter*, 3 Bann. & Ard. 480.—LOWELL, 1878.

270. Where defendant rests upon a question as to whether he has a license from complainant, where the validity of the patented thing is disputed, and the defendant is not alleged to be pecuniarily irresponsible, provisional injunction will not be granted. *McGuire v. Eames*, 15 Blatch. 312.—BENEDICT, 1878.

271. Where a patent has been twice sustained

in different courts it can hardly be expected that, upon a motion for provisional injunction, a construction will be given the patent in conflict with that it has previously received. *Clarke v. Johnson*, 16 Blatch. 495.—BENEDICT, 1879.

272. Motion was made for provisional injunction. Defendants were the agents of the manufacturer against whom suit was also pending in another circuit. The court refused to give the injunction outright, but ordered the same unless defendants gave bond. *Irwin et al. v. McRoberts et al.*, 4 Bann. & Ard. 411.—BLODGETT, 1879.

273. Where a patent has been sustained upon final hearing against a very wealthy defendant, and the present defendant corporation is substantially the same party as the former defendant corporation, it is incumbent on defendant, in adducing new matter, on a motion for provisional injunction, to make it extremely probable that, if such new matter had been put in evidence in the former case a different result would have been reached. *Colgate v. Gold & Stock Telegraph Co.*, 16 Blatch. 503.—BLATCHFORD, 1879.

274. A patent owner asked for provisional injunction. He was accustomed to exercise his rights under the patent by granting licenses. A provisional injunction was granted, but in connection therewith the court ordered an inquiry into the matter of complainant's granting defendant a license.—*Id.*

275. A court first found against a patent and adjudged it a nullity. Then there was an agreement of parties under which the decree was reversed and the patent sustained. Such an adjudication was held to have very little weight in a subsequent application for provisional injunction. *Spring et al. v. Domestic Sewing Mach. Co.*, 4 Bann. & Ard. 427.—NIXON, 1879.

276. Where a patent has been upheld by a court, its validity will be taken for granted on a subsequent motion for provisional injunction in the same court, "unless some decidedly new evidence, not accessible before, or some other reason for doubting the soundness of the result reached in the former case is brought forward." *Blaisdell v. Dows*, 4 Bann. & Ard. 499.—LOWELL, 1879.

277. The terms of an injunction were, that the defendant be restrained from using the patented invention, except the identical wires and cables then used by it, "and also from selling, transferring, lending, leasing, or parting with in any manner, any wires or cables embodying said invention, or conferring upon any other person, persons, or corporation either in whole or in part, or alone, or in conjunction, or in connec-

tion with the defendant, any use of, or right to use such wires or cables." Before service of the injunction defendant had agreed to furnish the infringing cable, and it was furnished after the service of the injunction. Defendant was held to have violated the injunction. *Colgate v. Gold & Stock Telegraph Co.*, 4 Bann. & Ard. 559.—BLATCHFORD, 1879.

278. "By" an "injunction, the defendant and its agents were restrained from using the invention, except the identical wires or cables then used by the defendant, 'and also from selling, lending, transferring, leasing, or parting with, in any manner, any wires or cables embodying said invention, or conferring upon any other person, persons, or corporation, either in whole or in part, or alone, or in conjunction, or in connection with the defendant, any use of, or right to use any such wires or cables.'" The court held that under the injunction the right of defendant to use for itself the identical wires or cables it was using for its own proper business was permissible, but that it was not permissible for defendant to confer on any other person or corporation the right to such use. *Colgate v. Western Union Telegraph Co.*, 4 Bann. & Ard. 562.—BLATCHFORD, 1879.

279. A patent having been sustained, another suit was brought and motion made for provisional injunction. Infringement was substantially shown, but defendant sought to avoid injunction by bringing up certain new matters; he had all along known of this matter, and had used it in defence in a former suit. Provisional injunction was granted. *Robinson et al. v. Randolph*, 4 Bann. & Ard. 163.—NIXON, 1879.

280. "The court will not lend its help, by way of preliminary injunction, in those cases where it appears that the complainant has acquiesced in the infringement and unreasonably delayed suit against the infringers. When patentees sleep over their rights, without an excuse, they must not rely upon the extraordinary aid of the court when they awake from their slumbers, but must be satisfied with such relief as may be afforded by the ordinary course of practice after final hearing." *Green v. French*, 4 Bann. & Ard. 169.—NIXON, 1879.

281. A reissued patent was granted May 9th, 1871; within a year suit for infringement was brought resulting in a great deal of litigation and in sustaining the patent. In 1876 the present suit was brought; defendant sought to avail himself of complainant's laches. The court held that the proof did not show laches.—*Id.*

282. "A delay in bringing actions against infringers, when satisfactorily accounted for, is

not to be treated as laches. It would be a great hardship to require patentees, who are generally poor, to institute legal proceedings as soon as an infringement was ascertained, or to lose the right to the protection which an interlocutory injunction affords."—*Id.*

283. "The court has no discretion, but is bound to grant a preliminary injunction where the validity of the complainant's patent has been established by protracted and expensive litigation, and the proof of infringement is clear."—*Id.*

284. The complainant owning two patents A and B, brought suit against the defendants upon both these patents. Complainant took proofs to show that the defendants infringed patent B, and notified defendants that they need not, until further notice, put in proofs as to patent A. The complainant then prosecuted the suit on patent A in another court successfully. Complainant then discontinuing its first suit against the defendants, brought the present suit on patent A. It was held that this course of action did not deprive complainant of the right to provisional injunction. *Atlantic Giant Powder Co. v. Rand et al.*, 16 Blatch. 250.—BLATCHFORD, 1879.

285. "Where a plaintiff moves for an injunction, and it is denied on defects pointed out, it is too late for him to wait until after the defendant has closed his proofs for final hearing before renewing his motion, on papers designed to cure such defects." *Wooster v. Howe Mach. Co.*, 4 Bann. & Ard. 319.—BLATCHFORD, 1879.

286. For circumstances under which an adjudication on a final hearing in one circuit will not be followed, from comity, on a motion for a provisional injunction in another circuit, see —. *U. S. Stamping Co. v. King et al.*, 17 Blatch. 55.—BLATCHFORD, 1879.

287. "Whether restraining orders go out in patent cases, or in other cases, they are framed according to the circumstances of each case, to wit: in one case there may be circumstances requiring an injunction *simpliciter*, but ordinarily a bond and an order for accounting suffices, and sometimes simply an order for accounting." *Kirby Bung M'g Co. v. White et al.*, 1 McCrary, 155.—TREAT, 1880.

288. On motion for provisional injunction, or other restraining order, the court will not inquire into the validity of the patent if it has previously been sustained in a *bona fide* trial on the merits. If there has been no such decision, "the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor. But if

the court, after a due consideration of the matter, has reached the conclusion that the patent is valid, on this provisional matter, the inquiry is not open."—*Id.*

289. Complainant's first claim was: "The cutter and feeding device of a bung-cutting machine, arranged substantially as hereinbefore described, so that each block as it is fed into the machine shall serve as a cutting-board for the next preceding block." On motion for a provisional injunction, and apparently on inspection of the patent only, the court said: "If the combination for placing one block after another on the fish-mouth cutter, whether underneath or sideways, vertical or longitudinal, so as to operate as a cutting-board through which the fish-mouth may penetrate, is an infringement of the patent, the complainant would be correct. But this is not so. It is a particular way of doing a particular thing. It is a mechanical device wrought out by combinations, which combinations are not in defendants' machine."—*Id.*

290. By the court: "In view of the fact that complainant does not use his patent as a monopoly, but grants license to others to use it, and in view of the further fact that there is some doubt on the question of prior use of the alleged improvements, the injunction will be withheld if the defendant will give security for the payment of all the profits he may derive from the use of the invention, and for the damages its use may cause the complainant, provided that the patent shall be sustained and an accounting ordered." *Greenwood v. Bracher*, 1 Fed. Rep. 856.—NIXON, 1880.

291. Complainant's patent for a lemon-squeezer covered a combination of old elements, one of which was a perforated bed for the lemon to rest on, the juice escaping through the perforations. He obtained a temporary injunction against defendant. Defendant then made a lemon-squeezer which had a corrugated bed for the lemons to rest on, and subsequently secured a patent for such construction. *Held*, on motion of attachment for contempt, that the question whether the latter construction was a mere colorable evasion, could not be decided therein. *Onderdonk v. Fanning*, 2 Fed. Rep. 568.—BENEDICT, 1880.

292. Where the patent is recent, has not been litigated, and its validity is seriously disputed, a provisional injunction will not be granted. *White v. Harris & Sons M'fg Co.*, 3 Fed. Rep. 161.—LOWELL, 1880.

293. Serious doubt of infringement will prevent grant of provisional injunction.—*Id.*

294. Complainant's basic patent had expired ;

the suit was based on a later patent covering improvements. The later patent had once been sustained in this country and in England—where the two patents were incorporated into one—several times. Defendant was a former employé of complainant, who infringed "beyond any doubt" "intentionally," "getting up his" [defendant's] "patent for the purpose." Provisional injunction granted. *Plimpton v. Winslow*, 3 Fed. Rep. 333.—LOWELL, 1880.

295. Section 719 of the Revised Statutes provides: "And an injunction shall not be issued by a district judge, as one of the judges of the Circuit Court, in any case where a party has had a reasonable time to apply to the Circuit Court for the writ; nor shall any injunction, so issued by district judge, continue longer than to the Circuit Court next ensuing, unless so ordered by the Circuit Court." *Held*, that "it must be taken to be the law still, that the district judge not acting through the court, but signing the writ himself in vacation, should not do so when the Circuit Court is sitting, or can be applied to, and should limit its operation to the next ensuing term. But the district judge has full power to hold the Circuit Court for all purposes, including this." *Goodyear D. V. Co. v. Folsom*, 3 Fed. Rep. 509.—LOWELL, 1880.

296. Provisional injunction issued against a father. His non-emancipated son proceeded to infringe with the father's knowledge, but against his advice. Father held responsible. *Dunks v. Gray*, 3 Fed. Rep. 862.—BUTLER, 1880.

297. Where, on a motion for provisional injunction, the equities are with the complainant, doubts as to infringement will be resolved in complainant's favor. *Onderdonk v. Fanning et al.*, 4 Fed. Rep. 148.—BENEDICT, 1880.

298. By the court: "Equity requires that the defendant, upon whose application the plaintiff's patent was granted, and whose wife sold the patent, together with the tools and stock to the plaintiff, and who is wholly insolvent, should not be permitted to make machines so nearly similar to that described in the plaintiff's patent, and by disposing of them at lower price destroy the value of the property bought of the wife, until his right to do so has been established by a final decree."—*Id.*

299. "This is a matter addressed to the sound discretion of the court. It is not a matter of course, upon the presentation of a patent, which *prima facie* establishes the right of the patentee to the thing patented, accompanied by an allegation that the defendant is violating it, that a preliminary injunction will issue; but it must appear likewise that, if the writ of injunction

does not issue, the complainant will be irreparably injured, and that no subsequent decree of the court can sufficiently ascertain and make good the damages." *Pullman et al. v. B. & O. R. R. Co.*, 4 Hughes, 236.—BOND, 1880.

300. Defendant for ten years had run complainants' patented sleeping cars over its road under contract, then built and ran cars of its own, which complainants claimed infringed their patents, offering expert affidavits to that effect; complainants also contended that if defendant was permitted thus to infringe others would thereby be incited to do the same. Defendant offered expert affidavits denying infringement. Motion for provisional injunction denied, because the court would not determine the validity of the patents on the question of infringement on the affidavit's evidence, because no irreparable damage would be done by withholding the injunction, and because the damages were ascertainable by the contract and the defendant was pecuniarily responsible.—*Ib.*

301. Complainant had a patent for a process for producing bronze color on iron, and for the product; the process was to clean the casting from sand and scale and then coat it with oil or oil varnish, and subject it to high heat. In a prior suit, on the merits, complainant had not claimed that his patent covered the case where the iron and oil were not both oxidized. Defendants made articles by first oxidizing the iron, then varnishing and heating to a less degree than would oxidize the varnish. A provisional injunction had been granted in the present suit. Motion for attachment for contempt of court in violating the injunction denied. *Tucker v. Burditt et al.*, 5 Fed. Rep. 808.—LOWELL, 1880.

302. Provisional injunction granted on the construction of complainant's patent made in two prior cases in other circuits. *Woven Wire Mattress Co. v. Palmer*, 5 Fed. Rep. 812.—BLATCHFORD, 1880.

303. On motion for provisional injunction, the construction of patent given by a sister court, in a previous trial on the merits, is to be followed. *Woven Wire M. Co. v. Wire Web Bed Co.*, 1 Fed. Rep. 222.—SHIPMAN, 1880.

304. A provisional injunction, granted in a prior case, with a decree in that case against respondents by consent of parties, is not such an establishment of the patent in suit as warrants a provisional injunction in a later suit against other parties; and where a patent was but three years old, and though 600,000 of the patented corset had been sold, it was held that this did not amount to such an establishment of the patent as would warrant the granting of a provi-

sional injunction. *Warner v. Bassett et al.*, 19 Blatch. 145.—SHIPMAN, 1881.

305. A decree made in a former suit, wherein no real defence was made, does not establish the validity of the patent sued on for the purpose of warranting provisional injunction in a subsequent suit. *Hayes v. Leten*, 5 Fed. Rep. 521.—BENEDICT, 1881.

306. Where the patented thing has been in extensive use for several years, and the public have acquiesced in the patentee's right, the issue of provisional injunction is warranted. *McKay et al. v. Dibert*, 5 Fed. Rep. 587.—NIXON, 1881.

307. Where the infringing defendants are licensees, and in the license are estopped from setting up the defence relied upon, provisional injunction will issue. *McKay v. McNight et al.*, 5 Fed. Rep. 593.—NIXON, 1881.

308. "Upon a motion for preliminary injunction the plaintiffs must establish the point of infringement beyond a reasonable doubt, and as this question often depends upon the proper construction of the patent, its claims should ordinarily have been construed by a court of competent jurisdiction, or should have been practically construed by the consent and acquiescence of that part of the public which is cognizant of the extent of the monopoly." *Steam Gauge & Lantern Co. et al. v. Miller & Co.*, 8 Fed. Rep. 314.—SHIPMAN, 1881.

309. A litigation carried to the point of getting ready for argument, and then settled by the defendant buying an interest in the patent for a large sum, has almost the weight of an adjudication in favor of the patent in an application for an injunction.—*Ib.*

310. Complainants had made the patented chair without infringement for about ten years, having a business of \$30,000 and two licensees. Defendant had gone into the business after warning from complainant. Provisional injunction granted. *Collignon et al. v. Hayes*, 8 Fed. Rep. 912.—BLATCHFORD, 1881.

311. "An application for a preliminary injunction should never be granted where the answering affidavits of the defendants show a reasonable doubt about the novelty or invalidity of the complainant's patent." *Illingworth v. Spaulding et al.*, 9 Fed. Rep. 154.—NIXON, 1881.

312. After a hearing on a motion for provisional injunction a party cannot take *ex parte* affidavits and have them considered.—*Ib.*

313. "Whenever, upon the facts presented, a fair and reasonable doubt exists as to whether the defendant has actually been guilty of an infringement, or when it does not satisfactorily appear that the complainant is the first and sole

inventor of the improvement claimed, a preliminary injunction will be refused." *Cross v. Livermore*, 9 Fed. Rep. 607.—COLT, 1881.

314. When the question of infringement is doubtful an injunction will be refused until final hearing. *Marks v. Corn et al.*, 11 Fed. Rep. 900.—BLATCHFORD, 1881.

315. Complainants' patent was issued July, 1878, and a successful business established under it. Defendant made affidavit that his use was only experimental, that no sales had been made, and that he had no intention of making sales during the suit; it was shown that defendant had exhibited at a fair and sent out circulars. Provisional injunction granted. *White et al. v. Heath*, 10 Fed. Rep. 291.—COLT, 1882.

316. Where infringement is doubtful a provisional injunction will not be granted. *Hardy et al. v. Marble*, 10 Fed. Rep. 752.—BLATCHFORD, 1882.

317. The court will not decide doubtful questions as to complainant's right upon a motion for a preliminary injunction. *N. Y. Grape Sugar Co. v. Am. Grape Sugar Co. et al.*, 20 Blatch. 386.—WALLACE, 1882.

318. "Formerly the rule undoubtedly was that a preliminary injunction would not be granted unless the right secured by the patent was fortified by evidence of an exclusive or recognized enjoyment of the right, or by former adjudications sustaining it. In more recent practice this rule has been relaxed when the validity of the patent is not assailed, and the proof of infringement is clear." "It would seem that the presumption arising from the grant, especially when not of a recent date, ought to suffice as against a defendant who has appropriated an invention secured to another by letters-patent which are attached."—*Ib.*

319. Complainant had recently purchased the patents sued on, not to manufacture, but to grant royalty licenses thereunder, and said in the moving affidavits that an injunction was not desired if the defendants would take a license, but it had not established a license fee. Defendants were entirely responsible; they had a large business with many operatives. Provisional injunction denied with leave to complainant to move, if it saw fit, for bond with sureties.—*Ib.*

320. "Irreparable damage is an indispensable element upon an application for a provisional injunction."—*Ib.*

321. By the court: "The defendant further contends that there has been an acquiescence for years on the part of McWilliams and his assigns in his use of the patent. We must remember, however, that the reissued patent was not grant-

ed until March, 1880, and that no prior use under a defective patent can authorize the use of the invention after the issuing of the renewed patent." *McWilliams M'fg Co. v. Blundell*, 11 Fed. Rep. 419.—COLT, 1882.

322. "The patentee is not obliged to proceed against all who infringe at once, and is not guilty of acquiescence for not doing so."—*Ib.*

323. "To the allegation of the defendant that the public have not acquiesced in the invention, is a sufficient answer to observe that the ground upon which such public acquiescence is important is, that it shows exclusive possession by the patentee, and thus creates a presumption of title; and . . . in this respect positive adjudication . . . is often more satisfactory than acquiescence."—*Ib.*

324. By the court: "In this case the infringement seems clear, and, upon the evidence submitted, the patent is valid; therefore the injunction should not be refused, because the defendant offers to give bonds with surety to pay any damages awarded against him."—*Ib.*

325. "Upon a motion for provisional injunction, and in the absence of an acquiescence by the public in the validity of plaintiffs' patent, the court is confined within the limits of previous adjudications, and ought not, by granting the motion, to give a new construction to previously sustained claims, unless such construction is perfectly clear." *Steam Gauge & Lantern Co. et al. v. Edward Miller & Co.*, 11 Fed. Rep. 718.—SHIPMAN, 1882.

326. Where the defence relied upon was the same as had been overruled in the Patent Office, with the same parties then represented, a provisional injunction was ordered to issue. *Holliday et al. v. Pickhardt et al.*, 12 Fed. Rep. 147.—BLATCHFORD, 1882.

327. Where the defendant succeeds in casting doubt upon the originality of the invention, where the patent has never been established in a suit, where complainant shows only a limited acquiescence on the part of manufacturers, and where the defendant has for several years seemed to openly assert the invalidity of the patent, a provisional injunction will be refused. *Fish v. Domestic Sewing Mach. Co.*, 12 Fed. Rep. 495.—WALLACE, 1882.

328. Complainant's patent having been sustained in a previous suit, complainant having shown infringement by clear and explicit evidence of two affiants, and the contrary evidence being the testimony of two affiants, not shown to be experts, a provisional injunction was allowed "with leave to the defendant to move to dissolve upon his filing his answer

upon fuller showing, if he shall so be advised." *Odorless Excavating Co. v. Lauman*, 12 Fed. Rep. 788.—BILLINGS, 1882.

329. The defendant had formerly owned an interest in complainants' patent. Defendant then patented an improvement which infringed complainants' patent, exhibited such patented improvement at a fair, and distributed circulars setting forth its advantages. Complainants had invested some twenty thousand dollars in the manufacture of their improvement, had established a successful business, had made large and numerous sales, and had had exclusive possession for a short time. Provisional injunction issued against defendant although he asserted that he had not sold any of the devices complained of as an infringement, and did not intend to do so during the pendency of the suit. *White et al. v. Heath*, 22 O. G. 500.—COLT, 1882.

330. One reason why a provisional injunction may be refused in a doubtful case is that "a wrong decision on a motion is not appealable, and, besides, it is within the power of the court at a hearing [though not often exercised of late] to grant a decree for damages or profits and withhold the injunction." *Brewster et al. v. Parry*, 11 Fed. Rep. 694.—LOWELL, 1882.

331. Injunction refused where the improvement in question was but a part of a large machine upon which the daily newspaper of the defendants was printed, the real damages to complainants being the loss of a license fee. *Hoe et al. v. Boston Daily Adv'r Cor. et al.*, 14 Fed. Rep. 914.—LOWELL, 1883.

332. When the defeated party in a Patent Office interference carries the interference into court, "it would be highly improper to enjoin the successful applicant from receiving his patent upon the mere suggestion that the Commissioner was mistaken." *Whipple v. Miner et al.*, 15 Fed. Rep. 117.—LOWELL, 1883.

333. By the court: "The defendants copied the plaintiff's design before it was patented, and without knowing that a patent was to be applied for, and they are ready to stop infringing. The damages must be small, and I should wish to end the case if that were possible; but a serious doubt is raised as to the novelty of the design, by the affidavit of one Smith, and by the admissions of the plaintiff in reply to Smith, so that I think an injunction *nisi* is all that I ought to grant." *Margot v. Schnitzen et al.*, 15 Fed. Rep. 118.—LOWELL, 1883.

334. By the court: "No case is cited, and I have been unable to find one sustaining an injunction where, as in this case, the following

facts concur: [1] A delay of ten years between the original patent and the reissue; [2] a controversy as to the amended claim of the reissue, and also upon the question of infringement; [3] an apparent apathy on the part of the patentee regarding his rights for many years following his invention; [4] no decision of any court establishing the validity of the patent; [5] no royalties or license fees paid to the patentee; [6] no general use; [7] no present manufacturing or vending under the patent; [8] no public recognition; [9] large interests of the defendants jeopardized; [10] no allegation of irresponsibility. On the contrary, the courts have frequently regarded the existence of a few of these circumstances as sufficient to authorize a denial of the application." *Tillinghast v. Hicks et al.*, 23 O. G. 739.—COXE, 1882.

335. "It is a well-settled rule in patent cases that the court will not grant an injunction where there is doubt as to the validity of the patent." *Nat'l Feather Duster Co. v. Dearborn Duster Co. et al.*, 24 O. G. 497.—BLDGGETT, 1881.

336. Where complainant has had a decree for the recovery of profits upon machines against one party, such machines go to a third party free from liability to complainant. And an injunction restraining the use of such machines *pendente lite* will be dissolved. *Steam Stone Cutter Co. v. Sheldons et al.*, 21 Blatch. 260.—WHEELER, 1883.

337. By the court: "It has been the course of proceedings here for more than twenty years, and elsewhere, to accept a decision in a patent case when made on the merits, without collusion or on mere default, as an adequate basis for any preliminary injunction so far as the validity of the patent is involved, leaving open for inquiry on such motion, solely the question of infringement." *Coburn et al. v. Clark*, 5 McCrary, 100.—TREAT, 1883.

338. Several cases against different parties were brought in a circuit court for the infringement of a patent. One case went to final hearing; the patent was held valid; the defendant was held to infringe, and an appeal was taken to the Supreme Court, but was abandoned at the instance of the plaintiffs for a consideration named. The other cases were dismissed. One of the other defendants continued to use his device for about seven years. Then complainants brought suit, and asked for a provisional injunction. The court held that the facts did not warrant an injunction. *McMillin et al. v. Conrad*, 5 McCrary, 140.—TREAT, 1883.

339. Where defendants have acknowledged infringement in writing, such fact warrants pro-

visional injunction. *Coburn et al. v. Brainard et al.*, 5 McCrary, 215.—TREAT, 1883.

340. By the court: "The decision of the Patent Office upon an interference proceeding is sufficient to entitle the successful party as against the defendant party or his trustees, to a preliminary injunction upon the question of priority of invention raised in the subsequent suit." *Smith v. Halkyard et al.*, 23 O. G. 1883.—COLT, 1883.

341. By the court: "While the defeated party to an interference is not estopped in another action from raising the question of want of novelty in the invention, yet if he had knowledge of the condition of the art at the time of his application, which the testimony here discloses, a want of novelty in the invention must be clearly apparent or a preliminary injunction will be granted. . . . In such a case it has been held that where there is a want of good faith the court will grant injunction."—*Id.*

342. Ordinarily the court will not, on a motion for provisional injunction, hear and discuss the case *in extenso*. *Washburn & Moen M'fg Co. et al. v. Fuchs*, 5 McCrary, 236.—TREAT, 1883.

343. Where the defendant was insolvent, but went into business apparently under a valid patent, and there were doubts as to whether complainants' patentee was the real inventor, a provisional injunction was refused.—*Id.*

344. Although complainant can show acquiescence by the public and injury to its business by a new rival, yet if a substantial question exists in regard to the validity of the patent, a provisional injunction will not be granted. *Bradley & Hubbard M'fg Co. v. The Charles Parker Co.*, 17 Fed. Rep. 240.—SHIPMAN, 1883.

345. Where a preliminary injunction was asked for, and defendant had been doing the acts complained of for seven years, while a suit at law had been brought in 1880 and not prosecuted, and complainant was one who made its patent profitable by licenses, and the defendant was shown to be pecuniarily responsible, the injunction was denied. *United Nickel Co. v. New Home Sewing Mach. Co.*, 21 Blatch. 415.—BLATCHFORD, 1883.

346. A preliminary injunction is granted only to restrain injury in its nature irreparable. *Zinsser et al. v. Cooledge et al.*, 17 Fed. Rep. 538.—WHEELER, 1883.

347. It is not a good objection to the grant of a preliminary injunction that a disclaimer was not filed, as respects other claims than those in issue before suit brought. *Duff et al. v. Calkins*, 25 O. G. 601.—ACHESON, 1883.

348. For an example of an injunction forbidding a licensor from declaring a forfeiture of the license for non-payment of royalty at the rate originally fixed therein, see —. *Baker M'fg Co. v. Washburn & Moen M'fg Co.*, 5 McCrary, 504.—MCCRARY, 1883.

349. Defendants while in complainant's employ took a patent on electric clocks and assigned same to complainant. A modification of such clock was made while in defendants' employ and represented by defendants to be within the patent. After leaving the employ, defendants attempted to make and sell the latter particular kind of clock, and the court granted a provisional injunction, notwithstanding the patent was recent and had never been litigated. Defendants were held to be estopped from denying validity and infringement. *Time Tel. Co. v. Carey et al.*, 22 Blatch. 34.—WALLACE, 1884.

350. Although on motions for provisional injunctions—wherein the ordinary rules of evidence do not obtain—records pertaining to other cases to which defendant was not a party or privy, may be introduced, such records are not admissible in a trial upon the merits. *Matthews v. Iron-Clad M'fg Co.*, 19 Fed. Rep. 321.—WALLACE, 1884.

351. Complainant brought a suit on its patent and secured a provisional injunction. Before defendants' answer was filed complainant brought another suit on the same patent for an alleged subsequent act of infringement, and sought provisional injunction, which was denied on the ground that the second suit would not lie with the first suit pending in the manner stated. *Gold & Stock Tel. Co. v. Pearce et al.*, 22 Blatch. 69.—WHEELER, 1884.

352. Where the complainant has prevailed over the defendants in an interference in the Patent Office, the interference proceedings determine, as between those parties, first, that the complainant was the prior inventor; and, second, that the subject-matter of the patent was not void for want of patentable novelty, so that the complainant would be entitled, if there were no other considerations, to a provisional injunction, there being no dispute as to the infringement. But it is open to the defendants to insist that the patent is void for want of patentable novelty, upon references now presented to the Patent Office, and for other reasons. *Swift v. Jenks et al.*, 19 Fed. Rep. 641.—COXE, 1884.

353. "Where an injunction will work great injury to one party without corresponding benefit to the other, it should not ordinarily issue, especially where adequate protection can be had without it."—*Id.*

354. For an example of a case where defendants raised some doubts as to the validity of complainant's patent, and the court was not willing to order a provisional injunction, but defendants were ordered to give bond with sureties, see —. *Id.*

355. "Upon the decision of a motion for a preliminary injunction against the infringement of a patent which has been sustained by a previous adjudication, it is proper, as a general rule, to follow the construction of the patent which was given upon such adjudication, provided the construction was given with deliberation and thoughtfulness in the use of language." *Malory M'fg Co. v. Hickok et al.*, 20 Fed. Rep. 116.—SHIPMAN, 1884.

356. Where there is doubt whether defendant's structure actually embodies the improvement of complainant's patent, a provisional injunction will be refused. *Newbury v. Mossman*, 21 Fed. Rep. 579.—WHEELER, 1884.

357. Where a complainant, in moving for a provisional injunction, relies upon the effect of conditions contained in licenses taken of complainant by defendants, the court will not proceed to act upon such conditions where the licenses are not mentioned in the bill. "Preliminary relief will not be granted when upon the same proofs and allegations final relief would not be granted." This is true, although copies of the licenses are annexed, and although enough may be spelled out from the affidavits of the defendants, and from the answer to the bill, to supply these omissions. "The court should not be asked to spend much time to find out whether the vital facts upon which the moving party relies, and which he has not taken the trouble to assert, cannot be exhumed from some other source." *International Tooth Crown Co. v. Mills et al.*, 22 Fed. Rep. 659.—WALLACE, 1884.

358. Complainants applied for a provisional injunction against defendant, their licensee, on the ground of default in the payment of royalties. Defendant alleged by affidavit that complainants had themselves violated the agreement, and it also appeared that complainants had practically lost the control of the market as to the patented thing, wherefore the court refused the provisional injunction, but ordered defendant to file in court sworn monthly reports with security for payment of royalties. *Washburn & Moen M'fg Co. et al. v. H. B. Schutt & Co.*, 22 Fed. Rep. 710.—ACHESON, 1884.

359. When complainant seeks a provisional injunction against defendant, its licensee, for default of payment of royalties, and defendant shows violation of the agreement on complain-

ant's part, and that complainant has practically lost control of the market as to the patented thing, the provisional injunction will be refused. *Washburn & Moen M'fg Co. v. Cincinnati Barbed Wire Fence Co.*, 22 Fed. Rep. 712.—SAGE, 1884.

360. By the court: "Assuming that the whole testimony is before the court, and that it has been completely presented and can be thoroughly studied on this motion, the fact still remains that a temporary injunction is being sought upon a question which now arises for the first time, and which must be examined with the care and patience necessarily incident to a case wherein men's minds must differ. In other words, the attempt is made to make a motion for a temporary injunction applicable to a state of facts to which such a motion is not adapted. It is no answer to the argument that upon a motion for an injunction *pendente lite*, the questions must be susceptible of ready answer, and the case must be free from reasonable doubt, to say that, this whole case is now before the court, and that the questions, after the state of the art is ascertained, are those of law, which can be settled as well now as at a final hearing; because a motion for a temporary injunction is not designed for the adjudication of doubtful questions which have not previously been discussed." *Gold & Stock Tel. Co. v. Commercial Tel. Co.*, 22 Fed. Rep. 838.—SHIPMAN, 1885.

361. Complainant's patents were granted June 10th, 1884. There having been no adjudication on these patents, a provisional injunction was granted April 6th, 1885. *Foster v. Crossin et al.*, 23 Fed. Rep. 400.—CARPENTER, 1885.

362. Where it appears that complainant has known for some time of defendant's infringement, there must be satisfactory explanation of this delay in order to secure a provisional injunction. *Mundy v. Kendall*, 23 Fed. Rep. 591.—NIXON, 1884.

363. Though a court may be satisfied of infringement, yet where the defendant raises doubts as to the novelty of complainant's patented device, the court will, in a proper case, refuse the injunction but order a bond and accounting. *N. Y. Belting & Packing Co. v. Magouan*, 23 Fed. Rep. 596.—NIXON, 1884.

364. Where upon a motion for a provisional injunction the complainant's title to the patent in suit is left in doubt, the injunction will be refused. *Continental Store Service Co. v. N. Y. Store Service Co. et al.*, 31 O. G. 1561.—SHIPMAN, 1885.

365. For an example of the construction of a patent made upon a motion for a provisional in-



junction, see —. *Parker v. Montpelier Carriage Co.*, 81 O. G. 1688.—WHEELER, 1885.

366. "Upon a motion for a provisional injunction where infringement is clear, the court will accept and follow an adjudication sustaining a patent made in another circuit on a final hearing and after full consideration." *Cary et al. v. Lowell M'fg Co.*, 24 Fed. Rep. 141.—ACHESON, 1885.

367. A Patent Office adjudication in an interference proceeding "is a sufficient adjudication upon the patentability of the invention and the right of the successful party to a patent for it, to lay the foundation for a preliminary injunction against the losing parties and privies, to prevent infringement of the patent; and neither alleged anticipation of the invention by others, known to them while they were seeking to obtain a patent for it themselves, nor their own, will avail them to prevent the injunction without being made to clearly appear." *Celluloid M'fg Co. et al. v. Chrolithion Collar & Cuff Co. et al.*, 32 O. G. 383.—WHEELER, 1885.

368. Upon a motion for a provisional injunction a prior decision in the same circuit is controlling. *Holliday et al. v. Matheson et al.*, 23 Blatch. 229.—WALLACE, 1885.

369. Although a prior case may have involved substantially the same questions which are involved in a later case, yet, if in the later case a probable mistake of fact is shown in the former case, or a different state of facts is shown, a provisional injunction will not be granted in the later case. *Hayes v. Bickelhaupt*, 32 O. G. 135.—WHEELER, 1885.

370. Where, on a motion for a provisional injunction, a doubt arises as to whether the claim of the reissue in suit is broader than the original patent, that is sufficient to defeat the motion. *Western Union Tel. Co. v. Baltimore & Ohio Tel. Co.*, 23 Blatch. 419.—WALLACE, 1885.

371. It is a recognized rule that in contests respecting provisional injunctions, the court will follow the prior decisions of other courts upon the same questions. *Ladd, Trustee, etc. v. Cameron*, 25 Fed. Rep. 37.—NIXON, 1885.

372. A motion for provisional injunction was made in 1885. It was shown that the owners of the patent had, since 1878, known of the alleged infringement and taken no steps, except by making threats, to restrain it. It was attempted to account for this delay by the statement that the owners of the patent were quarrelling among themselves from the date of the patent until 1882, and that since the latter date they had been constantly engaged in establishing their rights against other infringers. The explanation

was held unsatisfactory, and the provisional injunction was refused by reason of complainant's laches.—*Id.*

373. When the court is satisfied on the showing made, that defendant infringes, that the complainant is able to satisfy the public demand, and that his exclusive right has been acquiesced in by the public, a provisional injunction will be granted. *Covert v. Curtis*, 25 Fed. Rep. 43.—COXE, 1885.

374. Doubts about novelty will prevent the issue of a provisional injunction. *Gunn, Trustee, et al. v. Savage et al.*, 25 Fed. Rep. 101.—SHIPMAN, 1885.

375. For an example of a case where the court, upon application for a provisional injunction, did not follow the rulings upon the patent previously made by a sister court, but instead of granting an injunction ordered defendant to give bond for an accounting and damages, see —. *Steam Gauge & Lantern Co. et al. v. St. Louis R. R. Supplies M'fg Co.*, 33 O. G. 889.—TREAT, 1885.

376. This was a motion for a provisional injunction. The patent had been incidentally before the Supreme Court, sustained after a hard litigation in a circuit court, and that decision followed in the present Circuit Court. These facts were held to establish the validity of the patent for the purposes of the provisional injunction. *Cary et al. v. Domestic Spring Bed Co.*, 27 Fed. Rep. 299.—NIXON, 1885.

377. For an example of testimony held sufficient to warrant dissolution of a provisional injunction, see —. *Cary et al. v. Domestic Spring Bed Co. et al.*, 26 Fed. Rep. 38.—NIXON, 1886.

378. "The rule is a good one that the evidence which would prevent the issuing of an injunction ought to be regarded as sufficient to dissolve one already granted."—*Id.*

379. Although a patent may have been sustained by the Supreme Court, yet, if in the later case it is doubtful whether the thing then presented as an infringement really is such, a provisional injunction will not issue. *Consolidated Safety Valve Co. v. Ashton Valve Co. et al.*, 26 Fed. Rep. 319.—COLT, 1886.

380. A decree for infringement having gone against respondents, manufacturers in one circuit, a restraining order was subsequently granted in another circuit against the parties selling the said manufacturers' product. *Alabastine Co. v. Richardson et al.*, 26 Fed. Rep. 620.—CARPENTER, 1886.

381. Pending suit on a patent a disclaimer was filed, and motion for provisional injunction made. Defendants contended that a supple-

mental bill should have been filed and another motion for provisional injunction made. The court sustained complainant's mode of procedure. *Libbey v. Mt. Washington Glass Co. et al.*, 26 Fed. Rep. 757.—COLT, 1886.

382. On final hearings, motions for preliminary injunctions may be entirely disregarded for obvious reasons. *Con. Fruit Jar Co. v. Bellaire Stamping Co.*, 35 O. G. 627.—SAGE, 1886.

383. The taking of, and operating under a license would appear to be sufficient evidence of acquiescence in the validity of complainant's patent to warrant provisional injunction without previous adjudication, if the patent were unchallenged. *Brown v. Lapham et al.*, 23 Blatch. 475.—WHEELER, 1886.

384. Where there is a doubt whether a reissue claim can be sustained on comparison with the original, a provisional injunction will not issue. *Fraim et al. v. Sharon Valley Malleable & Gray Iron Co.*, 27 Fed. Rep. 457.—SHIPMAN, 1886.

385. "One who invents or discovers and keeps secret a process of manufacture, whether patentable or not, has a property therein which this court will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or discloses it to a third person." *Salomon v. Hertz et al.*, 35 O. G. 1109.—RUNYON, 1886.

386. On a motion for a provisional injunction in one circuit, prior decisions in other circuits upon the same patent and same points will be accepted as decisive for the purposes of the motion. *Am. Bell Telephone Co. et al. v. National Improved Telephone Co. et al.*, 27 Fed. Rep. 663, *per curiam*, 1886.

387. The fact that the Government has instituted a suit to annul or repeal a patent in one circuit is not a reason that a court should refuse in another circuit a provisional injunction on that patent.—*Id.*

388. In preparing for a motion for a provisional injunction, affidavits cannot be filed out of order, and after the proper time. *Am. Paper Barrel Co. v. Laraway*, 28 Fed. Rep. 141.—SHIPMAN, 1886.

389. Where a patent is less than a year old, and has never been adjudicated, a provisional injunction will be denied. *Johnston Ruffler Co. v. Avery Mach. Co.*, 28 Fed. Rep. 193.—WHEELER, 1886.

390. The patent in suit was a reissue. A vigorous contest had been had over the reissue in the Patent Office and the patent had been sustained by a court. Provisional injunction granted. *Consolidated Bunting Apparatus Co. v.*

*Peter Schoenhofen Brewing Co.*, 28 Fed. Rep. 428.—BLODGETT, 1886.

391. Two parties, A and B, were in interference in the Patent Office; A prevailed and took patent. Thereupon A's assignee brought suit against B's assignee, and complainant contended that, by virtue of this action of the Patent Office, complainant was entitled to a preliminary injunction. Thereof the court said: "While acquiescence in the decision of the Patent Office in an interference case might, under some circumstances, raise a presumption of the validity of the patent, and *prima facie* entitle the complainant to protection by injunction, it is far from *res adjudicata*. No court is bound by the decision of the Patent Office granting a patent, when immediate steps are taken to test its validity in an action instituted for that purpose, and in an interference case, when the issue is decided, the rights of the defeated party are not prejudiced if he avails himself of the law which virtually transfers the controversy to the courts.

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"The patent held by complainant, and the decision of the Patent Office in the interference, do not make out a case for an injunction, unless the *prima facie* right is fortified by a judicial decree or judgment or acquiescence, neither of which exists." Provisional injunction was refused. *Minneapolis Harvester Works v. McCormick Harvesting Machine Co.*, 28 Fed. Rep. 565.—NELSON, 1886.

392. On a motion for provisional injunction, "the fact of infringement being established clearly by the proofs, and it also appearing by the proof that the defendant has been a licensee of the complainant for the use of these patents, and at one time claimed to be the owner of the patents, and entitled to their use, and that he has extensively dealt in the patented article, it would seem that defendant is now hardly in position to seriously question the validity of the patent. At least, under the circumstances . . . the complainant is entitled to a preliminary injunction restraining the defendant from the use of devices covered by the patent until such time as the case can be fully investigated upon the final hearing." *Burr v. Kimbark*, 28 Fed. Rep. 574.—BLODGETT, 1886.

393. Where the president of the defendant corporation was, but a few months before, the president of the complainant corporation; where, with one exception, the trustees of the defendant corporation but recently occupied positions of confidence and trust under the complainant corporation, and continually recognized and asserted the validity of the patent in suit;

and where defendant has failed to respect a restraining order made pending a motion for provisional injunction, the court will hold defendant to a stricter accountability than an ordinary infringer. *Steam Gauge & Lantern Co. v. Ham M'fg Co.*, 28 Fed. Rep. 618.—COXE, 1886.

394. On a motion for provisional injunction, although the court will give due weight to all prior adjudications and recognize their scope, still, the question of infringement is to be determined in each particular case as it arises, and where the court is in doubt on the question of infringement the injunction will not be granted. *Hammerschlag M'fg Co. v. Judd*, 28 Fed. Rep. 621.—COLT, 1886.

395. A provisional injunction against infringement may be granted before patent issued and while the application for patent is pending. *Butler v. Ball*, 28 Fed. Rep. 574.—WELKER, 1886.

396. Although the patent in suit may previously have been sustained as to its validity, yet where the affidavits are conflicting and new facts are brought in, raising doubts, and defendants are responsible, and complainant is in the habit of granting licenses, a provisional injunction will be refused. *National Hat Pouncing Mach. Co. v. Hedden et al.*, 29 Fed. Rep. 147.—WALES, 1886.

397. "The ordinary rules of equity jurisprudence apply in patent cases as in others, and a temporary preliminary injunction will not be granted unless it seems probable that the protection which the complainant's bill shows he is entitled to compels it. If he can receive full protection without such temporary injunction, it will be refused. It will often be refused also, where there has been great delay on complainant's part, in consequence of which defendant has proceeded to build up an industry based upon that patent." *Keyes et al. v. Pueblo Smelting & Refining Co.*, 31 Fed. Rep. 560.—BREWER, 1887.

398. Where the defendant has been compelled to respond in damages and has used the alleged infringing device for nine years, provisional injunction will not issue.—*Id.*

399. The patent in suit was for an improvement in sweat-bands for hats and caps. Complainant had a capital stock of \$300,000, manufactured largely under its patent, and had granted one hundred and forty-five licenses, some of them in settlement of suits brought for infringement. A provisional injunction had been granted in another case, although not under circumstances to give it great force. Defendant's

infringement was of late date. The court had some doubts about the novelty and patentability, but under the circumstances resolved them in favor of the patent and granted an injunction, although there were some rather unsatisfactory affidavits as to prior use, and the court said: "Even where serious doubts exist, if the court can see that these may be removed, and that the withholding of the injunction will work great injury without corresponding advantage, it should not hesitate to issue the writ." *Hat-Sweat M'fg Co. v. Davis Sewing Mach. Co.*, 32 Fed. Rep. 401.—COXE, 1887.

400. On motion for a provisional injunction, where the mind of the court is not free from doubt as to the validity of complainant's patent, the injunction will be denied. *Canfield Rubber Co. v. Gross et al.*, 32 Fed. Rep. 226.—COLT, 1887.

401. The patent in suit was for a fire-kindler. Complainant had one suit in progress against the manufacturer of the alleged infringing articles wherein the validity of the patent was vigorously assailed. Complainant brought suit against one who bought the articles from the manufacturer seeking provisional injunction. The injunction was denied. *Hicks v. Beardsley et al.*, 32 Fed. Rep. 281.—LACOMBE, 1887.

402. "Before the preliminary injunction to restrain infringement of a patent is granted there must be a special presumption that the patent is valid. That presumption does not arise from the presentation of the unattended letters-patent. It may be shown, however, by proof, that the patent has been suitably adjudicated in a federal court, and there held valid, or that its validity has been suitably acquiesced in by the public, or that the patent has successfully undergone an interference in the Patent Office. When either of these facts appears, the validity of the patent will be presumed." *Edward Barr Co. v. New York & New Haven Automatic Sprinkler Co.*, 32 Fed. Rep. 79.—LACOMBE, 1887.

403. On a motion for provisional injunction, a general allegation of acquiescence in the bill does suffice to establish acquiescence.—*Id.*

404. The grant of a patent after victory in an interference does not establish the validity of the patent for the purpose of a provisional injunction against a person who was not a party to the interference.—*Id.*

405. "On an application for a preliminary injunction the court considers always the relative situation of the parties, and the injury or benefit which may result to either from the granting or the refusing of the injunction. Such an order is spoken of sometimes as an execution before

judgment, though that is not accurate. It is simply the tying up of the affairs of the relative parties and holding them in the present state until there can be a full determination. The court will not do that, where there is no probability that a final injunction will be given, nor unless it is apparent that some serious injury may result to the complainant unless it is granted, and that it will compare, as stated, the relative benefits and injuries to the different parties." *Westinghouse Air-Brake Co. v. Carpenter*, 32 Fed. Rep. 484.—BREWER, 1887.

406. On a motion for a provisional injunction against the infringement of a reissued patent having a plural number of claims, only some of which are in issue, the validity of the claims not in issue will not be looked into.—*Id.*

407. "It is undoubtedly true that a party may, before the expiration of another's patent, make all his arrangements of machinery, buildings, and everything of that kind for going into the business of manufacturing the patented article at the time the patent expires." In this case, however, the provisional injunction was granted only a short time before the expiration of the patent.—*Id.*

408. On a motion for a provisional injunction, where the defendant contends that the patent in suit will expire at a certain time by reason of a prior foreign patent for the same invention, and the complainant denies such contention, the court will not on such motion determine when the patent in suit expires. *Westinghouse Air-Brake Co. v. Carpenter*, 32 Fed. Rep. 545.—SHIRAS, 1887.

409. "That in many instances courts of equity have permitted the defendant to continue the manufacture, use, or sale of a patented article, pending the hearing and final decision of the cause, upon giving bond or other security, is not questioned; but upon examination of these cases it will be found that some fact or ground existed justifying such action on the part of the court, aside from the mere convenience of the defendant, and the case was of such a character that the giving of a bond afforded reasonable protection to the complainant. For instance, if the only or principal use made by the patentee of his patent-right is to sell territorial rights, or to demand and receive a royalty from licensees, then the court can, by providing for good security and proper accounting, reasonably protect the patentee from loss, even if the alleged infringer is permitted to continue in the use or manufacture of the patented article pending the hearing. So, also, if the patentee makes little or no use of his monopoly, or knowingly permits

a third party to engage in the manufacture of the patented article, and without objection allows him to invest money and time in the business, and then seeks to put a stop to the infringement, the court, even though well satisfied that the patent is valid, and the defendant is an infringer, may refuse to grant an injunction until the final hearing, or may give the defendant the option of giving bond. In such cases the laches of the patentee are such that he is held to have forfeited the protection which the court would otherwise have extended to him."—*Id.*

410. Where the infringement consists in placing the patented thing upon railway cars for experiment and exhibition with the evident intent to proceed with the manufacture, a provisional injunction will be granted although the patent in suit is near its expiration.—*Id.*

411. Ordinarily the decision of a court, after a hearing upon the merits, is controlling in a subsequent application for a provisional injunction on the same patent. *Seibert Cylinder Oil-Cup Co. v. Beggs*, 32 Fed. Rep. 790.—LACOMBE, 1887.

412. Where, on a motion for a provisional injunction, the court is in doubt as to the patentable novelty of the improvement, provisional injunction will be refused. *Baldwin v. Conway et al.*, 32 Fed. Rep. 795.—LACOMBE, 1887.

## INJUNCTION—PERPETUAL.

### CASES.

1. "Courts of equity constantly refuse injunctions, even where the legal right and title of the party are acknowledged, when his own conduct has led to the very act . . . of which he complains." And this doctrine is applied when the conduct in question was toward others than the present defendants. *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

2. By the court: "It does not seem to me that a court of equity ought to interfere to grant a perpetual injunction, in a case" where a disclaimer is needed, "whatever might be the right and remedy at law, unless a disclaimer has been in fact filed at the Patent Office before the suit is brought."—*Id.*

3. A was put under injunction. B, who had been his clerk, and known his transactions, immediately became A's assignee and continued the business. It was held that injunction might immediately issue against B. *Parkhurst v. Kinsman et al.*, 2 Blatch. 78.—BETTS, 1848.

4. "A perpetual injunction is a part of the decree made at the hearing upon the merits,

whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience." *Motte v. Bennett*, 2 Fish. P. C. 642.—WAYNE, 1849.

5. For a discussion of the history of injunctions, see — *Id.*

6. The court will not stay perpetual injunction where defendants are of ample pecuniary responsibility and fail to give security. *Tracy v. Torrey et al.*, 2 Blatch. 275.—NELSON, 1851.

7. A court of equity may, in its own discretion, order a perpetual injunction without a trial by jury. *Goodyear v. Day*, 2 Wall., Jr. 283.—GRIER, 1852.

8. Where there is a motion for a new trial, the practice is not to grant a perpetual injunction until the determination of the motion. *Day v. Hartshorn*, 3 Fish. P. C. 32.—PITMAN, 1855.

9. "Where a licensee undertakes to use a patent without paying for it the amount specified in the license, . . . equity will so far enjoin him, whether the license thereby becomes voidable at law or not, that unless he will pay he shall not be allowed to use."—*Id.*

10. Where a writ of error is pending, an injunction will not be granted.—*Id.*

11. "If, in a court of equity, an absolute injunction would be refused upon a bill praying for an injunction, on the ground that defendant had not performed the conditions of his contract, which authorized the use of a machine, but would allow the use upon the future fulfillment of his contract, and only a conditional injunction would be granted, is not this a good reason why a verdict, founded upon such a forfeiture, should not be considered as a sufficient reason to induce a court of equity to grant an absolute injunction?"—*Id.*

12. After an injunction is ordered to issue, he who is entitled to it cannot wait for months before having it served. "The *teste*, which verifies its authority, ceases to give it the character of a mandate of the court, for any primary action thereon, when the term during which the power was granted has terminated." *McCormick v. Jerome*, 3 Blatch. 486.—BETTS, 1856.

13. "If the party proceeded against as an infringer of the exclusive right of the person having the title to the patent, admits the infringement, but asserts that after notice or service of the injunction he had refrained from the use of the thing patented, and asserts that he will not afterward infringe, it is no reason why an injunction should not issue and be made perpetual. The complainant in such a case is not

obliged to rest his interests on the mere assertion of the defendant that he will not repeat the act of infringement. Having once been a wrongdoer, the law supposes the possibility of his being so again, and will interpose the proper restraint to prevent the repetition of the wrongful act." *Jenkins v. Greenwald*, 1 Bond, 126.—LEAVITT, 1857.

14. "There is no inflexible rule requiring a court of equity to refuse a permanent injunction, upon a final hearing, on the ground" that validity and infringement have not been established by the verdict of a jury. *Buchanan v. Howland et al.*, 5 Blatch. 151.—HALL, 1863.

15. Where a person has an invention which he keeps secret and imparts for a consideration, courts will interfere by injunction to preserve it to him. *Hammer v. Barnes et al.*, 26 Howard, N. Y. 174.—MULLIN, 1863.

16. The fact that complainant grants licenses at a fixed sum, and that defendant is not a maker or vendor, but only uses the machine, is not sufficient reason for refusing an injunction. *Hove v. Newton*, 2 Fish. P. C. 531.—LOWELL, 1865.

17. For an example of the withholding of injunction until the coming in of the master's report, see — *Yale & Greenleaf M'fg Co. et al. v. North*, 5 Blatch. 455.—SHIPMAN, 1867.

18. Where the terms of a patent are too broad, but the difficulty is curable by disclaimer, "there may . . . be a decree for a perpetual injunction, each party to pay his own costs, without any actual previous disclaimer of record in the Patent Office." Accounting will not, however, be ordered until disclaimer is filed. *Aiken v. Dolan*, 3 Fish. P. C. 197.—CADWALADER, 1867.

19. A perpetual injunction having been granted at the time of referring the case to a master for an account, defendant moved a suspension thereof upon filing bond. Motion denied. *Potter et al. v. Mack*, 3 Fish. P. C. 428.—SWAYNE, 1868.

20. Where a patent has been extended pending a suit on the original patent, a supplemental bill needs to be filed in order to warrant injunction. *Booth v. Parks*, 1 Flippin, 381.—WELKER, 1874.

21. "The ordinary practice is for an injunction, as a matter of course, to follow a decree in favor of the complainant on the merits, unless the defendant is able to show the court such facts and circumstances existing in the case as to make it manifest that the equities between the parties demand the withholding of the injunction until after an accounting has been had." *Rumford Chemical Works v. Hecker*, 2 Bann. & Ard. 386.—NIXON, 1876.

22. "A bill to restrain the infringements of the rights of the patentee has some of the features of a bill *quia timet*, and . . . the relief by injunction is preventive, and is intended to restrain the defendant from doing in the future the wrong he is shown to have committed, and to be in the actual commission of when the bill is filed." *Wheeler v. McCormick*, 8 Blatch. 267.—WOODRUFF, 1871.

23. For an example of a permanent injunction withheld, upon giving bond with security, see —. *Wetherill et al. v. Passaic Zinc Co. et al.*, 9 Phil. 385.—MCKENNAN, 1872.

24. Where a suit is brought upon a patent, which pending the suit is extended, injunction cannot be awarded. *Renwick et al. v. Pond*, 10 Blatch. 39.—BLATCHFORD, 1872.

25. The patent in suit was for reaping machines. The complainant was not a manufacturer. Defendants were extensively engaged in manufacturing. A bond, etc., was substituted for perpetual injunction. *Dorsey Harvester Revolving-Rake Co. v. Marsh et al.*, 6 Fish. P. C. 387.—MCKENNAN, 1873.

26. After the original term of a patent has expired injunction cannot be granted in a suit based thereon, although the patent has since been extended. *McComb v. Beard*, 10 Blatch. 350.—BLATCHFORD, 1873.

27. Where, after suit brought, complainants assign away a portion of the patent in suit, complainants cannot have injunction as to the territory thus assigned away. *Boomer et al. v. United Power Press Co. et al.*, 13 Blatch. 107.—SHIPMAN, 1875.

28. A technical infringement is sufficient to authorize injunction, but not to send the case to an accounting. *Albright v. Celluloid Harness Trimming Co.*, 2 Bann. & Ard. 629.—NIXON, 1877.

29. The fact that defendants have ceased to infringe is not a ground for withholding a perpetual injunction. *Bullock Printing-Press Co. v. Jones et al.*, 3 Bann. & Ard. 195.—WHEELER, 1878.

30. Where a decree of infringement and for perpetual injunction is issued by consent of parties, the decree and injunction are not annulled or affected by a conditional license afterward granted respondent by complainant. *Pentlarge v. Beeston et al.*, 18 Blatch. 38.—BENEDICT, 1880.

31. Where infringing articles are made during the life of the patent, their use will be enjoined after the expiration of the patent. *Am. Diamond Rock-Boring Co. v. Sheldon et al.*, 18 Blatch. 50.—WHEELER, 1880.

32. Complainant's patent covered, before it expired, the drill-head of a drilling machine, but not the combination of the drill-head with the operating machinery. Defendant made such operating machinery before the expiration of the patent, and made and combined therewith afterward the drill-heads. *Held*, that complainant could not, after expiration of patent, prevent the use of the combination by defendant. *Am. Diamond Rock-Boring Co. v. Rutland Marble Co.*, 18 Blatch. 147.—WHEELER, 1880.

33. The use of infringing machines made during the life of the patent will be enjoined after the expiration of the patent. *Am. Diamond Rock-Boring Co. v. Rutland Marble Co. et al.*, 18 Blatch. 146.—WHEELER, 1880.

34. "As the allowance of an injunction would cause much greater injury to the respondent than benefit to the complainant, the decree will be only for an account." *McCrary v. Pa. Canal Co.*, 5 Fed. Rep. 367, *per curiam*, 1880.

35. "The words 'perpetual injunction' in the decree mean only for the life of the patent." *De Florez et al. v. Reynolds et al.*, 17 Blatch. 436.—BLATCHFORD, 1880.

36. Infringements having been found against defendants, and an injunction issued, a motion for the suspension of the injunction, 'till final decree, upon the filing of a bond, on the ground that defendants would suffer large damages on account of infringing machines which they had contracted to deliver before the finding was made, was denied. *Brown v. Deere et al.*, 2 McCrary, 422.—TREAT, 1881.

37. "Each court should, according to the facts presented; decide whether in justice to the parties, the interlocutory decree should be suspended until the final determination of the suit, or to take immediate effect."—*Ib.*

38. An injunction having been suspended for two months to enable defendant either to change its machinery or to obtain a license, and the defendant having done neither, though it had tried to find other suitable machinery, a further suspension of the injunction was refused. *Mauley v. White Mach. Co.*, 21 O. G. 204.—BLATCHFORD, 1881.

39. Complainant had a patent for a machine for making welts which was used in making leather trimmings for carriages. For many years defendants used the improvement in the manufacture of boots and shoes. Complainant had not had knowledge of the infringement, nor had the defendants had knowledge of the patent. It was held that complainant could not recover profits, but might damages, by a suit at law. But an injunction was ordered to issue, with an

order for an account from the date of the bill of complaint, or from any earlier time when defendants had knowledge of complainant's title. *Merriam v. Smith et al.*, 11 Fed. Rep. 588.—LOWELL, 1882.

40. By the court: "Inasmuch as any interference with the use of the wooden pavements constructed in the city of Pittsburg, in infringement of the complainant's rights, would only operate injuriously to the public without benefiting the complainant, an injunction will not be granted." *Sawyer v. Miller et al.*, 4 Woods, 472.—PARDEE, 1882.

41. "No injunction can issue for the manufacture, by defendant, of machines made for complainant's licensees." *Washburn & Moen M'fg Co. v. Griesche*, 5 McCrary, 246.—TREAT, 1883.

42. It seems that where the actual superiority of the patented thing over the prior art is not a positive certainty in the minds of the court, that a perpetual injunction will be withheld until the coming in of the master's report, the matter then to be further considered. *Crosby Steam Gauge & Valve Co. v. Ashcroft M'fg Co.*, 17 Fed. Rep. 85.—LOWELL, 1883.

43. The Supreme Court will not interfere on motion with injunctions granted by the Circuit Court, except in cases appealed before the adoption of Equity Rule No. 30. *White et al. v. Dunbar et al.*, 26 O. G. 353.—SUP. CT. 1883.

44. "Mere delay in seeking relief, when there is no estoppel, will not, in general, prevent an injunction, though it may preclude the plaintiff from right to an account for past profits." *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1834.

45. Where the complainant does not lead the defendant into any expenditures or course of conduct by his silence when he ought to have spoken, complainant has not, through laches, forfeited his right to an injunction. *Child v. B. & F. II. Iron Works*, 19 Fed. Rep. 258.—LOWELL, 1884.

46. "After a decree on final hearing, establishing an exclusive right, and awarding an injunction to protect the right, the injunction is not suspended unless some extraordinary course is shown to exist outside of the rights established by the decree." *Monson v. N. Y.*, 22 Blatch. 45.—WHEELER, 1884.

47. Where an injunction has been issued against a city official based upon a patent covering the mode of book-keeping used by that official, the injunction cannot be suspended upon the ground that the rights of the city, as such, require it.—*Id.*

48. A bill of complaint alleged infringement of complainant's patent for thirteen years on the part of the defendant, without setting up any excuse for complainant's delay in prosecuting, without setting up ignorance of defendant's conduct, and without setting up inability on complainant's part to assert his rights. It was held that after such laches complainant was not entitled to an injunction. *McLaughlin v. People's R. R. Co.*, 21 Fed. Rep. 574.—BREWER, 1884.

49. "If a defendant has, before suit brought, abandoned the manufacture and sale of the infringing machine, and the court is satisfied that the abandonment was in good faith and final, the injunction ought to be refused upon the principles of equity applicable to injunction." *Odell et al. v. Stout et al.*, 29 O. G. 862.—SAGE, MATTHEWS concurring, 1884.

50. Although it is shown that a grantee or licensee, for a certain district, infringes by selling the patented article outside such district, he cannot be enjoined from advertising the goods for sale within said district. *Hatch et al. v. Hall*, 22 Fed. Rep. 438.—WHEELER, 1884.

51. Where a license between a patentee and a licensee is such that the patentee could be enjoined from infringing, and the patentee sells his right to a third party, with knowledge of the facts, the third party can be enjoined from infringing at the instance of the licensee. *Hapgood et al. v. Rosenstock et al.*, 23 Blatch. 95.—WALLACE, 1885.

52. "Equity will enjoin the breach of negative covenants wherever it would decree a specific performance of the agreement between the parties."—*Id.*

53. It seems that in an equity suit for infringement, where defendants own and set up an interfering patent, the complainant's patent may be declared void by the court, and the complainant enjoined from bringing or threatening further suits under it. *Sawyer v. Massey et al.*, 25 Fed. Rep. 144.—SPEAR, 1885.

54. A suit being brought for infringement, the patent expired while the suit was pending, and in the decree it was sought to include an injunction against the defendant using or selling the infringing articles manufactured by him during the life of the patent. Counsel for complainant contended that such was the ordinary rule, but that courts are authorized so to do; that they do often exercise that authority, and it was exercised in this case because while the suit was pending, and defendant was thus advised by complainant's claim, the defendant went on with his manufacture of infringing

articles, and, as a legal consequence, must have expected such an injunction to follow, if the case turned in complainant's favor. *N. Y. Belting & Packing Co. v. Magowan*, 34 O. G. 1278.—NIXON, 1886.

55. Although a patentee may recover against the manufacturer of an infringing article, such, for instance, as a barrow, the user of such barrow may still be an infringer liable to separate suit, and the patent owner may not be enjoined from threatening such suits. *Tuttle et al. v. Matthews*, 28 Fed. Rep. 98.—COXE, 1886.

56. Where the infringement complained of was not wilful, where but a single infringing device was made, and the infringement was stopped as soon as proceedings were begun, there is no occasion for an injunction. *North American Iron Works v. Fiske*, 30 Fed. Rep. 622.—WHEELER, 1887.

57. A defendant company had not sold the infringing instrument, but it had such in its office and advertised them for sale. It was held that the secretary and treasurer of the defendant company, and also its electrician, were all subject to injunction. *Am. Bell Tel. Co. v. Globe Tel. Co. et al.*, 31 Fed. Rep. 729.—WALLACE, 1887.

## INSOLVENCY AND BANKRUPTCY.

### CASES.

1. A conveyance of interest in a patent by a receiver appointed in proceedings where the court did not have jurisdiction of the patent owner is null and void. *Railroad Co. v. Trimble*, 10 Wall. 367.—SUP. CT. 1870.

2. An insolvent patent owner must himself assign the patent in order to pass the right. An assignment by his trustees or the like will not answer. *Ashcroft v. Watworth et al.*, 1 Holmes, 152.—SHEPLEY, 1872.

3. In equity, the bankruptcy of a party and the appointment of an assignee does not abate a pending suit, but calls for a supplementary bill citing in the assignee. This can be avoided by a reconveyance to the complainant in suit. *Gear v. Fitch*, 3 Bann. & Ard. 573.—LOWELL, 1873.

4. Where a party's manufacturing rights are limited by a license, he becomes insolvent, and another party buys the manufactures in question, the latter party, in selling those manufactures, would be an infringer in any case where the party first mentioned would be an infringer. *Moody v. Taber*, 1 Holmes, 325.—SHEPLEY, 1874.

5. "The interest in a patent may be assigned by operation of law in case of bankruptcy of the patentee." *Barnes v. Morgan*, 3 Hun. 703.—BRADY, 1875.

6. On motion, a court may compel a judgment debtor to execute the order of his receiver and make assignment of his letters-patent. *Clan Ronald v. Wyckoff*, 41 N. Y. Superior, 527.—FREEDMAN, 1877.

7. "The bankrupt law, Rev. Stat. U. S., Section 5046, vested all patent rights at once in the assignee. His title was like that which the administrators would have acquired if the bankrupt had died without bankruptcy proceedings being in force. It accrued by the operation of the law, and such titles need not be recorded." *Prime et al. v. Brandon M'fg Co.*, 16 Blatch. 453.—WHEELER, 1879.

8. "The provisions of the bankruptcy law not only vested the title to patent rights which the bankrupt had, in the assignee, but all rights in equity, and choses in action, which would cover the whole. Rev. Stat. U. S., Section 5046."—*Id.*

9. An assignee in insolvency does not acquire a legal title to a patent unless the insolvent makes a due assignment to him. *Gordon v. Anthony et al.*, 15 Blatch. 234.—BLATCH, 1879.

10. "The incorporeal and intangible right of an inventor or an author in a patent or copyright cannot be taken on execution at law; and a general assignment of his property under a bankrupt or insolvent act will either by its own effect pass his right to the assignee in bankruptcy or insolvency, or will, at least, entitle the latter by proper procedure to assign the same." *Carver v. Peck*, 131 Mass. 291.—GRAY, 1881.

11. A court of equity has power to compel the assignment and sale of a patent for the benefit of judgment creditors. *Pacific Bank v. Robinson*, 20 O. G. 1314.—McKEE, 1881.

12. "Patent rights of a bankrupt pass by act and operation of law to his assignees in bankruptcy for the benefit of creditors."—*Id.*

13. The rights of a patentee in his patent may be sold under a decree of a court and the proceeds applied to the payment of his debts; an injunction may be granted to restrain the patentee from selling or assigning the patent during the pendency of the suit, and the patentee may be compelled to execute such an assignment of the patent to the purchaser as may be necessary to vest the title in conformity with the patent laws of the United States. *Murray v. Ager et al.*, 20 O. G. 1311.—HAGNER, 1881.

14. "A patent right may be ordered by court of equity to be sold and the proceeds applied to the payment of a judgment debt of the patentee." *Ager et al. v. Murray*, 105 U. S. 126.—SUP. CT. 1882.

15. "The rule that a receiver cannot convey



a title to a patent unless the owner of the legal title joins, as held in *Gordon v. Anthony*, 16 Blatch. 234, does not apply to the transfer of a mere equitable title." *Adams et al. v. Howard et al.*, 23 Blatch. 27.—WALLACE, 1884.

16. Where it is sought to sue a receiver as an infringer, whereby the assets in his hands must respond to the judgment, permission to sue him must be first had of the court under which he is administering the assets intrusted to him. On the other hand, where he has taken possession of property not rightfully belonging to his trust in an administrative capacity, whether as United States marshal, sheriff, administrator, or otherwise, he is personally responsible for the trespass committed; where he acts under positive orders of a state court, the United States Court will withhold its action for the making of an application to the state court for the proper modification of its order. *Curran v. Craig*, 22 Fed. Rep. 101.—TREAT, 1884.

17. Where an award of profits and damages has been made against an infringer it is provable against his bankrupt estate. *Boston v. Fair Haven Iron Works, in re*, 29 Fed. Rep. 783.—NELSON, 1884. (Reversed by Judge Colt.)

18. Where a corporation has infringed a patent and then made an assignment in insolvency to an assignee, a bill for infringement by the corporation can be maintained against the assignee, although the patent owner might, if he choose, present his claim to the assignee and prosecute it under the laws of the state. *Gordon et al. v. St. Paul Harvester Works et al.*, 23 Fed. Rep. 147.—NELSON, 1885.

19. A bill of complaint disclosed that a corporation owned one half of the patent in suit. The suit was brought in the name of the receiver. It was held that he had no title to maintain an action in his own name. *Dick et al. v. Struthers et al.*, 25 Fed. Rep. 103.—ACHESON, 1885.

20. It seems that the assignment of a bankrupt's patent, made by his duly appointed assignee, is a legal assignment. *Kittle v. Hall et al.*, 29 Fed. Rep. 508.—COXE, 1887.

## INTERFERENCE.

### "INTERFERENCE" IN THE PATENT ACTS.

Act approved February 21st, 1793.

SECTION 9. *And be it further enacted*, That in case of interfering applications, the same shall be submitted to the arbitration of three persons, one of whom shall be chosen by each of the applicants, and the third person shall be appointed

by the Secretary of State; and the decision or award of such arbitrators, delivered to the Secretary of State in writing, and subscribed by them, or any two of them, shall be final, as far as respects the granting of the patent. And if either of the applicants shall refuse, or fail to choose an arbitrator, the patent shall issue to the opposite party. And where there shall be more than two interfering applications, and the parties applying shall not all unite in appointing three arbitrators, it shall be in the power of the Secretary of State to appoint three arbitrators for the purpose. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 8. *And be it further enacted*, That whenever an application shall be made for a patent which, in the opinion of the Commissioner, would interfere with any other patent for which an application may be pending, or with any unexpired patent which shall have been granted, it shall be the duty of the Commissioner to give notice thereof to such applicants, or patentees, as the case may be; and if either shall be dissatisfied with the decision of the Commissioner on the question of priority of right or invention, on a hearing thereof, he may appeal from such decision. . . . Whenever the applicant shall request it, the patent shall take date from the time of the filing of the specification and drawings, not, however, exceeding six months prior to the actual issuing of the patent; and, on like request, and the payment of the duty herein required, by any applicant, his specification and drawings shall be filed in the secret archives of the office until he shall furnish the model and the patent to be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications.

SEC. 12. Provides for caveats, and then says: "And if application shall be made by any other person within one year from the time of filing such caveat for a patent for any invention with which it may in any respect interfere, it shall be the duty of the Commissioner to deposit the description and specification, drawings, and model in the confidential archives of the office, and to give notice by mail to the person filing the caveat, of such application, who shall within three months after receiving the notice, if he would avail himself of the benefit of his caveat, file his description, specifications, drawings, and model; and if, in the opinion of the Commissioner, the specification or claims interfere with each other, like proceedings may be had in all respects as are in this act provided in the case of interfering applications."

SEC. 16. *And be it further enacted*, That when-

ever there shall be two interfering patents, or whenever a patent on application shall have been refused on an adverse decision of a board of examiners, on the ground that the patent applied for would interfere with an unexpired patent previously granted, any person interested in any such patent, either by assignment or otherwise, in the one case, and any such applicant in the other case, may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge and declare either of the patents void in whole or in part, or inoperative or invalid in any particular part or portion of the United States, according to the interest which the parties to such suit may possess in the patent or the inventions patented, and may also adjudge that such applicant is entitled, according to the principles and provisions of this act, to have and receive a patent for his invention, as specified in his claim, or for any part thereof, as the fact of priority of right or invention shall in any such case be made to appear. And such adjudication, if it be in favor of the right of such applicant, shall authorize the Commissioner to issue such patent, on his filing a copy of the adjudication, and otherwise complying with the requisitions of this act. *Provided, however,* That no such judgment or adjudication shall affect the rights of any person except the parties to the action, and those deriving title from or under them subsequent to the rendition of such judgment. [Repealed July 8th, 1870.]

Act approved March 3d, 1839.

SEC. 12. *And be it further enacted,* That the Commissioner of Patents shall have power to make all such regulations, in respect to the taking of evidence to be used in contested cases before him, as may be just and reasonable. [Repealed July 8th, 1870.]

Act approved March 2d, 1861.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Commissioner of Patents may establish rules for taking affidavits and depositions required in cases pending in the Patent Office, and such affidavits and depositions may be taken before any justice of the peace, or other officer authorized by law to take depositions to be used in the courts of the United States, or in the state courts of any state where such officer shall reside. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 40. *And be it further enacted,* That any citizen of the United States who shall have made any new invention or discovery, and shall

desire further time to mature the same, may, on payment of the duty required by law, file in the Patent Office a caveat setting forth the design thereof, and of its distinguishing characteristics, and praying protection of his right until he shall have matured his invention; and such caveat shall be filed in the confidential archives of the Office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof; and if application shall be made within the year by any other person for a patent with which such caveat would in any manner interfere, the Commissioner shall deposit the description, specification, drawings, and model of such application in like manner in the confidential archives of the Office, and give notice thereof, by mail, to the person filing the caveat, who, if he would avail himself of his caveat, shall file his description, specification, drawings, and model within three months from the time of placing said notice in the post-office in Washington, with the usual time required for transmitting it to the caveator added thereto, which time shall be indorsed on the notice. And an alien shall have the privilege herein granted, if he shall have resided in the United States one year next preceding the filing of his caveat, and made oath of his intention to become a citizen.

SEC. 42. *And be it further enacted,* That whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who shall be adjudged the prior inventor, unless the adverse party shall appeal from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time—not less than twenty days—as the Commissioner shall prescribe. . . .

SEC. 43. *And be it further enacted,* That the Commissioner may establish rules for taking affidavits and depositions required in cases pending in the Patent Office, and such affidavits and depositions may be taken before any officer authorized by law to take depositions to be used in the courts of the United States, or of the state where the officer resides.

SEC. 52. *And be it further enacted,* That whenever a patent on application is refused, for any reason whatever, either by the Commissioner or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the ap-

plicant may have remedy by bill in equity ; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent, on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requisitions of law. And in all cases where there is no opposing party a copy of the bill shall be served on the Commissioner, and all the expenses of the proceeding shall be paid by the applicant whether the final decision is in his favor or not.

SEC. 58.. *And be it further enacted*, That whenever there shall be interfering patents, any person interested in any one of such interfering patents, or in the workings of the invention claimed under either of such patents, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent ; and the court having cognizance thereof, as hereinbefore provided, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the rights of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4902. Any citizen of the United States who makes any new invention or discovery, and desires further time to mature and perfect the same, may, on payment of the fees required by law, file in the Patent Office a caveat setting forth the design thereof, and of its distinguishing characteristics, and praying protection of his right until he shall have matured his invention. Such caveat shall be filed in the confidential archives of the office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof ; and if application is made within the year by any other person for a patent with which such caveat would in any manner interfere, the Commissioner shall deposit the description, specification, drawings, and model of such application in like manner in the

confidential archives of the office, and give notice thereof, by mail, to the person by whom the caveat was filed. If such person desires to avail himself of his caveat, he shall file his description, specification, drawings, and model within three months from the time of placing the notice in the post-office in Washington, with the usual time required for transmitting it to the caveator added thereto ; which time shall be indorsed on the notice. And an alien shall have the privilege herein granted, if he has resided in the United States one year next preceding the filing of his caveat, and has made oath of his intention to become a citizen.

SEC. 4904. Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decisions of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time—not less than twenty days—as the Commissioner shall prescribe.

SEC. 4905. The Commissioner of Patents may establish rules for taking affidavits and depositions required in cases pending in the Patent Office, and such affidavits and depositions may be taken before any officer authorized by law to take depositions to be used in the courts of the United States, or of the state where the officer resides.

SEC. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia, upon appeal from the Commissioner, the applicant may have remedy by bill in equity ; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent for the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases where there is no opposing party a copy of the bill shall be served on the Commissioner ; and all the expenses of the proceeding shall be paid by the ap-

plicant, whether the final decision is in his favor or not.

SEC. 4918. Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties and other due proceedings had, according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment.

#### CASES.

1. In a Patent Office interference, "after a contest has arisen, the parties have a right to insist not only that the evidence should be taken agreeably to the rules prescribed by the Commissioner, but that it should be evidence competent in the law." *Arnold v. Bishop et al.*, 1 MacArthur's P. C. 27.—CRANCH, 1841.

2. In a Patent Office interference between an applicant and a patentee, where the Commissioner decides in favor of the applicant, the patentee cannot appeal to the Court of the District of Columbia. *Pomeroy v. Comison*, 1 MacArthur's P. C. 40.—CRANCH, 1842.

3. "There is nothing in the laws relating to the Patent Office or in the rules adopted by the Commissioner to prevent him from postponing the hearing of a cause if, in his opinion, the justice of the case should require it, and especially for the correcting of an irregularity in matter of form. To deny him this power would be to stifle Justice in her own forms." *Smith v. Flickenger et al.*, 1 MacArthur's P. C. 46.—CRANCH, 1843.

4. A contestant in a Patent Office interference who does not object at a hearing to the shortness of notice given him by his opponent for taking testimony waives his objection. Where the distance to be travelled is but four hundred miles, eleven days' notice is reasonable notice.—*Id.*

5. In a Patent Office interference, where depositions are taken without notice to the opposite party, they cannot be used unless the opposing party consents. *Perry v. Cornell*, 1 MacArthur's P. C. 66.—CRANCH, 1847.

6. Where an interference is taken from the Patent Office to the Court of the District of Columbia, it is proper that the Commissioner should be represented in the court by counsel.—*Id.*

7. Under Section 10 of the act of March 8d, 1839, amending and enlarging Section 16 of the act of July 4th, 1836, the assignee of a patent to be issued on an application which stands rejected may bring suit in equity in his own name asking for the patent, and for the annulling of the interfering patent. *Gay v. Cornell*, 1 Blatch. 506.—NELSON, 1849.

8. Where, in a Patent Office interference, the case is taken from the Patent Office to the Court of the District of Columbia, the judge has jurisdiction with the question of interference as well as the question of priority of the invention. *Bain v. Morse*, 6 West. L. J. 372.—CRANCH, 1849.

9. In a Patent Office interference certificates not under oath cannot be received in evidence. *Jillison v. Winsor*, 1 MacArthur's P. C. 136.—CRANCH, 1850.

10. "All the conditions mentioned in the act of March 8d, Section 11, in the case of interference, must be complied with as prerequisites before the judge can take jurisdiction by the way of appeal from the decision of the Commissioner refusing to grant a patent to the applicant. The jurisdiction which he can take is a very special, limited jurisdiction, and all the previous circumstances must exist under which it is given before it can attach; and no other power or authority can be fairly inferred." *Greenough v. Clark*, 1 MacArthur's P. C. 173.—MORSELL, 1853.

11. In a Patent Office interference, the whole question of granting a postponement is within the discretion of the Commissioner. *O'Reilly et al. v. Smith*, 1 MacArthur's P. C. 218.—MORSELL, 1853.

12. "Up to the moment of issuing the patent, the Commissioner has the discretion to rehear a case before decided by him, and ought to do so till his mind is convinced as to the true inventor, to whom alone the patent ought to be issued. But when he is so satisfied, and in his discretion refuses a new application, or to declare a new interference, or to grant a rehearing, no appeal lies from that refusal." *Rouse, W., In re*, 1 MacArthur's P. C. 286.—DUNLOP, 1854.

13. In a Patent Office interference between a patentee and an applicant, where the Patent Office awards priority to the applicant, the patentee cannot appeal from the Commissioner.

*Bowen v. Herriet*, 1 MacArthur's P. C. 310.—MORSELL, 1854.

14. In a Patent Office interference, where appeal is taken from the Commissioner to the judge of the Court of the District of Columbia, the judge may consider the patentability of the improvement in opposition to the decision of the Commissioner. *Burrows v. Wetherill*, 1 MacArthur's P. C. 315.—MORSELL, 1854.

15. In a Patent Office interference between a patentee and an applicant, where the Commissioner decides in favor of the applicant, appeal from the Commissioner cannot be taken. *Whipple v. Renton*, 1 MacArthur's P. C. 332.—MORSELL, 1854. *Hopkins v. Barnum*, 1 MacArthur's P. C. 334.—MORSELL, 1854.

16. In a Patent Office interference between a patentee and an applicant, where the applicant prevails, appeal cannot be taken from the Commissioner. *Drake v. Cunningham*, 1 MacArthur's P. C. 378.—MORSELL, 1855.

17. Where, in a Patent Office interference, the Commissioner denies the patent to both parties, appeal from his decision may be taken. *Carter et al. v. Carter et al.*, 1 MacArthur's P. C. 388.—MORSELL, 1855.

18. In a Patent Office interference public use that impugns the patent will be taken notice of. *Rugg v. Haines*, 1 MacArthur's P. C. 420.—MORSELL, 1855.

19. Where of two applicants for patent on the same improvement pending at the same time, a patent has issued on the latter application without notice to the former applicant, such fact gives the former applicant no claim for damages against the United States. *Thistle v. United States*, Devereux, 130.—SCARBURG, 1856.

20. In a Patent Office interference, where appeal is taken from the Commissioner, the judge will decide whether or not there is an interference. *Cornell v. Hyatt*, 1 MacArthur's P. C. 423.—MORSELL, 1856.

21. In a Patent Office interference the whole question of granting or refusing time to the parties is within the discretion of the Commissioner. *Wellman v. Blood*, 1 MacArthur's P. C. 432.—MORSELL, 1856.

22. In a Patent Office interference between a patentee and an applicant, where the Commissioner decides in favor of the applicant, the patentee cannot appeal from the decision of the Commissioner. *King v. Gedney*, 1 MacArthur's P. C. 443.—MORSELL, 1856.

23. In a Patent Office interference the question of public use may properly be considered. *Mowry v. Barber*, 1 MacArthur's P. C. 563.—MORSELL, 1858.

24. It seems that in an interference proceeding in court, the bill must allege that the patentee has surreptitiously or unjustly obtained his patent for that which was in fact invented or discovered by the complainant, who was using reasonable diligence in adapting and perfecting the same. *Ellithorpe v. Robertson et al.*, 4 Blatch. 307.—INGERSOLL, 1859.

25. In a Patent Office interference "under Section 8 of the act of 1836, a patentee has equal right of appeal from a decision of the Commissioner in favor of the applicant to one of the judges of the Circuit Court of the District of Columbia, as an applicant for a patent has under the same section from an adverse decision in favor of a prior patentee." *Babcock v. Degener*, 1 MacArthur's P. C. 607.—MERRICK, 1859.

26. In a Patent Office interference between a patentee and an applicant for patent, where the applicant prevails, appeal from the Commissioner may be taken by the patentee. *Spear v. Belson*, 1 MacArthur's P. C. 699.—DUNLOP, 1859.

27. Pending an interference proceeding in court, the court may order a provisional injunction against the sale or use of a patent involved in the interference. *Potter et al. v. Dixon et al.*, 5 Blatch. 160.—NELSON, 1863.

28. The Commissioner of Patents may put the same application for patent into more than one interference.—*Id.*

29. "No interference can lie except as between claimants of the same invention." *Marvin v. Lillie*, 27 O. G. 299.—OLIN, 1867.

30. "Two patents interfere within the meaning of Section 16 only when they claim, in whole or in part, the same invention. The interference intended is of the same character with that spoken of in Section 8 of the same act, which refers to an interference between two pending applications for patents, and to one between a pending application for a patent and an unexpired patent previously granted, and with that mentioned in Section 12 of the same act, which refers to an interference between two applications when 'the specifications of claim interfere with each other.'" *Gold & Silver Ore Separating Co. v. United States Disintegrating Ore Co. et al.*, 6 Blatch. 307.—BLATCHFORD, 1869.

31. A patent had the following claim: "The employment or application of superheated steam in the manner as, or substantially as, described and set forth, for the purpose of refining or reducing metals, and for the removal of sulphur, arsenic, phosphorus, or other impurities from ores or minerals."

Another patent had the following claim: "The improved process of Mason for removing

sulphur, arsenic, phosphorus, and antimony from auriferous, argentiferous, or other metallic ores, and for oxidizing the said ores by treating them with hydrogen and carbonic acid gases, substantially in the manner set forth." They were held to be interfering claims.—*Ib.*

32. For an example of interference between two patents and annulment of one of them, see —. *Sturges v. Van Hagen*, 6 Fish. P. C. 572.—BLDGGETT, 1873.

33. In a suit in equity under Section 4918 of the Revised Statutes, concerning alleged interfering patents, the section authorizes a court to adjudge either of the interfering patents void in whole or in part. "The power vested in the court to adjudge either of the interfering patents void, in whole or in part, is held to confer full authority, where the evidence justifies, on issues fairly made, to decree, not one of the patents alone, but both to be void." *Foster v. Lindsay et al.*, 3 Dillon, 126.—TREAT, 1875.

34. Where, in a Patent Office interference the application of the successful contestant is referred back to the primary examiner to determine upon the question of abandonment, the defeated contestant may take appeal from the decision of the examiner. *Bigelow v. Com'r of Patents*, 2 MacArthur's P. C. 24.—CARTTER, 1875.

35. In an interference between an application for patent and a previously issued patent, priority of invention was awarded the applicant. The question arose whether the applicant had not abandoned his invention to the public and was decided in the negative. This decision was made by a primary examiner and the patentee sought to appeal therefrom. The Commissioner of Patents refused to entertain the appeal. The Supreme Court of the District of Columbia held that it cannot compel the Commissioner to entertain such an appeal by mandamus.—*Ib.*

36. A owned a patent of a certain date. B went into interference in the Patent Office with A, and took a patent for the same invention of later date. B then threatened A's customers with suit. A then sought to have B enjoined from bringing said suit until the termination of an interference upon the same matter between A and B in court. Injunction refused. *Asbestos Felting Co. v. U. S. & Foreign Salamander Felting Co.*, 13 Blatch. 453.—BLATCHFORD, 1876.

37. Doubted, that any case be found sustaining an action in the nature of an interference by a junior private patentee, who alleges that his patent does not conflict with a prior patent, and who asks the court to so adjudge. "It is, in substance, a suit to limit the effect of a patent,

to declare that it does not extend to a certain class of cases, and, *pro tanto*, to have it adjudged to be void and of no force. Such an action can only be sustained by the Attorney-General, in the name and on behalf of the United States." *Celluloid M'f'g Co. v. Goodyear Dental Vulcanite Co.*, 13 Blatch. 375.—HUNT, 1876.

38. An averment in complainant's bill that the defendant claims an interference and that the complainant denies it, cannot authorize the complainant to ask a settlement as of an interference.—*Ib.*

39. In case of interfering patents, the remedy is not by *scire facias* at the instance of the relator, as in England, but the statute provides for a suit in equity brought by the owner or other person interested in the working of the invention, against the owner of the interfering patent." *Attorney-General v. Rumford Chemical Works et al.*, 2 Bann. & Ard. 298.—SHEPLEY, 1876.

40. "By the act of 1836 it was not intended to confer upon an interfering patentee the right to try . . . a question by a suit in his own name, which would be conclusive only *inter partes*, and leave the same question open . . . to innumerable vexatious suits to set aside the patent, since a decree in favor of the patentee in one suit would be no bar to a suit by another party."—*Ib.*

41. An interference case in court "having been presented by a 'bill in equity,' and notice given as prescribed, the 'due proceedings' to follow must be such as pertain to equity causes." And "all the proceedings had before the Patent Office should be received together with such other testimony as may be taken in the progress of this suit." Furthermore "the court will receive all the proceedings had before the Patent Office, and when an appeal lies to the Supreme Court of the District of Columbia, all the proceedings had before that court, *together with all new and additional testimony* taken in the equity proceedings." *Squire, John J., in re*, 3 Bann. & Ard. 133.—TREAT, 1877.

42. "An application for a reissue to cover a feature not claimed, but disclosed in the original application, cannot be put in interference with a subsequent application." *Platts & Walden, ex parte*, 15 O. G. 827.—CARTTER, 1879.

43. "The statute confines interference to cases where an applicant claims that for which a patent has been granted, or that which is claimed or can be claimed in a previous application."—*Ib.*

44. Where the present litigants had previously been in interference in the Patent Office, the court

said : " If the only question in the case was the priority of the invention, as between the parties, I should not hesitate to grant the injunction forthwith to the complainant. The decree of the Patent Office on the interference doubtless concludes the defendant, as he has not thought proper to appeal from the same, after submitting himself to the jurisdiction." *Greenwood v. Bracher*, 1 Fed. Rep. 856.—NIXON, 1880.

45. Complainant having brought suit on its patent, defendant submitted the evidence and decision in a Patent Office interference awarding priority to defendant's patent. The court said : " While this decision is not conclusive here, it is nevertheless entitled to sufficient weight to cast the burden on the plaintiff." *Wire Book Sewing Machine Co. v. Stevenson*, 11 Fed. Rep. 155.—BUTLER, 1882.

46. Where the defeated party in a Patent Office interference carries the interference into court, " it would be highly improper to enjoin the successful applicant from receiving his patent upon the mere suggestion that the Commissioner was mistaken." *Whipple v. Miner et al.*, 15 Fed. Rep. 117.—LOWELL, 1883.

47. By the court : " The decision of the Patent Office upon an interference proceeding is sufficient to entitle the successful party as against the defeated party or his trustees, to a preliminary injunction upon the question of priority of invention raised in the subsequent suit." *Smith v. Hallegard et al.*, 23 O. G. 1833.—COLT, 1883.

48. By the court : " While the defeated party to an interference is not estopped in another action from raising the question of want of novelty in the invention, yet if he had knowledge of the condition of the art at the time of his application, which the testimony here discloses, a want of novelty in the invention must be clearly apparent or a preliminary injunction will be granted. . . . In such a case it has been held that where there is a want of good faith the court will grant injunction."—*Id.*

49. " It is well settled that the decisions of the Commissioner of Patents, though entitled to great weight on questions of priority, are not final, even between those who have been fully heard in the interference." *Gloucester Isinglass & Glue Co. v. Brooks et al.*, 19 Fed. Rep. 426.—NELSON, 1884.

50. Where complainant has prevailed over defendants in an interference in the Patent Office, the interference proceedings determine as between these parties, first, that the complainant was the prior inventor ; and, second, that the subject-matter of the patent was not void for

want of patentable novelty, so that the complainant would be entitled, if there were no other considerations, to a provisional injunction, there being no dispute as to the infringement. But it is open to the defendants to insist that the patent is void for want of patentable novelty, on references not presented to the Patent Office, and for other reasons. *Swift v. Jenks et al.*, 19 Fed. Rep. 641.—COXE, 1884.

51. Where a suit is brought by a patentee for the annulment of an interfering patent, it is not pertinent for the defendant to attempt to show the invalidity of complainant's patent, and a plea to that effect will be overruled. *Pentlargo v. Pentlargo*, 22 Blatch. 10.—BENEDICT, 1884.

52. It seems that the question whether two patents interfere with each other may be properly raised by demurrer to the bill. *Morris v. Kempshall M'fg Co.*, 20 Fed. Rep. 121.—SHIPMAN, 1884.

53. Although the language of the claim of one patent may be broad enough to cover and include the device described in another patent, that fact does not suffice to make the two patents interfering patents under Section 4918 of the Revised Statutes.—*Id.*

54. " The sole question that can be litigated under Section 4918 is the question of priority between two interfering patents." The question whether either or both patents are void for lack of patentable novelty cannot be brought into an interference. *Lockwood v. Cleveland et al.*, 20 Fed. Rep. 164.—NIXON, 1884.

55. Two patents do not interfere under Section 4918, unless they claim the same thing. The practice of the invention described in defendants' patent may infringe complainant's patent, but that is not necessarily a pertinent fact. *Pentlargo v. N. T. Bung & Bushing Co. et al.*, 20 Fed. Rep. 314.—WHEELER, 1884 ; also 28 O. G. 370.

56. One Butler was in the Patent Office with an application for a patent on milk-setting apparatus. He was put in interference with one Shaw on a claim or issue stated by the Patent Office. Subsequently the Commissioner rejected another claim made by Shaw, such rejection being based upon the result of said interference proceedings. Butler brought his application to the court under Section 4915 of the Revised Statutes at large. The point was made that he ought to have taken his *appeal*, on the claim last referred to, to the Supreme Court of the District of Columbia. The court held that the action was properly brought. *Butler et al. v. Shaw*, 21 Fed. Rep. 321.—GRAY, 1884.

57. The losing party to an interference in the

Patent Office being a prior patentee, may bring on the interference anew in a United States Circuit Court under Section 4918 of the Revised Statutes. *Hubel v. Tucker et al.*, 23 Blatch. 297.—WALLACE, 1885.

58. Privies to an interference proceeding "are bound by the judgment to the same extent as parties to the record. The decision upon an interference is not conclusive in suits upon the patent granted in pursuance of it." *Celluloid M'fg Co. et al. v. Chrolithion Collar & Cuff Co. et al.*, 32 O. G. 383.—WHEELER, 1885.

59. A Patent Office adjudication in an interference proceeding "is a sufficient adjudication upon the patentability of the invention, and the right of the successful party to a patent for it, to lay the foundation for a preliminary injunction against the losing parties and privies to prevent infringement of the patent, and neither alleged anticipation of the invention by others, known to them while they were seeking to obtain a patent for it themselves, nor their own will avail them to prevent the injunction without being made clearly to appear."—*Id.*

60. It seems that in an equity suit for infringement, where defendants own and set up an interfering patent, the complainant's patent may be declared void by the court, and the complainant enjoined from bringing or threatening further suits under it. *Saivyer v. Massey et al.*, 25 Fed. Rep. 144.—SPEAR, 1885.

61. Under Section 4915 of the Revised Statutes, where there is an opposing party, it is not needful to make the Commissioner of Patents a party. *Graham v. Teter*, 33 O. G. 758.—BRADLEY, 1885.

62. In a proceeding under Section 4915 of the Revised Statutes, where the inventor has assigned an interest, the assignee should be joined with him.—*Id.*

63. Two parties, A and B, were in interference in the Patent Office; A prevailed and took patent. Thereupon A's assignee brought suit against B's assignee, and complainant contended that by virtue of this action of the Patent Office complainant was entitled to preliminary injunction. Thereof the court said: "While acquiescence in the decision of the Patent Office in an interference case might raise a presumption of the validity of the patent, and *prima facie* entitle the complainant to protection by injunction, it is far from *res adjudicata*. No court is bound by the decision of the Patent Office granting a patent, when immediate steps are taken to test its validity in an action instituted for that purpose; and in an interference case, when the issue is decided, the rights of the defeated party

are not prejudiced if he avails himself of the law which virtually transfers the controversy to the courts. . . . The patent held by complainant, and the decision of the Patent Office in the interference, do not make out a case for an injunction, unless the *prima facie* right is forfeited by a judicial decree or judgment or acquiescence, neither of which exist." Provisional injunction was refused. *Minneapolis Harvester Works v. McCormick Harvesting Machine Co.*, 28 Fed. Rep. 565.—NELSON, 1886.

64. Where A brings suit against B claiming priority of right of patent to A over that to B, B may file a cross-bill claiming priority of right for his patent, and asking that the patent of A be declared void, although the court has the power to do that without such a cross-bill. *Am. Clay-Bird Co. v. Ligowski Clay Pigeon Co.*, 31 Fed. Rep. 466.—SAGE, 1887.

65. "The court is limited, in causes brought under Section 4918, to the question of priority between the interfering patents."—*Id.*

66. The grant of a patent after victory in an interference does not establish the validity of the patent for the purpose of a provisional injunction against a person who was not a party to the interference. *Edward Barr Co. v. New York & New Haven Automatic Sprinkler Co.*, 32 Fed. Rep. 79.—LACOMBE, 1887.

67. A victory in a Patent Office interference is *prima facie* sufficient to entitle the victor to have the patent of his opponent annulled. *Chicopee Folding Box Co. v. Rogers*, 32 Fed. Rep. 695.—WALLACE, 1887.

## INVENTION—INSUFFICIENCY OF.

### "INVENTION—INSUFFICIENCY OF" IN THE PATENT ACTS.

Act approved February 21st, 1793

SECTION 2. . . . Simply changing the form or the proportions of any machine, or composition of matter in any degree, shall not be deemed a discovery. [Repealed July 4th, 1836.]

#### CASES.

1. The prior machine need not have been in "every respect similar," for a mere change of form or proportions will not support a patent. *Woodcock v. Parker et al.*, 1 Gall. 437.—STORY, 1813.

2. "If new effects are produced by an old machine in its unaltered state, . . . no patent can be legally supported." *Whittemore et al. v. Cutter*, 1 Gall. 478.—STORY, 1813.

3. "The patent must be for a specific ma-



chine, substantially new in its structure and mode of operation, and not merely changed in form, or in the proportion of its parts." *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

4. Increasing the number of arms in a reel does not amount to invention. *Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

5. Changes in form or proportion only do not amount to invention. *Dixon v. Moyer*, 4 Wash. 68.—WASH. 1821.

6. Folding thread into skeins, enclosing it in a sealed wrapper, and labelling the wrapper, does not constitute a useful invention within the meaning of the patent law. *Langdon v. De Groot et al.*, 1 Paine, 203.—LIVINGSTON, 1822.

7. Improvement in form or proportions made by a mechanic in constructing an invention may be adopted without invalidating the patent. [Said with reference to a suggestion of two rows of rivets by mechanic against the one row of the inventor.] *Pennock et al. v. Dialogue*, 4 Wash. 438.—WASH. 1825.

8. Improvements and alterations in form and proportions, but not of essential parts and principles, made by a person employed to embody an invention, are the property of the inventor, as a part of his invention. *Watson v. Bladen*, 4 Wash. 580.—WASH. 1826.

9. The application of an old thing to a new, without other invention, is not patentable. Grinding peas for the first time in a coffee-mill, or carding wool for the first time on a cotton-card, is not patentable. *Ames v. Howard et al.*, 1 Sumner, 482.—STORY, 1833.

10. "Mere formal differences cannot be protected by a patent. . . The difference must be substantial; and if they" [the jury] "shall find that a stove was in use prior to the plaintiff's invention, substantially like his, he can claim no exclusive right." *Stanley v. Whipple*, 2 McLean, 35.—MCLEAN, 1839.

11. Packing blocks of ice edgewise is not a patentable invention. *Kemper's Application*, 1 MacArthur's P. C. 1.—CRANCH, 1841.

12. Where a certain process of curing has been applied to hair used for mattresses and the like, it is not patentable to apply that same process to the curing of palm-leaf. *Howe v. Abbott*, 2 Story, 190.—STORY, 1842.

13. "Mere colorable or slight alteration of machine, or a change in its proportions, gives no ground for a patent, nor can it shelter an individual from the consequences of an infringement. In such cases the inquiry is always whether the principle of the two machines is the same. If the principle on which the machinery works is the same, and the effect is similar in

both, in contemplation of law the machines are identical. A change in the position of the operating powers, or in the thing on which the effect is produced, is of no importance. Such a modification does not arise to the dignity of invention. There must be an essential difference in the application of the mechanical power to make the machines dissimilar." *Brooks et al. v. Bicknell et al.*, 3 McLean, 250.—MCLEAN, 1843.

14. "A machine, or apparatus, or other mechanical contrivance, in order to give the party a claim to a patent therefor, must, in itself, be substantially new. If it is old and well known, and applied only to a new purpose, that does not make it patentable. A coffee-mill applied for the first time to grind oats, or corn, or mustard would not give a title to a patent for the machine. A cotton-gin applied without alteration to clean hemp would not give a title to a patent for the gin as new. A loom to weave cotton yarn would not, if unaltered, become a patentable machine, as a new invention, by first applying it to weave woollen yarn. A steam-engine, if ordinarily applied to turn a grist-mill, would not entitle a party to a patent to it, if it were first applied by him to turn the main wheel of a cotton factory. In short, the machine must be new, not merely the purpose to which it is applied. A purpose is not patentable, but the machinery only, if new, by which it is to be accomplished. In other words, the thing itself which is patented must be new, and not the mere application of it to a new purpose or object." *Bean v. Smallwood*, 2 Story, 408.—STORY, 1843.

15. If a construction is old in common carriages, it is not patentable simply to employ it in railway carriages. *Winans v. Boston & Providence R. R. Co.*, 2 Story, 412.—STORY, 1843.

16. "The substitution of a well-known mechanical equivalent is not an invention within the patent laws." *Cochrane v. Waterman*, 1 MacArthur's P. C. 52.—CRANCH, 1844.

17. "The endless screw and wheel is a common mechanical power applicable to an indefinite number of machines, and the mere application of it to a machine, to which it had never before been applied, would not be an invention, although it might make the machine better than it would have been without it." "The application of it to the steering of a vessel seems to be no more entitled to a patent than if it had been applied to a kitchen-jack for washing. It seems to be an ordinary power applied to an ordinary purpose, and that the application of it is not invention within the meaning of the patent law."—*Ib.*

18. A change in the number of knives at-

tached to a cylinder, or the attachment of the same on the cylinder by screws instead of by rivets at the end, "hardly seems a sufficient change in form or principle, or results, . . . to justify a patent." *Hovey v. Stevens*, 1 W. & M. 290.—WOODBURY, 1846

19. Change of form is not substantial change, unless a new and useful result is produced. *Gibson v. Harris*, 1 Blatch. 167.—NELSON, 1846.

20. A patented improvement consisted mainly in making knobs for doors and the like of potters' clay or porcelain, being otherwise like knobs of the previous art. The court thereof said: "To give an exclusive right there must be what is called a new principle invented. Not a mere principle in an abstract sense, for none such is likely to be discovered, but a new combination or mode, for instance, of attaching the spindle to the knob." "The cheapness and quality of the article are relied upon as giving, or contributing to give the complainants exclusive right. But these afford no ground whatever for a patent." "An article made according to a known method may be better than other articles made in the same manner, on account of its superior mechanism. But that is no foundation of an exclusive right. And if a material not before used in the same structure be used, that gives no claim to a patent though the article be more valuable than any other of its kind." Jury found for the defendants. *Hotchkiss v. Greenwood et al.*, 4 McLean, 456.—MCLEAN, 1848.

21. "Change of form is not material, when the form does not contribute toward the new result." *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

22. Mere differences of form generally amount to nothing. *Many v. Jagger et al.*, 1 Blatch. 372.—NELSON, 1848.

23. "A formal difference between the combination of B . . . and any previous combination, is not patentable, and involves no skill, ingenuity, or mind. It is simply a difference in mechanical construction. In order to be patentable the change must be substantial, as contradistinguished from formal. The new article must be different from the article on which it is claimed to be an improvement, not only in its mechanical contrivance and construction, but in its practical operation and effect in producing the useful result. Then it is not formal. Then it requires mind, ingenuity, labor, time, and expense." *Buck et al. v. Hermance*, 1 Blatch. 398.—NELSON, 1849.

24. Mere difference in form or size is not a

difference in principle. *Foote v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

25. There is nothing substantially new in the mere duplication of parts. *Wilbur v. Beecher*, 2 Blatch. 132.—NELSON, 1850.

26. "A difference merely in shape is a difference in degree only, and not in the thing itself." —*Id.*

27. The improvement of the patent in suit, as stated in the claim, was: "What we claim as our invention, and desire to secure by letters-patent, is the manufacturing of knobs, as stated in the foregoing specification, of potters' clay, or any kind of clay used in pottery, and shaped and finished by moulding, turning, burning, and glazing, and also of porcelain." The knob was not new, nor were the metallic shank and spindle, nor the dove-tail form of the cavity in the knob, nor the means by which the metallic shank was fastened therein. The only new thing was the substitution of a knob of a different material from that before used in the same connection. The court held the patent invalid, saying: "The difference is formal, and destitute of ingenuity or invention, and it may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purpose intended, but nothing more." *Hotchkiss et al. v. Greenwood et al.*, 11 Howard, 248.—SUP. CT. 1850.

28. A person may be the inventor of a device, and not be entitled to a patent therefor, because he is not the original and first inventor. His ignorance of prior structures is an immaterial fact. *Larabee v. Courtlan et al.*, Taney's Dec. 180.—TANEY, 1851.

29. Plaintiff's invention consisted in the combination of a jet-bath with a movable reservoir. The combination of a fixed reservoir and bath was old. The court said. "A movable reservoir, and supplying the jet with water from the reservoir, is substantially the same with that by which the jet-bath and reservoir were united together in the old improvement, or if a mechanic of ordinary skill, and acquainted with such business, with the old improvement before him, could have attached the jet-bath to the movable reservoir in a manner that would have produced the same result with that adopted by the plaintiff, then the improvement he claims to have invented is not patentable, and his patent is invalid," and the jury found a verdict for defendants.—*Id.*

30. Making paint from the refuse, insoluble matter that remains after the extraction of the soluble parts in the manufacture of chromate of potash from chromic iron ore is not a patent-

able invention. *Maule, W. P., in re, 1 MacArthur's P. C. 271.*—MORSELL, 1853.

31. A floating dock being old, to construct a floating dock in sections is not patentable. *Everson & Ricard, in re, 1 MacArthur's P. C. 406.*—MORSELL, 1855.

32. "In cases where the utility of the change, and the consequences resulting therefrom [in the case of a machine] are such as to show that the inventive faculty has been exercised, though in point of fact the change was the result of accident, the requisite test of a sufficient amount of invention may exist. But if, on the other hand, the change consists merely in the employment of an obvious substitute, the discovery and application of which could not have involved the exercise of the inventive faculty in any considerable degree, the change will then be treated as merely an unsubstantial, colorable variation, or a double use, and, of course, not patentable." —*Ib.*

33. "The mere application of an existing machine or organization to a new use is not the subject-matter of a patent. If a party finding a machine calculated and intended for the accomplishment of one purpose, discovers or conceives that it is able to accomplish another purpose, and that purpose can be accomplished by the organization which has before been produced, he can have no patent for the application of his old machine to a new use." *Conover v. Roach et al., 4 Fish. P. C. 12.*—HALL, 1857.

34. Making the base of a cartridge shell of steel and the top of brass is not patentable over a shell wholly of brass. *Maynard, E., in re, 1 MacArthur's P. C. 536.*—MERRICK, 1857.

35. Providing a portable steam-engine with a hollow bed-plate to which the other parts are attached, in order to avoid the injurious effects of expansion and contraction of the boiler where the parts are attached directly to the boiler, does not amount to patentable invention. *Blandy et al., in re, 1 MacArthur's P. C. 552.*—MORSELL, 1858.

36. "Where the principle of the alleged invention has been discovered and applied before, the application will be what is called a double use. In such cases, although there may be in the new application some degree of novelty, something may have been discovered or found out that was not known before, yet, unless the new occasion on which the new principle is applied leads to some kind of new manufacture or to some new result, it will be but a double use. Again, if the same purpose has in other instances been accomplished by the same means substantially, the use of those means on a new occasion

does not constitute a sufficiency of invention." —*Ib.*

37. A construction, the use of which has been confined to a refrigerator, is not made patentable by extending it to an ice-box or a pork-house. *Pike v. Potter, 3 Fish. P. C. 55.*—PITMAN, 1859.

38. If the principle of the patentee's improvement was thoroughly understood before his invention, a mere perfected carrying out of that principle, on the part of the patentee, does not amount to patentable invention. *Judson v. Coze et al., 1 Bond, 327.*—LEAVITT, 1860.

39. "A mere use or application of a material or composition previously known is not a new invention." *Matthews v. Skates et al., 1 Fish. P. C. 602.*—JONES, 1860.

40. If a certain mode of operation be found in one kind of machine, it does not constitute patentable invention to impart that same mode of operation to a different kind of machine and operate it automatically. *Singer et al. v. Walmsley, 1 Fish. P. C. 558.*—GILES, 1860.

41. If it be proved that the patented invention was communicated to the patentee by another originally, the patent is void.—*Ib.*

42. The enlargement of the organization of a machine does not amount to patentable invention. (This was said of a case where the parts of a sawing machine for sawing shingles and the like were enlarged so as to make the machine capable of sawing logs.) *Phillips v. Page, 24 Howard, 164.*—SUP. CT. 1860.

43. Changing, in a lantern, the arrangement of the thumb-pieces attached to the spring is but a change of form involving no invention; it is simply the device of the mechanic. *Sangster v. Miller et al., 5 Blatch. 243.*—NELSON, 1865.

44. Complainant's patented improvement in cannon consisted in fastening upon the exterior of cast iron cannon, wrought iron bands, by both shrinking and screwing them on. The prior art showed a wrought iron gun with bands shrunk on with niches underneath to hold them in place. Another part of the prior art showed a cast iron gun with bands shrunk on. Complainant's patent was held void for want of patentable novelty. *Treadwell v. Parrott, 5 Blatch. 369.*—NELSON, 1866.

45. "The common uses of common materials are supposed to be known. If a man merely makes a machine out of iron that has been made out of wood, and the jury find that it is the same machine, producing the same result in the same way, that is no invention, because everybody knows that every constructor can make a machine out of iron instead of wood." *Woodman v. Simpson, 3 Fish. P. C. 98.*—LOWELL, 1866.

46. The application of other than manual power to the operation of a machine previously worked by hand is not invention.—*Id.*

47. "The mere question whether any mechanic of ordinary skill could make the combination, will not do as a general test of the novelty of a machine. If the machines are similar, if they produce similar results, and the question is whether it is a new combination, whether it is a new arrangement of machinery, then it is very important to know whether any constructor acquainted with one machine could, by his common knowledge and skill, make the other, and work out that result in a somewhat more perfect manner. It is an important test in that sense; not a test whether an ordinary mechanic can make the combination if it is suggested, but whether he can make the combination without such suggestion; whether he can make the change by means of his ordinary knowledge, as a means of determining the question whether there is any new machine at all. That is to say, it is the ordinary knowledge and skill of the mechanic."—*Id.*

48. "Suppose . . . the man who invented gunpowder gets a patent for it. If it was nitroglycerine perhaps it might not be useful, and so would not be the subject of a patent; but suppose it was gunpowder. There is no question but that gunpowder is useful, and it is an invention. Suppose he had said, 'I combine saltpetre, sulphur, and charcoal in a certain way and produce a somewhat startling result.' It would be no answer to the novelty of that invention that any chemist could do it after he had been shown how. The question is, Did every chemist have the knowledge as well as the skill? Because, if not, there is invention, and it is a proper subject for a patent."—*Id.*

49. "A mere difference in form is not usually very important if the work is done in substantially the same way."—*Id.*

50. Simply an arrangement of a discharge pipe with a stop-cock upon a steam-boiler is not a patentable invention. *Am. Wood-Paper Co. v. Heft et al.*, 3 Fish. P. C. 316.—GRIER, 1867.

51. "Simple contrivances, the offspring of simple, even involuntary thoughts, often produce great and beneficial results, while complex and elaborate ones, the product of long and profound cogitation, not infrequently prove comparatively wholly abortive. But it is obvious that there is a limit beyond which mere changes cannot and ought not to receive this protection. . . . The law never intended that it should cover a change like . . . merely turning a seat at a different angle, regardless of the means by which

it is to be accomplished." *Kirby et al. v. Beardsley et al.*, 5 Blatch. 438.—SHIPMAN, 1867.

52. The locating of the rakers' seat upon a harvester diagonally across the path of the machine is not a patentable invention.—*Id.*

53. Although a prior machine may have been designed or used for a different purpose from the patented machine, yet, if it be substantially the same, the patented machine is destitute of patentable novelty. *Swift et al. v. Whisen et al.*, 2 Bond, 115.—LEAVITT, 1867.

54. Where the reach of a wagon has been curved so as to permit the forward wheels to pass partly under it, there is no invention involved in increasing the curve so as to permit the wheel to pass entirely under it. *Flood v. Hicks*, 2 Bissell, 169.—DRUMMOND, 1869.

55. Where the fifth wheel of a wagon has been made of wood no patentable invention is involved in making it of iron.—*Id.*

56. "To allow . . . a person by a mere change in the structure of a machine, such as would suggest itself to any mechanic, to acquire a monopoly for that change, and the shield and protection of the law, would be an abuse of the law itself."—*Id.*

57. A patented machine was for ornamenting leather; it had one smooth roll and one figured roll; the figured roll by itself was old; and a machine having two rolls, neither of them figured, was old; the improvement was held not to be patentable. *Stimpson v. Woodman*, 10 Wall. 117.—SUP. CT. 1869.

58. A construction which is old in an ice-cream freezer is not patentable in a paint can. *Brown v. Hall et al.*, 6 Blatch. 401.—BLATCHFORD, 1869.

59. "It is only under very special circumstances that a claim for a seat on a machine, upon which an attendant or operator can ride, should be sustained." *Brown v. Selby et al.*, 2 Bissell, 457.—DRUMMOND, 1871.

60. The claim in complainant's patent was: "The arranging of the smutter or scourer and the suction separating fan, within or between the legs of the blast or air-trunk, in which the entire separation is made, and which passes over or around them for the purpose of economizing space and cheapening the construction of the machine, substantially as described." The court held the improvement destitute of patentable invention, saying, "The idea here expressed, which the patentee has embodied in his machine, and claims to secure as his own, is that, in a machine having a scourer and fan connected by an air-trunk, as described, economy of space and cheapness of construction would

be gained by placing the smutter or scourer between the legs of the air-trunk, instead of elsewhere. Certainly no invention was required to reach such a result. It would rather require invention to find any reasonably convenient place to locate a fan and scourer so connected, other than the one chosen by the patentee. No advantage or change in the operation of the machine is claimed for the arrangement, but simply economy of space and cheapness in the construction." *Knox v. Murtha et al.*, 9 Blatch. 205.—BENEDICT, 1871.

61. The patent in suit was for detachable teeth in circular saws, and it was held that substantially the same improvement had been applied to tongue and groove cutters; and the new use was so analogous as to be a double use. *Tucker v. Spaulding*, 13 Wall. 453:—SUP. CT. 1871.

62. *Intimated*, that where an impervious bearing surface of vulcanized rubber was old in a horse collar, it was not patentable to afterward apply such a bearing surface to a saddle pad. *Am. Saddle Co. v. Hogg*, 1 Holmes, 133.—SHEP-LEY, 1872.

63. "The law . . . gives no monopoly to industry, to wise judgment, or to mere mechanical skill in the use of known means, nor to the product of either, if it be not new. These are within the proper field of competition, and open to all. In general, they will, in that competition, be justly appreciated, and will command their proper remuneration if usefully employed. It is invention of what is new, and not comparative superiority or greater excellence in what was before known, which the law protects as exclusive property; and it is that alone which is secured by patent." *Smith v. Elliot*, 9 Blatch. 400.—WOODRUFF, 1872.

64. "There are many changes which may be suggested by the judgment or taste of the manufacturer, or by the particular uses to which the article produced is to be applied, which are not invention; and many exhibitions of superior skill, in producing an article of greater excellence, which are not invention. Thus, if the fabric be already known and in use, change of color, change of mere material, change in its degree of fineness, or in fineness of parts thereof—if these changes involve nothing new in construction, in the relation of its parts, in the office or function of either part or of the whole—do not constitute invention, although, for many purposes, these may constitute the greater excellence of the fabric."—*Id.*

65. "If the fabric be not new, the application of it to a new use is not invention, when nothing novel is required for its adaptation."—*Id.*

66. Although the use of a certain device in the prior art was for the purpose of planing, yet its applicability to sawing may not be patentable. *Tucker v. Spaulding*, 13 Wall. 453.—SUP. CT. 1872.

67. Complainant's package or case for putting up powders had distributing perforations covered by wax or wafer. In view of prior art, paper boxes, and prior sealing of bottles by wax and wafers, this improvement was held destitute of patentable novelty. *Sawyer v. Birby et al.*, 9 Blatch. 361.—WOODRUFF, 1872.

68. Applying to the main circuit of a telegraph line, a device old in the local circuit, does not amount to invention. *Day et al. v. Bankers' & Brokers' Telegraph Co.*, 9 Blatch. 345.—BLATCHFORD, 1872.

69. Enlarging the diameter and capacity of a telegraph sounder does not amount to invention.—*Id.*

70. The application of a gauge which is old in other machines, to a pegging machine, does not constitute invention. *Gallahue et al. v. Butterfield*, 10 Blatch. 232.—WOODRUFF, 1872.

71. Although a certain kind of truck was old under a railway car having trucks at each end, it was held that to combine such a truck with a locomotive devoid of a truck at the rear, constituted a patentable invention. *Locomotive Engine Safety Truck Co. v. Erie R. R. Co.*, 10 Blatch. 292.—BLATCHFORD, 1872.

72. Complainant's patented improvement was: "'Preserving fish or other articles in a close chamber, by means of a freezing mixture having no contact with the atmosphere of the preserving-chamber, substantially as set forth.'" In view of the ordinary ice-cream freezer this was held destitute of patentable novelty. *Piper v. Moon et al.*, 10 Blatch. 264.—BLATCHFORD, 1872.

73. Enlarging a part of a lantern does not constitute invention. *Dane et al. v. Chicago Mfg Co.*, 3 Bissell, 380.—BLODGETT, 1872.

74. The inverting of certain features of a lantern does not constitute invention. *Dane et al. v. Ill. Mfg Co.*, 3 Bissell, 374.—BLODGETT, 1872.

75. "The mere change of the location of the parts of a mechanism, so long as no different or additional function is performed, does not make the mechanism patentable."—*Id.*

76. "The fact that an article is better and more useful in the trade is evidence of novelty, but if the superiority is attained by the application of known means in a known way to produce a known result, the novelty required by the patent law is wanting." *Smith v. Nichols*, 1 Holmes, 172.—LOWELL, 1872.

77. A chemical compound being old for the purpose of a fertilizer, increasing the amount of acid therein for the purpose of increasing the degree of a known quality, and using the same as a bread-raising compound, does not amount to patentable invention, nor, in the same connection, does washing bones clean to make an article fit for food, amount to patentable invention. *Rumford Chemical Works v. Lauer*, 10 Blatch. 122.—BLATCHFORD, 1872.

78. The claim in a patent was: "As a new article of manufacture, an embossed collar or cuff, made of a fabric composed of paper and muslin, or an equivalent fabric." Thereof the court said: "As like embossing had been done on starched linen, the result of producing such embossing on smooth, white, polished or enamelled surface representing that of starched linen, cannot be patented as an invention." *Union Paper Collar Co. v. Van Deusen et al.*, 10 Blatch. 109.—BLATCHFORD, 1872.

79. The claim in a patent was: "As a new article of manufacture, an ornamented collar or cuff, made of a fabric composed of paper and muslin, or of an equivalent fabric, ornamented by printing, or otherwise marking on the surface plain or colored devices." Thereof the court said: "Printing had been done before on a smooth, white, enamelled surface; and, nothing being claimed as new in the appliance, machinery, or process for producing the printing, and the surface imitating starched linen being provided, there was nothing of patentable novelty in the idea of printing upon such surface."—*Id.*

80. The claim in a patent was: "1. 'The turning over of a paper, or of a paper and cloth collar, by a defined line, whether pressed into the material by a die or printed instrument, or by bending it over the edge of a pattern or block of the proper curve or line, substantially as described.'" Thereof the court said: "It is shown that, for many years before Gray's invention, paper envelopes, and the tops and bottoms of paper and card-board boxes, were produced by shapers of steel pressed on the material so as to produce defined lines, whereby the material could be folded. It was also shown that, in 1856 and 1857, the collars of Walter Hunt, made of paper and cloth, were folded over a piece of metal, in a straight line—the same process spoken of in the first claim of Gray's issue, as bending the material 'over the edge of a pattern or block of the proper curve or line.'" "It was also shown that, prior to Gray's invention, linen collars were ironed on blocks, with a groove in the block, so that, as

the iron passed into the groove, the collar received a defined line by which it was turned down. This evidence disposes of the first claim of the Gray reissue."—*Id.*

81. A claim in a patent was: "'Turning the part B of a paper, or a paper and cloth collar, over, onto, or toward the part A, in a curved or angular line, instead of a straight line, substantially as and for the purpose described.'" Thereof the court said: "It is . . . proved that, before Gray's invention, paper collars were folded by laying upon the unfinished side a piece of tin having at one edge the required curve, and pressing upward, over such curve, a part of the collar, so as to mark the line of the curve, and crease the paper, preparatory to folding it over; and that linen collars were turned over on a curved line before Gray's invention, with the prevention of wrinkling and the affording of space for the cravat. The second claim of Gray's reissue is therefore invalid."—*Id.*

82. The claim in a patent was: "'A collar made of long fibre paper, substantially such as is above described.'" Paper collars being old, and long fibre paper being old, this improvement was held destitute of patentable novelty.—*Id.*

83. The claim in complainants' patent was: "'A paint consisting of oxide of copper, with a suitable vehicle or medium, substantially as described.'" The benefit derived from the oxide of copper was its poisonous effect against vermin, an old and well-known effect; held, not sustainable. *Tarr et al. v. Webb*, 10 Blatch. 96.—BENEDICT, 1872.

84. Changing the parts of a seaming machine so as to produce a wider and smoother seam than any of its predecessors, is a matter of mechanical skill and not invention. *Barry v. Gugenheim et al.*, 5 Fish. P. C. 452.—MCKENNAN, 1872.

85. "The transfer of flanges from an iron hub to a wooden hub would not be patentable, unless it required some ingenuity or contrivance to adapt it to use in its new position." *Sareen v. Hall et al.*, 9 Blatch. 524.—WOODRUFF, 1872.

86. "The mere appropriation of an old device to a new use is not patentable."—*Id.*

87. "A man cannot even have two patents for the same process, because for different purposes." *McComb et al. v. Brodie*, 1 Woods, 153.—WOODS, 1872.

88. In a sand-washer, lowering the outlet of a vessel so as to make it command a greater depth does not amount to invention. *Smith et al. v. Frazer et al.*, 3 Pittsb. 397.—MCKENNAN, 1872.

89. Springing a piece of erasive rubber upon

the end of a pencil does not amount to patentable invention. Of such device the court said: "Such an article cannot be the subject of a patent. The elastic and erasive properties of india-rubber were well known to all, and gave to that substance the name by which it is generally designated; and how to make a piece of rubber encompass and adhere to another article was well known to every person who has ever seen a rubber shoe." *Rubber-Tip Pencil Co. v. Hovey et al.*, 9 Blatch. 490.—BENEDICT, 1872.

90. An old article made upon a new machine is not a new manufacture in the sense of the patent law. "It could not have been the intention of the statute that pins, matches, nails, and other old articles in common use, should be patented as new articles of manufacture, simply because they were fabricated by the use of new and improved machinery, unless the product itself was a new and improved product, and, as such, possessing novelty of its own, independent of the new devices, or processes, or arts by which it was produced." *Draper v. Hudson*, 1 Holmes, 208.—SHEPLEY, 1873.

91. Certain wooden slides for dining-tables being old, it is but mechanical skill to make them of metal. *Carter v. Messinger*, 11 Blatch. 24.—WOODRUFF, 1873.

92. "If screws had been used to bind parts of a wooden frame together, it would not be invention to put parts of an iron frame together with screws, when the mode of application was identical."—*Id.*

93. "Structural changes of form and proportions, although they improve the operation, without changing the mode of operation, and produce a much better result, although one of the same kind, are only different and better forms of embodying the same idea, and illustrate the difference between mechanical skill and inventive genius." *Greely, ex parte*, 1 Holmes, 284.—SHEPLEY, 1873.

94. "A machine is not patentable on the mere ground that it makes an already known article more perfectly than it has been, or can be, made without a machine." *Wooster v. Calhoun et al.*, 11 Blatch. 215.—WOODRUFF, 1873.

95. Although a prior inventor of a device may not see or know all its uses, yet no one can thereafter patent that device when applied to some new use. *Richardson v. Lockwood*, 6 Fish. P. C. 454.—LOWELL, 1873.

96. The placing side by side of lights that were old in the prior art for the purpose of a skylight or a vault-light, is but a double use. *Lake v. Fitzgerald*, 6 Fish. P. C. 420.—EMMONS, 1873.

97. Where a patented device is the same as a

prior device, except in a single feature, and that feature is old in other devices of the same general nature, the patent cannot be sustained. *Tyloson v. Munson*, 5 Bissell, 426.—BLODGETT, 1873.

98. A wooden cabinet being old, and the works of a sewing machine being old, there is no patentable novelty in mounting the sewing machine works upon a cabinet, nor in providing a wooden box to cover the works from dust and the like. *Ross v. Wolfinger et al.*, 5 O. G. 117.—BLODGETT, 1873.

99. Where, in corn-planters, the driver has ridden upon the machine, and the platform has been constructed in such a manner that its movement backward or forward raises or lowers the seeding apparatus, and the seat itself is not new, it cannot be contended that the proper location of the seat for effecting the same requires the exercise of inventive power. *Brown v. Guild et al.*, 23 Wall. 181.—BRADLEY, 1874.

100. Cutting away the metallic butt of a gun so as to permit the introduction of the cartridge into the barrel is not patentable invention. *Borden Fire Arms M'fg Co. v. Remington & Sons*, 3 O. G. 688.—WOODRUFF, 1873.

101. "The use of one material instead of another in constructing a well-known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called invention, unless some new and useful result, an increase of efficiency, or a decided saving in operation is clearly attained." *Hicks v. Kelsey*, 18 Wall. 670.—SUP. CT. 1873.

102. The substitution of iron for wood in making a wagon reach is not patentable invention.—*Id.*

103. Where illuminated openings are old in one kind of stove, there is not patentable invention in applying them to another kind of stove. *Hailes et al. v. Van Wormer et al.*, 20 Wall. 353.—SUP. CT. 1873.

104. Paper pulp from one vegetable substance being old, paper pulp from another vegetable substance is not patentable. *Am. Wood-Paper Co. v. Fiber Disintegrating Co.*, 23 Wall. 566.—SUP. CT. 1874.

105. The application of a portable soda-water fountain to the new purpose of a fire extinguisher does not constitute patentable invention. *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 1 Bann. & Ard. 177.—MCKENNAN, 1874.

106. "Where an effect or result has been before produced, the mechanical agencies by which it is reproduced, if they are not in themselves new, are not the subject of a patent."—*Id.*

107. Placing two or more letters upon each of a set of spelling blocks where they had been used in the same general way before, though unsystematically, is not patentable invention. *Hill v. Houghton*, 1 Bann. & Ard. 291.—LOWELL, 1874.

108. A "shoe having the substance or material of the upper part . . . thickened up, is not a new article of manufacture, in view of the prior shoe having the substance or material of the sole so thickened up. It is a mere double use of the same invention. The fabric not being new, the application of it to make the upper part of a shoe is not invention, nothing novel being required to adapt it to make such upper part." *Meyer et al. v. Pritchard*, 12 Blatch. 101.—BLATCHFORD, 1874.

109. A hair-net of small squares, sufficiently small to keep short hair from protruding, such small squares being formed of threads so small as to be entitled to be called fine threads, being old, it is not patentable invention to substitute for each alternate fine thread a coarse thread in both directions. *Dalton v. Jennings*, 12 Blatch. 96.—BLATCHFORD, 1874.

110. "It would be absurd to say that making one end of a lead-pencil larger than the other would be patentable." *Reckendorfer v. Faber*, 12 Blatch. 68.—WOODRUFF, 1874.

111. The accidental making of an improvement, with utter inability on the part of the maker to make another, is not invention. *Pelton et al. v. Waters*, 1 Bann. & Ard. 599.—EMMONS, 1874.

112. "This is the history of the art in relation to most of the important discoveries and inventions of the present day. The want, which the discovery or invention is to supply, is first felt, and the genius of invention is aroused, and the thoughts and efforts of inventors are directed in a particular channel. When one achieves success it not infrequently appears that prior inventors have been travelling in the same path, and, in the light of his success, we look back with wonder at the omission of those who started earlier in the race to take the last short step which separated them from the goal. But it is the last step in the race of discovery or invention that counts, and he who first crosses the dividing line between experiment and success wins the prize over those who, having started earlier in the race, are but a single step behind at the goal." *Pike v. Providence & Worcester R. R. Co.*, 1 Holmes, 445.—SHEPLEY, 1874.

113. Complainant's improvement was for a "method of introducing the molten cast iron into the mould, through a series of holes, di-

rectly upon the inner influxed surface of the cast steel tire, by which a perfect union and weld of the metals are produced." Car-wheels made by first forming a rim of cast steel, and then heating and placing it in a mould previously prepared for the purpose, and then pouring molten cast iron into the mould, welding the steel and iron together, were old. It was held that complainant's method of locating the pouring holes was an improvement in the nature of mere mechanical skill, and that it was a matter of common knowledge that iron and steel might be successfully welded together without the use of a flux, and that complainant had not made a patentable invention. *Needham v. Washburn et al.*, 4 Cliff. 254.—CLIFFORD, 1874.

114. Where a patented device is anticipated by a prior device, which is the same as the patented device except as to a certain screw which, had defendant used, he would have been an infringer, the difference is immaterial and the patent is void. *Spring et al. v. Packard*, 1 Bann. & Ard. 531.—LOWELL, 1874.

115. Barrel head linings bundled together by wiring do not constitute a patentable invention. *Reed v. Reed et al.*, 12 Blatch. 366.—WALLACE, 1874.

116. "The mere production of an article of bulk to one of smaller size, is not, in general, the subject of a patent as a new manufacture, unless the properties of the article are improved by the introduction of some new ingredients, or by the subtraction of one or more of the ingredients of the original article, by which the new product is improved and made more useful." *Milligan & Higgins Glue Co. v. Upton*, 4 Cliff. 237.—CLIFFORD, 1874.

117. "Glue, comminuted, is more readily soluble than glue in flakes, but the admission affords no support to the theory that comminuted glue is patentable, as the fact that small particles of soluble substances are more readily dissolved in liquids than larger ones, is a matter of common knowledge, and has been known for ages, whereof the memory of man runneth not to the contrary."—*Id.*

118. "New articles of commerce are not patentable as new manufactures, unless it appears, in the given case, that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production."—*Id.*

119. "Nothing short of invention or discovery will support a patent for a manufacture any more than for an art, machine, or composition of matter."—*Id.*



120. "The reduction of glue, as manufactured in flakes, to small particles, . . . does not involve the exercise of invention or discovery."—*Ib.*

121. The claim of complainant's patent was: "For a collar having a paper surface, imitative of the textile face and fibre of a dressed linen collar, as set forth." Thereof the court said: "Collars and cuffs, made of paper, being old, and paper embossed in various forms, some of which were imitations of the surface of textile fabrics, being known, . . . there was . . . no patentable novelty in the application of paper embossed in imitation of linen to the making of collars and cuffs." *Union Paper Collar Co. v. Leland*, 1 Holmes, 427.—LOWELL, 1874.

122. Making by machinery an article heretofore made by hand is not patentable invention. *King v. Werner*, 12 Blatch. 270.—BLATCHFORD, 1874.

123. Making cast-iron furnace legs hollow in order to make them lighter is not patentable invention. *Baxter, in re*, 1 MacArthur's P. C. 520.—CARTTER, 1874.

124. Where a textile fabric differs from prior textile fabrics only in greater tightness of the weaving, a firmer grasping of the elastic cords by the weft threads, and a greater beauty and value, no patentable invention has been made. *Smith v. Nichols*, 21 Wall. 112.—SUP. CT. 1874.

125. "A patentable invention is a mental result. It must be new, and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process, or product, is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward, or a new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee, in the other to the public at large."—*Ib.*

126. "Articles of manufacture may be new in

the commercial sense when they are not new in the sense of the patent law. New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production." *Union Paper Collar Co. v. Van Deusen et al.*, 23 Wall. 530.—SUP. CT. 1874.

127. "Nothing short of invention or discovery will support a patent for a manufacture any more than for an art, machine, or composition of matter."—*Ib.*

128. Turning down a paper collar on a curved line, after a manner old as to collars and other fabrics, is not patentable invention.—*Ib.*

129. An anchored balloon bearing upon itself, or holding in suspension, in any convenient manner, an advertisement for display before the public, is not a patentable invention. *Gould, II. W., in re*, 1 MacArthur's P. C. 410.—CARTTER, 1874.

130. The patent in suit was for an erasive pencil-head; the court took this to be a claim to a piece of rubber with a hole in it, and held it destitute of patentable novelty. *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498.—SUP. CT. 1874.

131. Where a composition is old for one purpose, its application to another use, as for preventing radiation of heat, is not patentable. *U. S. & Foreign Salamander Felting Co. v. Haven*, 3 Dillon, 131.—TREAT, 1875.

132. Where the bottoms of spittoons had been weighted to prevent them from overturning, and where cuspidors had been made of *papier-maché*, there is no patentable invention in making a sheet-metal cuspidor with a like weighting of the bottom. *Ingersoll v. Turner et al.*, 2 Bann. & Ard. 89.—NIXON, 1875.

133. "The mere substitution of one known material for another in a known combination is not the subject of letters-patent, though such substituted material is a cheaper or better one for the purpose." *Putnam v. Weatherbee et al.*, 1 Holmes, 497.—SHEPLEY, 1875.

134. If a prior device effects the same result as the patented device, it is not a material fact that such was not the intent in the prior device. *Trusts et al. v. Boston Mach. Co.*, 1 Holmes, 459.—SHEPLEY, 1875.

135. Applying to the preservation of fish and other articles a freezing process which was old for preserving corpses is not patentable. *Brown et al. v. Piper*, 91 U. S. 37.—SUP. CT. 1875.

136. "It is no new invention to use an old

machine for a new purpose." *Roberts v. Ryer*, 91 U. S. 150.—SUP. CT. 1875.

137. Where a refrigerator of the prior art had both an ascending and descending current, an improvement procured by the use of the ascending rather than the descending does not amount to patentable invention.—*Id.*

138. It being old to preserve green corn by canning, it is not patentable invention to cut the corn from the cob and can it in the same way. *Sewell v. Jones et al.*, 91 U. S. 171.—SUP. CT. 1875.

139. "It is the invention of what is new, and not the arrival at comparative superiority or greater excellence in that which was already known, which the law protects as exclusive property, and which is secured by patent." *Putnam v. Yerrington*, 2 Bann. & Ard. 237.—NIXON, 1876.

140. The patent in suit was for a cotton-press. In the prior press there was a nut revolving with the press-box and frame, but the screw-rod did not revolve, it being fixed in a cross-beam above, the ends of which were arranged to slide up and down in grooves of the side frame. In the press of the patent the nut was stationary, being fixed in the cross-beam above, while the screw revolved with the press-box and frame, being fixed to the follower. The patented arrangement was held to be a mere reversal of operation of the parts of the prior device, and not to involve patentable invention. *Wicks v. Stevens*, 2 Woods, 310.—BRADLEY, 1876.

141. Making in iron a frame which had been before made in wood does not involve patentable invention. *Holbrook et al. v. Small*, 2 Bann. & Ard. 396.—LOWELL, 1876.

142. The claim in complainant's patent in suit was: "As a new article of manufacture, a covered corset clasp, the cloth of which forms a marginal flap or flaps along its length suitable for and adapted to being sewed upon the corset, substantially as described, and for use in the place of broken, injured, or worn-out clasps or cloth, as herein set forth." In the prior art corset clasps covered with material similar to that of the corset to which the clasps were to be applied had long been made with flaps by which they might be sewed to the rest of the corset, and as these were worn out they had to be replaced by new ones. Complainant's improvement was held destitute of patentable novelty, the court saying: "The plaintiff's claim is merely to the making and selling a part of an old and known manufacture as a new way of trade, and it is not, in its nature, the subject of a patent." *Seligman v. Day et al.*, 14 Blatch. 72.—JOHNSON, 1876.

143. A structure that is old as a chair seat cannot be patented as a bed bottom. *Woven Wire Mattress Co. v. Whittlesley et al.*, 8 Bissell, 23.—BLODGETT, 1876.

144. "The law requires more than a change of form, or juxtaposition of parts, or the external arrangement of things, or of the order in which they are used, to give patentability." "A double use is not patentable, nor does its cheapness make it so." *Reckendorfer v. Faber*, 92 U. S. 347.—SUP. CT. 1876.

145. "An instrument or manufacture which is the result of mechanical skill merely is not patentable. Mechanical skill is one thing; invention is a different thing. Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish the expense, is not patentable. The distinction between mechanical skill, with its conveniences and advantages, and inventive genius is recognized in all the cases."—*Id.*

146. The patent in suit was for "a head or hair net composed of a main set of meshes fabricated of coarse threads combined with an auxiliary set or sets of meshes fabricated of fine thread, substantially as described." The court was of the opinion that if the netting thus patented had been produced by the patentee for the first time, it would have been difficult to find in it or in the process by which he made it anything deserving of the name of invention within the meaning of the patent law. *Dalton v. Jennings*, 93 U. S. 271.—SUP. CT. 1876.

147. It being old to use a deflector on one side of a saw, there is no invention in using a deflector on both sides of a saw. *Dunbar et al. v. Myers et al.*, 94 U. S. 187.—SUP. CT. 1876.

148. "Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent, and it was decided by this court more than a quarter of a century ago that unless more ingenuity and skill were required in making or applying the said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention."—*Id.*

149. "A mere carrying forward of an original patented conception involving only a change of form, proportions, or degree, or the substitution of equivalents doing the same thing as the original invention by substantially the same means, is not such an invention as will sustain a patent, even though the changes of this kind may produce better results."—*Id.*

150. The patented invention consisted "in the

employment of a metal ring within a ring formed of artificial ivory or similar materials, for giving strength to the same, thereby producing a new article of manufacture." The ivory was old. It was old to cover metallic rings with compositions such as lacquer, varnish, rubber, and enamel. It was old to use dies in the manufacture of pipes or rings upon iron cores. The patented improvement was held destitute of patentable novelty. *Rubber Coated Harness Trimming Co. et al. v. Welling*, 97 U. S. 7.—SUP. CT. 1877.

151. The patent was for a pavement composed of tiers or rows of wedge-shaped blocks driven into a foundation of sand or earth, thereby compacting the earth, and the spaces between the rows were then filled with gravel. The court was strongly of the opinion that a prior pavement made of cobble-stones, with their sharp, or pointed, or smaller ends set downward, and the whole rammed or driven into the sand or gravel on which it was laid, substantially anticipated the patent. *Stow v. City of Chicago*, 8 Bissell, 47.—BLOGGETT, 1877.

152. A patent for improvement in a pavement was for a method of spacing distances between the blocks by the use of a removable strip or board of the thickness of the required spaces. In view of the common mode of spacing pickets, the court was of the opinion that this pavement was not patentable.—*Id.*

153. The substitution in a pavement of wooden blocks for stone blocks does not involve patentable invention.—*Id.*

154. "A reconstruction of a machine, so that a less number of parts will perform all of the functions of the greater, may be invention of a high order; but the omission of a part, with a corresponding omission in function, so that the retained parts do just what they did before in the combination, cannot be other than a mere matter of judgment, depending upon whether it is desirable to have the machine do all, or less, than it did before."—*Id.*

155. A multiplication of existing seeding cylinders is not patentable. *Moore et al. v. Thomes et al.*, 3 Bann. & Ard. 13.—BROWN, 1877.

156. "It is well settled that an invention is not patentable until a machine has been perfected; and, if not actually used, made capable of useful operation."—*Id.*

157. When a pavement differs from a prior pavement simply in degree of finish and quality of stone, it is not patentable. *Guidet v. City of Brooklyn*, 3 Bann. & Ard. 291.—BLATCHFORD, 1878.

158. Glue in broken sheets being old, there is

no patentable invention in comminuted glue. *Glue Co. v. Upton*, 97 U. S. 3.—SUP. CT. 1878.

159. "A distinction must be observed between a new article of commerce and a new article which, as such, is patentable. Any change in form from a previous condition may render the article new in commerce; as powdered sugar is a different article in commerce from loaf sugar, and ground coffee is a different article in commerce from coffee in the berry. But to render the article new in the sense of the patent law, it must be more or less efficacious, or possess new properties by a combination with other ingredients; not from a mere change of form produced by a mechanical division. It is only where one of these results follow that the product of the compound can be treated as the result of the invention or discovery, and be regarded as a new and useful art."—*Id.*

160. "Where certain properties are known to belong generally to classes of articles, there can be no invention in putting a new species of the class in a condition for the development of its properties similar to that in which other species of the same class have been placed for similar development; nor can the changed form of the article from its condition in bulk to small particles, by breaking, or bruising, or slicing, or rasping, or filing, or grinding, or sifting, or other similar mechanical means, make it a new article in the sense of the patent law."—*Id.*

161. Cutting two or more series of collars side by side, from a strip of paper or other suitable material, in such a manner that the wide parts of the collar of one series shall come opposite the narrow parts of the adjoining series does not amount to patentable invention. *Snow v. Taylor*, 4 Bann. & Ard. 5.—LOWELL, 1878.

162. Where a certain kind of independent damper was used in one kind of reed organ, it was held that adapting such a damper to a different style of reeds did not amount to patentable invention. *Burdett v. Estey et al.*, 15 Blatch. 349.—BLATCHFORD, 1878.

163. Changing a part of a machine is not a substantial change, if after the change it operates in precisely the same way and accomplishes the same result that it did before the change. *Know et al. v. Great Western Quicksilver Mining Co.*, 6 Sawyer, 430.—SAWYER, 1878.

164. A double leather covering on a soft ball was well known, and a single leather covering on a hard ball was well known. It was held not patentable to apply a double leather covering to a hard ball. *Mahn v. Harwood et al.*, 3 Bann. & Ard. 515.—LOWELL, 1878.

165. "Mere discovery of a patentable improve-

ment does not constitute it the proper subject of a patent, unless it be embodied, if a machine, into working machinery, and adapted to practical use." *Judson v. Bradford et al.*, 3 Bann. & Ard. 539.—CLIFFORD, 1878.

166. "Crude and imperfect experiments are not sufficient to confer a right to a patent, but, in order to constitute an invention, the party must have proceeded so far as to have reduced his conception to practice, and have embodied it in some distinct form."—*Ib.*

167. "It is not an invention of a new die to change the form of a die so as to make a new shaped article under it." *Smith v. Am. Bridge Co.*, 8 Bissell, 312.—BLODGETT, 1878.

168. There is no invention in placing a window in the wall of a metallic chamber, whether the same be designed to give light outward or to permit the inspection of the flame. *Kerosene Lamp Heater Co. v. Littell*, 3 Bann. & Ard. 312.—NIXON, 1878.

169. When it is once demonstrated that an entire trunk may be improved and strengthened by covering it with corrugations, is there anything patentable in applying that idea to the covers of the corners of a wooden trunk? *Gould et al. v. Ballard et al.*, 3 Bann. & Ard. 324.—NIXON, 1878.

170. Wooden corner sockets for show-cases being old, it is not patentable to make metallic corner sockets for the same purpose. *Terhune v. Phillips et al.*, 99 U. S. 592.—SUP. CT. 1879.

171. Where a marked tag for a plug of tobacco is old, attaching prongs to the tag and sticking it into the tobacco is not patentable invention. *Lorillard et al. v. Ridgway*, 4 Bann. & Ard. 564.—MCKENNAN, 1879.

172. Where marks impressed upon the surface of plugs of tobacco were old, it was held not patentable invention to put similar marks on metallic disks attached to the tobacco plugs.—*Ib.*

173. In the old art, referring to lamps, a chimney base and chimney top were formed in one piece; he who made them in two pieces did not produce a patentable improvement. *Blackman et al. v. Hibbler et al.*, 17 Blatch. 333.—BENEDICT, 1879.

174. Placing a surrounding rim on the upper part of a lamp-chimney-base, for the purpose of maintaining in place a separate top-piece, does not amount to patentable invention.—*Ib.*

175. "It is an elementary principle that the mere application of an old thing to a new use is not patentable." *Gottfried et al. v. Phillip Best Brewing Co.*, 5 Bann. & Ard. 4.—DYER, 1879.

176. "While the value and utility of a device, and the fact that it has superseded others previously employed for analogous uses, is undoubtedly entitled to weight in considering the question of patentability [*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486], it is, after all, a somewhat uncertain criterion. If the device be, in fact, novel, it furnishes an additional reason why the inventor should receive the reward of his ingenuity; but if it involves no exercise of the inventive faculty, its very utility is an aggravation of the wrong done by the patentees in seizing and appropriating that which properly belongs to the public." *Phillips et al. v. City of Detroit*, 4 Bann. & Ard. 347.—BROWN, 1879.

177. Complainants' patent in suit was for a patented improvement consisting of blocks of wood cut from the trunks or branches of trees in their natural form, the bark only being removed, laid vertically upon a bed of gravel or sand, which was also used to keep the filling in position. Both elements of this patent were old; sand unmixed with other substances had been used as a filling and foundation of stone pavements; round blocks of wood laid vertically had been used with filling of sand mixed with asphalt, tar, or pitch. Complainants' patent was held destitute of patentable novelty.—*Ib.*

178. A process of packing and preserving meat after it has been submitted to preserving processes, then to a heavy pressure, then packing it and hermetically sealing it in packages or boxes, does not make it a patentable invention. *Wilson Packing Co. et al. v. Clapp*, 8 Bissell, 545.—DRUMMOND, 1879.

179. "Cooked meat put up in a solid form in its natural state, without disintegration or desiccation in hermetically sealed packages," does not constitute patentable novelty.—*Ib.*

180. A "can for packing food hermetically sealed, and constructed of pyramidal form, with round corners, and with off-set ends to support the head," does not embody patentable novelty.—*Ib.*

181. "There cannot be a patent for a mere form, unless the form is of the essence of the invention. It is not easy to describe what constitutes the essence of the form so as to make it the subject of a patent, and distinguish it from that which is mere form. Sometimes, as the courts say, the form may be the substance of the invention, and there may be such a change produced in a certain article as to make it [the article manufactured or otherwise, whatever it may be] the subject of a patent."—*Ib.*

182. Taking a vegetable gum and washing it with hot water, so as to make it fit for a chewing gum, does not amount to patentable invention when hot water has been used for washing india-rubber and other gums. *Adams v. Loft*, 4 Bann. & Ard. 495.—NIXON, 1879.

183. An improvement of complainants' patent in suit, as expressed in the claim, was: "The use and adaptation of the body or sides of a stove or range D, to serve as and perform the office of a flue or chimney over the lamp or oil-holder A, substantially as described, and for the purposes set forth." In view of the known employment of chimneys over lamps for all the purposes indicated in this claim, this patent was held destitute of patentable novelty. *Couse et al. v. Johnson et al.*, 4 Bann. & Ard. 501.—MCKENNAN, 1879.

184. "The application of old mechanical devices, without material change, to a use in which they were not employed before, but which was known and had been practised, does not constitute a patentable invention."—*Id.*

185. An improvement of complainants' patent in suit, as expressed in the claim, was: "The insulation of the lamp or oil-holder by non-contact with the heater, stove, or range, substantially as described and set forth." The insulation was effected by making the legs of the stove long enough to allow the lamp to be placed under it without touching. Thereof the court said: "To call this invention is to misapply the term. The means of effecting the desired result are so obvious that it does not require ordinary mechanical skill to devise and apply them."—*Id.*

186. "Plain-edged" and "jaggedly cut" bags being old, and plain-edged paper bags notched at the mouth also being old, there is no patentable novelty in a notched "jaggedly cut mouth" paper bag, the notch being for the express purpose of enabling the consumer to overcome the resistance of the felted edges to the opening of the bag. *Arkell's Application*, 15 Blatch. 437.—SHIPMAN, 1879.

187. "The application of an old contrivance to a new purpose is not patentable, when the old and new purposes, and the object to which the contrivance is applied, are merely analogous. If the use of an old contrivance produces a new effect, the new manufacture or process may be patentable because the new use is not analogous to the former one; but if the new use is simply on a new occasion, not producing a new effect, the use is analogous to what had been done before."—*Id.*

188. "If the effect of the old contrivance,

when applied to the new object, is simply an effect in an analogous object by the use of precisely the same means, the application of the new use is not patentable."—*Id.*

189. "Invention often involves a new result, first thought of by the patentee; and in such cases, the fact that the mechanical changes he has made are not difficult is often unimportant. The cases in which invention is wanting are usually those in which the result is old in kind and the change of means is obvious, or has been used in analogous machines or articles, and then the smallness of the change is very likely to be decisive against the patent." *Stewart v. Mahoney*, 4 Bann. & Ard. 84.—LOWELL, 1879.

190. A patented improvement, as stated in the claim of the patent in suit, was: "As a new article of manufacture, writing-paper whereof the lines are embossed by or with an ogee pattern, which exposes a like face on opposite sides." The court held that "embossed lines on writing-paper being old and well known, and ogee lines embossed on paper being equally so, there was no room to claim an invention for, a distinct and new product merely by changing the spaces of the ogee lines so that they might be used for writing-paper." *Cone v. Morgan Envelope Co.*, 4 Bann. & Ard. 107.—LOWELL, 1879.

191. Defendants' patent in suit was for a mode of cutting soles for boots and shoes, and the mode was to place the die upon the leather and cut one sole, then to reverse the die and cut the second. This was held not to amount to patentable invention. *Walker v. Rawson et al.*, 4 Bann. & Ard. 128.—LOWELL, 1879.

192. "Both the loose pulley and the brake devices are known in mechanics to produce a stop motion in machinery. Being equivalent, there is no invention in substituting the one for the other." *Willimantic Linen Co. et al. v. Clark Thread Co. et al.*, 4 Bann. & Ard. 133.—NIXON, 1879.

193. The complainant's patented improvement, as expressed in the claim, was: "As an article of manufacture, the bale B, of plasterers' hair, consisting of several bundles, A, containing a bushel each by weight, enclosed or encased by paper bags or similar material, and united, compressed, and secured to form a package, substantially as specified." This improvement was held destitute of patentable novelty. *King v. Frost et al.*, 8 Bissell, 510.—DRUMMOND, 1879.

194. Where a metal chair seat has been perforated, there is no invention in perforating a wooden chair seat. *Gardner et al. v. Herz et al.*, 16 Blatch. 303.—BLATCHFORD, 1879.

195. To fasten both bands of a truss in a mode which is old for fastening one band, or to fasten the band to the plate of the pad rather than to the brace which holds the pad, with no change in the operation of the band, does not involve patentable novelty. *Elastic Truss Co. v. Page et al.*, 4 Bann. & Ard. 328.—LOWELL, 1879.

196. "Some changes, such as a substitution of brass for iron or of steam-power for horse-power, are, at the present day, presumed to be within the common knowledge of mechanics." *Dunbar et al. v. Albert Field Tack Co.*, 4 Fed. Rep. 543.—LOWELL, 1879.

197. "The decision," as to presence of patentable invention, "does not necessarily depend upon the amount of thought, or even of experiment, which may have been had in reaching the result. Thus, if an old machine or process is put to a new use, invention is positively excluded, although the new use may apparently be very remote from the old, requiring experiment to ascertain its practicability, and though the actual operation of the machine or process may not be exactly the same in the new as in the old application, provided no new means are, in fact, employed."—*Id.*

198. The improvement of the patent in suit was stated therein as follows: "The nature of our invention consists in combining two large, light, tight, firm, stout tanks with an ordinary railway car, making the tank practically a part of the car, so as to carry the desired substance in bulk in the car itself, or in a permanent fixture or part thereof, instead of in barrels, casks, hogsheads, tierces, or other movable vessels or packages, as is now universally done on railroad cars, and thereby saving the weight of the barrels, casks, hogsheads, tierces, or other movable vessels or packages." Large casks loaded and cleated on ordinary cars were old, and their location over the trucks was old. The improvement was held destitute of patentable novelty. *Densmore et al. v. Scofield et al.*, 102 U. S. 375.—SUP. CT. 1880.

199. Where the cross-bar of a shawl-strap had been made measurably stiff by the use of stiff leather, it was held not to amount to patentable invention to make it still stiffer by the use of iron. *Crouch v. Roemer*, 103 U. S. 797.—SUP. CT. 1880.

200. The improvement of the patent in suit was an ornamental chain consisting of solid links and open spiral links made of tubing, the latter being finished before they were sprung into the solid links, and the connection being made by thus springing the links together. "Chains having alternate open and closed links,

the open links being spiral and sprung into the closed links, were known. So were chains made entirely of spiral links, even of open spiral links. A chain had also been made and worn, and it was for sale in the stores, the links of which were hollow." "The coils were soldered together after the links had been sprung into each other." "Omitting that process and the outward deflection of the ends, and alternating the links with other links, made closed and soldered, is not invention." *Pearce v. Mulford et al.*, 102 U. S. 112.—SUP. CT. 1880.

201. "All improvement is not invention and entitled to protection as such. Thus, to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates."—*Id.*

202. "There could be no invention in putting a stereoscope upon one kind of well-known stand instead of another. It was merely putting the old stand to a new use." *Quirolo v. Ardito et al.*, 17 Blatch. 400.—WHEELER, 1880.

203. "If the ordinary form of corrugated iron, when applied to the roof or sides of a building, does not give sufficient air spaces, there is nothing new in the idea of making them larger, and diminishing the surface of iron at the point where it is nailed to woodwork, although it might remedy the objection." *Belt v. Crittenden et al.*, 1 McCrary, 209.—NELSON, 1880.

204. Complainant's patented device for cleaning windows consisted of an elastic strip [rubber] attached at one end to a holder, with a yielding support behind the strip, which support was a rubber tube and with rubber plates at the ends to adapt it to service in corners. A broad strip of rubber firmly inserted in a wooden handle had previously been used in cleaning the decks of ships; also a handle like that of a hair-brush, furnished with rubber surfaces, had been used for scouring. Complainant's device was held to show only mechanical skill. *Perfection Window Cleaner Co. v. Bosley*, 9 Bissell, 385.—DYER, 1880.

205. Japanning being old, and furniture springs being old, a claim to "japanned furniture springs" covers nothing patentable. *Eagleton M'fg Co. v. West, Bradley & Carey M'fg Co. et al.*, 18 Blatch. 218.—WHEELER, 1880.

206. The essence of complainant's improvement in nail ears was to have "the lower sides of both points of the staples bevelled or cut away, so as to cause them to bend upwardly and clinch within the wood when being driven." A staple with one point bevelled on one side and the

other point bevelled on the opposite side was old. The improvement was held to show nothing more than a "mere change of form." *Double-pointed Tack Co. v. Two Rivers M'fg Co. et al.*, 9 Bissell, 258.—DYER, 1880.

207. "Cards for buttons faced with foil and divided into spaces by bands were well known and in common use. Those for pearl buttons may not have been divided into dozens, in rows of three by four, but they were divided so that dozens could be readily cut from the card, in two rows of six and one of twelve; and there were cards divided into spaces for several dozens by such bands as the patent describes; and cards of cloth buttons spaced for dozens in rows of three by four. With these things known, there was nothing rising to the level of inventive skill in arranging pearl buttons by dozens on cards, in three rows of four." *Plimpton v. Winslow*, 3 Fed. Rep. 333.—LOWELL, 1880.

208. By the court: "There is considerable doubt whether the patent, as between the owners and public generally, is of any validity. Hay has long been baled, to the common knowledge of all. The whole invention in controversy consists in baling hay cut short in the same manner. The well-known process of baling hay was applied to another kind of hay." *Faulkes et al. v. Gamp et al.*, 17 Blatch. 432.—WHEELER, 1880.

209. Complainant's patent claimed: "The method of utilizing the leather of old card clothing by heating it with gum-tragacanth and re-setting it with teeth, reversely to the original teeth, substantially as described." Complainant claimed that the use of the gum-tragacanth was non-essential. Prior use, where the gum-tragacanth was not used, and where the leather was turned over instead of around, was proved. *Held*, to anticipate the patent. *Brummitt v. Howard et al.*, 3 Fed. Rep. 801.—LOWELL, 1880.

210. "Given the two facts that a clock dial, with printed paper dial, a metallic back and a metallic rim uniting the back and the paper dial, was old; and that a metallic back and with a lateral outside flange, through which screws were inserted to fasten the dial to the clock-case, was common in use; it was no material part of the invention to make the rim correspond generally with the old pattern of the back." *Root v. E. N. Welch M'fg Co.*, 17 Blatch. 478.—SHIPMAN, 1880.

211. A fare-box with two compartments and a window to the upper compartment being old, it is mere aggregation and duplication to add another window to the upper compartment. *Slawson v. Grand St., Prospect Park & Flatbush R. R. Co.*, 17 Blatch. 512.—BENEDICT, 1880.

212. By the court: "Assuming the claim to be for a combination, the only novelty pretended consists in the arranging the fare-box, lamp, and reflector in such a manner that the light from the lamp will be thrown into the fare-box. No invention was required to so arrange these parts. It would not fail to be accomplished by any person of ordinary intelligence and experience who should attempt it."—*Id.*

213. Applying a mode of feeding, which is old in lime kilns, to a quicksilver furnace is not invention. *Knox et al. v. Quicksilver Mining Co.*, 4 Fed. Rep. 809.—FIELD, 1880.

214. Wire fences being old, if barbed wire for other than fencing purposes had been old, then the substitution of barbed wire for fences would not have been an invention. *Washburn & Moen M'fg Co. et al. v. Haish*, 10 Bissell, 65.—DRUMMOND and BLODGETT, 1880.

215. The feature of improvement in a patent for barbed wire fences was pointing the barb at both ends by cutting it off diagonally. Barbs had been before this time made sharp by cutting the sheet metal used diagonally, and it was held to be no invention to point wire by cutting it diagonally.—*Id.*

216. The idea of barbing fence wire was the subject of one patent. The idea of fixing the barb rigidly upon the wire by twisting another wire upon it was the subject of a second patent. The looping of the barb around the fence wire was the subject of a third patent. A fourth patent was for all these features combined. It was held not to embody patentable invention.—*Id.*

217. "Soaps made with the purer carbolic acid which existed in 1867 may be applicable to purposes to which soaps made with less pure carbolic acid cannot be applied, but that only shows a difference in degree and not invention." *Buchan et al. v. McKesson et al.*, 18 Blatch. 485.—BLATCHFORD, 1880.

218. "There are undoubtedly cases where a combination may be made of parts never combined before, where no invention is involved; such is the case where a well-known contrivance is used to perform a function exactly analogous to that in which it was formerly used." *Wisner et al. v. Grant et al.*, 7 Fed. Rep. 485.—WALLACE, 1880.

219. By the court: "The perforations of no annular series had been placed so closely together, probably, as Caldwell placed them, but such series had been made before, and it was mere workmanship and not invention to make them thicker if they were needed thicker." *Tift v. Sharp et al.*, 18 Blatch. 138.—WHEELER, 1880.

220. The steaming of oil wells, in order to melt paraffine, being old, and surrounding the eduction pipe with an outer casing being old, it was not invention to carry a steam-pipe down between the eduction pipe and casing. *Double-day v. Roess*, 11 Fed. Rep. 737.—ACHESON, 1880.

221. For an example of what was held to be mere mechanical skill in grates for stoves, see —. *Wier v. No. Chicago R. Mill Co.*, 9 Bissell, 508.—BLODGETT, 1880.

222. By the court: "So far as the first claim is concerned, the alleged invention is simply securing the door of the time-lock with a key, and providing such door with an aperture through which the clock can be wound. In view of the Rutherford clock, the watchman's time detector, and, indeed, the locks and watches which are commonly in use, the improvement seems to me to have been so obvious, and plainly a mechanical one, that it is unnecessary to dwell upon this part of the case." *Yale Lock M'fg Co. et al. v. Norwich Nat. Bank*, 19 Blatch. 123.—SHIPMAN, 1881.

223. Stay-strips for overhanging seams in leather shoes being old, and leather strips with beaded edges being old upon harness, "a stay-strip with beaded edges to protect the stitches could not be patented as a new article of manufacture." *Smith et al. v. Merriam et al.*, 6 Fed. Rep. 903.—LOWELL, 1881.

224. By the court: "Both experts agree that every mechanic knew, and for years had known, that a slot and pin and a connecting-rod were alternative modes of obtaining this change of motion. If so, the change did not require invention." *Crompton v. Knowles et al.*, 7 Fed. Rep. 204.—LOWELL, 1881.

225. Complainant patented a process consisting of two steps for forming boot and shoe counters. Defendants practised the process by passing the blanks through two old machines, each designed for use in making counters. *Held*, that the claim could not be sustained. *Moffitt v. Rogers et al.*, 8 Fed. Rep. 147.—LOWELL, 1881.

226. By the court: "I am not aware that a patent has ever been sustained for a process or method which consisted of employing an old machine for the very purpose for which it was made. If any person discovers how to use an old machine to the best advantage, he is only a skilful workman, not an inventor." . . . "I do not mean to say that a patent cannot possibly be supported for a process or method which consists only of applying an old machine to a new use. Many of the ablest writers and jurists assert that such a claim is possible. . . . If one is

ever supported, it will be when the new use is so remote from the old use that a court or jury can say that a new idea has been discovered." —*Id.*

227. A suspension ring for cards, the same as a prior umbrella fastener except in mere change in form, is not a patentable invention. *Griffiths et al. v. Holmes, Booth & Haydens*, 8 Fed. Rep. 154.—SHIPMAN, 1881.

228. Water traps of cast lead being old, it is not patentable to make them by drawing them in dies. *McCloskey v. Du Bois et al.*, 19 Blatch. 205.—WHEELER, 1881.

229. The patented thing was a sweat lining for hats, extending well out upon the brim, crimped over the angle formed by the brim and crown, and stitched to the brim by stitches passing perpendicularly through the brim and outside of the crown band. The sweat lining thus located on the hat was old, the perpendicular stitches were old elsewhere, the crimping was held to have been done before by the heads of the wearers, and the device was found destitute of patentable novelty. *Beatty v. Hodges et al.*, 19 Blatch. 381.—WHEELER, 1881.

230. The result of holding firmly the ends of railroad rails by means of bolts and a plate being well known, making the plates ribbed does not amount to patentable invention. *Fisher, Ex parte*, 20 O. G. 957.—WYLIE, 1881.

231. In complainants' patent on "improvements in children's carriages," certain combination claims had "profile frames" as one element, which were profile frames of horses. Prior structures had profile frames of swans. *Held*, that the difference was not [mechanically] patentable. *Crandall et al. v. Richardson et al.*, 8 Fed. Rep. 808.—BLATCHFORD, 1881.

232. Die-drawn lead traps, as compared with cast traps, have walls of greater solidity and more perfect uniformity, they are more elastic, and the quality of the metal is changed and improved by the process of drawing; but all these differences are effects which were before well known; the die-drawn trap is not patentable. *McCloskey v. Du Bois et al.*, 20 Blatch. 7.—WHEELER, 1881.

233. Complainant's patented mode of canning meat was [1] to boil it; [2] pack it yet warm in a case tightly enough to express the air and superfluous moisture; [3] close the can airtight. The boiling of meat was old; airtight canning of meats under pressure was old. *Held*, that the patented mode did not amount to invention. *Wilson Packing Co. v. Chicago Packing & Provision Co. et al.*, 10 Bissell, 559.—BLODGETT, 1881.



234. While extensive use is evidence tending to establish sufficiency of invention, it has no conclusive force where the use is evidently due to the care and skill used in preparing the patented article for consumption.—*Ib.*

235. Complainant's patent claimed "a can for packing food hermetically sealed and constructed of pyramidal form, with rounded corners and off-set ends to support the heads, said heads being secured as shown and described." Pyramidal-shaped cans were old; cans not pyramidal, but with rounded corners and off-set ends, were old. *Held*, that complainant's can did not amount to an invention.—*Ib.*

236. Complainant's patent claimed "as an improved article of manufacture solid meat compressed and secured within a pyramidal case or can, so that said can forms a mould for the meat and permits its discharge as a solid cake, substantially as specified." Meat compressed into cans [shape not shown] was old; pyramidal cans were old. *Held*, that complainant's patentee had not exercised patentable invention.—*Ib.*

237. It is mere mechanical skill, and not invention, to substitute for a lever, rod, rack, and pinion—as a means of rotating a shaft—some other mechanical means of giving such rotation. *Davis et al. v. Brown et al.*, 19 Blatch. 263.—BLATCHFORD, 1881.

238. A fertilizer composed of ground bone, calcined plaster, nitrate of soda, sulphate of ammonia, and dry muck or the like being old, there was no invention in substituting dissolved bone and ground plaster for the calcined plaster, the said substitutes being known fertilizers. *Boykin et al. v. Baker et al.*, 4 Hughes, 282.—MORRIS, 1881.

239. "Whenever a new material is substituted for an old one in an article of manufacture, as silk for cotton, steel for iron, metal for wood, a better result may be obtained, and one which may give a greatly increased beauty, usefulness, or commercial value to the article produced, and may greatly increase the demand for it; but this is a result which is to be attributed to mechanical skill or business enterprise, and not to invention as that word is applied to patents."—*Ib.*

240. A furnace with a fan to draw air from it and force it into casks for heating them being old, there is no invention in forcing the air through the furnace and then into the casks, even though the result may be improved. *Gottfried v. Crescent Brewing Co.*, 9 Fed. Rep. 762.—GRESHAM, 1881.

241. An electric wire "covered with braided

fibrous covering and dipped in wax" being old, and bituminous matter pressed into such a fibrous covering being old, it is not invention to press wax into such a fibrous covering. *Western Electric M'fg Co. v. Ansonia Brass & Copper Co.*, 20 Blatch. 170.—SHIPMAN, 1881.

242. It being old to form a lip around the mouth of a rubber shoe by doubling the edge, and it also being old to form ribs in rubber fabrics by rolls, a rib formed around the mouth of the shoe by rolls was held to be a mere double use. *Meyer et al. v. Goodyear India Rubber Glove M'fg Co.*, 20 Blatch. 91.—SHIPMAN, 1881.

243. Artificial honeycomb foundation wholly of wax and with pyramidal cell-floors being old, and such foundation partly of wax and with flat cell-floors being old, there is no invention in making such foundation wholly of wax and with flat cell-floors. *Van Deusen et al. v. Nellis*, 20 Blatch. 45.—BLATCHFORD, 1881.

244. A "cylinder-notch" for drawing off slag being old in a blast furnace, there is no invention in applying a cylinder-notch to a cupola furnace for the same purpose. *Vinton et al. v. Hamilton et al.*, 21 O. G. 557.—SUP. CT. 1882.

245. A patent prior to that sued on showed the same device, a pavement, effecting the same result as that described in complainant's patent, but such result was not described in the prior patents. Complainant's patent held to be anticipated. *Stone v. Chicago*, 104 U. S. 547.—SUP. CT. 1882.

246. The patented device under consideration being a gang plough, corn-planters and horse-rakes were held to be a part of the prior art. *Newton v. F. & B. M'fg Co.*, 11 Bissell, 405.—BLODGETT, 1882.

247. By the court: "It would seem that the employment of sheet metal as a lining for the bottom of a starch tray involves no invention. The bottom had been made of wood, and undoubtedly, when lined with lead or copper or galvanized iron, would be more durable and more easily cleaned. But it is within common knowledge that such linings had been used analogously in many other vessels made to contain liquids because of these advantages." *N. Y. Grape Sugar Co. v. Am. Grape Sugar Co. et al.*, 20 Blatch. 386.—WALLACE, 1882.

248. A certain kind of furnace upon one side of a chimney being old, there is no invention in putting such a furnace upon two sides of a chimney. *Millner v. Voss et al.*, 4 Hughes. 262.—BOND, 1882.

249. Double-recessed lap-joints in sheet-metal structures being old, and soldering by dipping being old, and complainant's alleged invention

consisting in "a can or other vessel made of that metal, in which the top or bottom is joined to the sides by a double-recessed lap-joint," the court said: "The patentee has merely aggregated these elements in his can, without causing them to perform, by their united action, any function which they did not perform separately before. . . In the conception or material embodiment or operation of such a union of well-known elements, we cannot detect any patentable merit." *Combined Patents Can Co. v. Lloyd*, 11 Fed. Rep. 153.—MCKENNAN, 1882.

250. Where it is old to put up meat in a certain way by broiling, roasting, or steaming, it is not patentable to boil and put up meat in the same way. *Wilson Packing Co. et al. v. Chicago Packing & Provision Co. et al.*, 105 U. S. 566.—SUP. CT. 1882.

251. It being old to put up meat in one form of can, the mould for the meat being formed by the can, it is not patentable to use in that connection another form of can—to wit, a pyramidal can.—*Id.*

252. Loops upon whip-sockets being old, there is no invention in attaching the loop to a new form of socket. *Worden et al. v. Fisher et al.*, 11 Fed. Rep. 505.—BROWN, 1882.

253. Complainants' patent was for "an earthenware saucepan, the bottom of which is rounded and has a regular surface of or about an equal thickness throughout." Earthenware vessels being old, and cast-iron vessels having bottoms of the shape in question being old, it was seriously questioned whether what the patent claimed amounted to a patentable invention. *Scott et al. v. Evans*, 11 Fed. Rep. 726.—ACHE-SON, 1882.

254. By the court: "What Guidet did was to show that if a stone were used with rougher side surfaces than those found in the old pavement, all artificial means of keeping the transverse joints open might be abandoned and the requisite surfaces secured. This was simply carrying forward the old idea, and doing what had been done before in substantially the same way, but with better results. The change was only in degree, and consequently not patentable." *Guidet v. City of Brooklyn*, 105 U. S. 550.—SUP. CT. 1882.

255. When an inventor has applied his improvement to one form of a class of articles, obvious modifications of the improvement, to adapt it to other forms of the class, are not substantial change. *Putnam v. Hutchinson*, 211 Bissell, 233.—BLODGETT, 1882.

256. An anti-clinker opening between a dump- ing grate and the bottom of the fire-pot above it,

with the grate larger in area than such bottom, was old. Downwardly contracted fire-pots were old. There was no new effect had by uniting the two. *Perry et al., Trustees, v. Co-operative Foundry Co. et al.*, 20 Blatch. 505.—BLATCH- FORD, 1882.

257. An anti-clinker opening between a dished grate and a fire-pot was old. The union of the two involved no invention.—*Id.*

258. Complainants had an expired patent for a machine for making shoes, and later patents for the product of such machines and the process of making such products. Held, that after the machine had been made the process and product did not present patentable subject-matter. *McKay et al. v. Jackman*, 20 Blatch. 466.—WHEELER, 1882.

259. Chair-seats of crossed veneers being old, perforated chair-seats being old, and concave chair-seats being old, there is no invention in making a perforated chair-seat of crossed veneers formed to a concave shape. *Gardner et al. v. Herz et al.*, 20 Blatch. 538.—WALLACE, 1882.

260. The popularity and success achieved by an improvement is not always evidence of the exercise of invention, but may be due to other matters.—*Id.*

261. By the court: "It is plain that the mere addition of hooks, either moving upward or downward, does not constitute invention." *Neacy v. Allis*, 22 O. G. 1621.—DYER, 1882.

262. Wire-frame dummies for displaying clothing being old, it is not patentably novel to make the shell of such a dummy of *papier-maché*, that substance having been before used for making lay figures representing celebrated persons, which had appropriate costumes. *Palmerbing v. Buchholz*, 21 Blatch. 162.—WALLACE, 1882.

263. "If mechanics, skilled in the particular department of construction, could have seen at a glance the feasibility of the change, then, although the device may have been mechanically new, it was not intellectually novel."—*Id.*

264. "The new application of an old material will not generally support a patent."—*Id.*

265. The patent in question was for a rocking-chair mounted on an elevated platform. The prior art contained a rocking-chair mounted on a platform, with a flange on the outside of each rocker to prevent lateral movement of the rocker, and with metallic plates to prevent the rocker from being thrown off the platform. The patented device differed from this simply in tonguing the rocker into grooves in the plat- form at each end, and using an elastic band in place of metallic plates. The court held that

there was not sufficient invention to support a patent. *Singer Rocking Chair Co. v. Toby F. Co.*, 11 Bissell, 358.—DRUMMOND, 1882.

266. By the court: "It is obvious that a plain ring, or a ring with radial slits, has the same action in combination with an annular recess, in which it is held by its elastic force alone, so far as regards its readjustment in the recess when disturbed, that a ring with inward non-continuous projection has. The coaction between the recess and the part of the ring in it, when the part of the ring out of it and next to the stock is disturbed, is the same in all three cases. Therefore, if the ring with inward non-continuous projections existed before, even though without the annular recess, there was no patentable invention in using such a ring with the old annular recess with which the plain ring has been used." *Searls v. Merriam et al.*, 20 Blatch. 263.—BLATCHFORD, 1882.

267. By the court: "The only advantage which the public gained from the specifications and claim of the complainants' patent was that Welling made a selection of a few ingredients from the larger number of Westendarp from which material might be chosen to experiment with, and we do not think that such an exercise of judgment or mechanical skill should be dignified with the name of invention." *Welling et al. v. Crane et al.*, 23 O. G. 189.—NIXON, 1882.

268. Doubted whether splitting the stems of feathers for dusters in order to give increased pliability amounts to invention. *Nat'l Feather Duster Co. v. Dearborn Duster Co. et al.*, 24 O. G. 497.—BLODGETT, 1882.

269. "Provisions for upright and horizontal stays and for annular stays for the wire cone of a mouse-trap" are not inventions. "They are suggestions which would occur to any skilled mechanic in constructing such chambers of wire cloth, from the very nature of the material, and are mere matters of workmanship, involving no invention." *Nat'l M'fg Co. v. Myers*, 15 Fed. Rep. 237.—MATTHEWS, 1883.

270. By the court: "It is not invention to transfer such workmanship [double seaming] from the draft eye of the harness to the terrets and rings of the harness." *Theberath v. R. & C. Harness Trimming Co.*, 15 Fed. Rep. 246.—NIXON, 1883.

271. Merely carrying forward the original and previous conceptions of another is not invention. —*Ib.*

272. By the court: "I am further inclined to think that, if an article has been made by hand in such a way that it might have been used separately from the larger thing to which it was

joined, though there was no occasion so to use it, a patent cannot be taken out for that article as a new manufacture." *Hatch et al. v. Moffitt*, 15 Fed. Rep. 252.—LOWELL, 1883.

273. By the court: "There was no invention in adding to the solid conical bolt the screw thread of the cored conical bolt." *Hall v. Macneale et al.*, 107 U. S. 90.—SUP. CT. 1883.

274. By the court: "The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant a single party a monopoly of every slight advance made, except where the exercise of invention above ordinary mechanical or engineering skill is distinctly shown, is unjust in its principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary process of manufactures. Such indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate inventions." *Atlantic Works v. Brady*, 107 U. S. 192.—SUP. CT. 1882.

275. For an example of a case where a union of old elements was held not to constitute a patentable invention, see — *Ib.*

276. For an example of the exercise of mere mechanical skill in the production of a soldering tool which was a practical improvement on its predecessors, see — *McMurray v. Miller et al.*, 16 Fed. Rep. 471.—WAITE, 1883.

277. It is not patentable invention to place a glass on the side of a fare-box, so that passengers may look therein; or a glass on the top thereof, so that the ordinary street car lamp may light the interior thereof. *Slawson v. Grand St., P. & F. R. R. Co.*, 107 U. S. 649.—SUP. CT. 1883.

278. Where the prior art showed all the parts of the patented thing—a rolling colter for ploughs—and the patentee had simply changed the form and position of the parts, it was held that the patentee's improvements were matters of mere mechanical skill. *Manny v. Oyler*, 5 McCrary, 232.—TREAT, 1883.

279. Complainant's patented thing was a corrugated, metallic shingle having nail-holes in it. Metallic roofing in small sheets, overlapping when laid, was old. Corrugated metallic roofing laid in sheets, and overlapping when laid, was old. *Held*, that complainant's patented thing did not amount to an invention. *Am. Iron Co. v. Anglo-Am. Roofing Co.*, 21 Blatch. 324.—WALLACE, 1883.

280. By the court: "It would seem that the only distinction that can be suggested between the old method described in the patent is in the extended racks—in the use of a girdle frame a few inches smaller instead of a few inches larger than the racks." *Clark Pomace Holder Co. v. Ferguson*, 21 Blatch. 376.—COXE, 1883.

281. By the court: "It seems to me that if any mechanic had been directed to make a wheel case of two plates, which should contain water-tight openings for the induction and escape pipes, he would have found it almost a necessity to cast the openings upon one of the plates; and I think there is no invention whatever involved in the idea of casting these openings upon one plate instead of casting half or a portion in one and the other part in the other." *Backus Water Motor Co. v. Tuerk, Jr., et al.*, 24 O. G. 994.—BLODGETT, 1883.

282. The prior art contained a machine for forming heel stiffeners for boots and shoes, wherein the flange-forming apparatus was moved in a straight line and the heel seat was formed straight; and it was held that there was nothing patentable in moving the flange-forming apparatus in the arc of a circle and thereby making the thread curved, there seeming to be no practical advantage in having the heel seat somewhat curved. *Moffitt v. Cavanaugh*, 17 Fed. Rep. 336.—SHIPMAN, 1883.

283. The patented thing being a plough-standard, with a peculiar arrangement of bolts and bolt-holes in the head, a cultivator standard having a differently shaped head, but the same arrangement of bolts and bolt-holes, was held to anticipate the patent. *Matteson et al. v. Cairne*, 8 Sawyer, 498.—SAWYER, 1883.

284. In a hat-forming machine of the prior art, a cowl or hood was drawn over a bat by hand. In the patented machine a cloth was wound around the bat by the revolutions of the cone. The patented structure was held not to embody patentable invention. *Brett, Administratrix, v. Quintard, Administrator*, 17 Fed. Rep. 529.—SHIPMAN, 1883.

285. Complainants' claim sought to monopolize the treble combination of any time lock, any combination of key lock, and the multiple bolt-

work of a single door of a vault or safe." Multiple bolt-work was old. Safe doors fastened by key locks, by combination locks, and by time locks were old, and all had been applied to independent bolt-work. Two combination locks had been used upon a single door with independent bolt-work; and a time lock and a combination lock had been put upon a single door with two sets of multiple bolt-works. In this state of the art it was held that there was no patentable novelty in putting one old form of lock, a time lock, in place of another, a combination lock, in the instance above mentioned of the two combination locks dogging one compound bolt-work. Nor was it patentable to substitute a mere known multiple bolt-work for two such bolt-works with which a time lock and a combination lock had been combined in another of those instances. *Yale Lock Mfg Co. et al. v. Berkshire Nat'l Bank et al.*, 17 Fed. Rep. 531.—LOWELL, 1883.

286. In the case last referred to, the court said: "There never was a time, in my judgment, since the first lock was invented by Tubal Cain, or whoever was the inventor, when there was any patentable novelty in combining two locks with a single door. There may be no record of its having been done, but no one can doubt that when one lock was found to be inadequate another was added. I cannot make this plainer by argument, but I may perhaps by illustration. When nails were invented and had become public property, the carpenter who had the right to use one nail might use two if he found that one would not fasten his two pieces of wood sufficiently for his purpose. If one has invented a pair of shoes of a new form and another a pair of shoes of a different form, a combination, consisting of putting a shoe of one of these forms upon the right foot and one of the other form upon the left, would not be patentable. If one has made a new plough and used it with oxen, it is not patentable to use the same plough in combination with a horse independently of the mechanical adaptation. In the language of the old law, it is a 'double use.' To the man who invents a lock there must always remain the right to use it on an old door in addition to any old lock which he finds or may choose to put on that door."—*Id.*

287. "Sometimes better results are produced by mere mechanical skill without the exercise of invention. The law does not extend to cover such cases, . . . nor where the change is merely in degree and not new." *Wood et al. v. Packer*, 17 Fed. Rep. 650.—NIXON, 1883.

288. Complainant's patented device was a

rubber boot-strap. This strap was old in metal, and it was attached to the boot in a manner common for attaching rubber handles to bags and the like. Complainant's device was held not to embody invention. *Boston Rubber Shoe Co. v. Larkin et al.*, 18 Fed. Rep. 93.—LOWELL, 1883.

289. Complainant's patent claimed "an article of manufacture, to wit: a bale of plasterers' hair, consisting of several bundles, enclosed in bags and compressed and secured in the form of a package." *Held*, that the bagging of materials generally being old, and the compression of materials generally being old, the thing claimed did not amount to a patentable invention. *King v. Gallun et al.*, 109 U. S. 99.—SUP. CT. 1883.

290. Complainant's invention was a wire staple for fastening pail handles to wooden pails, with both points bevelled upon the same side, so that both points stand upwardly on being driven into the wood. Double-pointed wire staples, with a bevel on opposite sides of the points, were old. It was held that complainant's change did not amount to a patentable invention. *Double-pointed Tuck Co. v. Two Rivers M'fg Co. et al.*, 109 U. S. 117.—SUP. CT. 1883.

291. The patent being for forming the bottom of trays of galvanized iron instead of wood, it was held that the substitution did not constitute patentable invention. *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1883.

292. For changes in a box loop for harnesses made by defendant and held to be immaterial, see —. *Brighton v. Wilson*, 18 Fed. Rep. 378.—COLT, 1883.

293. The patent in suit being for an improvement in reed organs, and the court below having sustained the patent over differences in the prior art which consisted in the size of certain valve openings, the Supreme Court reversed the decision of the court below on this point, and said that "the absolute length and size of the valve openings was a matter of judgment in view of the state of the art, . . . regulated by the judgment of the manufacturer, as to the quantity of the air necessary and the resistance to be overcome in working the valve, and the inconvenience of the leakage of air." *Estey et al. v. Burdett*, 109 U. S. 633.—SUP. CT. 1884.

294. By the court: "In view of the state of the art, there was no invention in claim 1 of the patent in using, to attach the base-pan, an old mode used in attaching other projecting parts of the stove." *Bussey et al. v. Excelsior M'fg Co.*, 110 U. S. 131.—SUP. CT. 1884.

295. Complainants' patent for processing canned goods covered in its first claim the combination of the processing vessel and the boiler, the vessel being mounted upon the boiler and communicating with the steam drum. The second claim was for the combination of the vessel and the boiler, with the vessel resting upon and partially within the boiler. The third claim was for the combination of the same elements in connection with a movable lid for the kettle, a clamp to fasten it, a gauge-cock and pipe. Substantially the same processing vessel was shown in a prior patent. The court held that the adaptations claimed were simply the results of mere mechanical skill. *Nicodemus et al. v. Frazier*, 19 Fed. Rep. 260.—MORRIS, 1884.

296. "In *Atlantic Works v. Brady*, 107 U. S. 200, the Supreme Court has declared very plainly that it is not the design of the patent laws to grant a monopoly of the improvements and adaptations which, in the progress of manufactures, from time to time occur, as the demand for them arises, to any skilled mechanic or operator."—*Id.*

297. Complainant's patented improvement in compositors' copy distributors was for a series of copy hooks and a series of galley spaces correspondingly lettered. The prior art showed the lettered copy hooks and the galley spaces lettered anew each day. Complainant's improvement was held not to amount to patentable invention. *Brainard v. Eve. Post Association*, 22 Blatch. 61.—SHIPMAN, 1884.

298. Complainant's patent in suit was for lapping two pieces of leather in making the seam of a boot or any other work of the kind, running a line of rivets along and then a line of stitching on each side of the line of rivets, so as to make a compact, tight seam. Complainant had a prior patent showing the same seam, with a strip of india-rubber inserted. It was held that if the prior patent had been the patent of another person, the later patent would be void, but that, under the circumstances, the second patent was in the nature of a claim which might have been made in the first patent, and was therefore valid. *Cahn v. Wong Town On*, 9 Sawyer, 630.—SAWYER, 1884.

299. By the court: "In the case at bar the old contrivance of a railroad truck, with the swivelling king-bolt, transverse slot, and pendent divergent links, already in use under railroad cars, is applied in the old way, without any novelty in the mode of applying it, to the analogous purpose of forming the forward truck of a locomotive engine. This application is not a new invention, and therefore not a valid subject

of a patent." *Pa. R. R. Co. v. Locomotive Truck Co.*, 110 U. S. 490.—SUP. CT. 1884.

300. "The applying of an old process or machine to a similar or analogous subject with no change in the manner of application and no result substantially distinct in its nature will not sustain a patent, even if the new form of result has not before been contemplated."—*Id.*

301. Where the patented structure [a shoe tip] was precisely like a prior thing, except that the earlier was inside the shoe while the latter was outside, the patented contrivance was held not to amount to an invention. *Truss v. Shuter et al.*, 26 O. G. 1210.—WALLACE, 1884.

302. "Merely improving a known structure by introducing a known equivalent for one of its features" does not amount to invention. *Fryer v. Maurer*, 22 Blatch. 100.—WALLACE, 1884.

303. Complainant's patented device was a corner iron for a bed frame, and its sole difference from the prior art consisted in making its flange sufficiently lower than the top of the end piece to be out of the way of the attachment of the spring. "The difference of construction would be so obvious to any competent mechanic as not to amount to a patentable invention." *Nat'l Wire Matt. Co. v. N. Y. Braided Wire Matt. Co.*, 20 Fed. Rep. 119.—WHEELER, 1884.

304. Complainants' patented improvement consisted in laying a foundation of broken stone, above that a layer of coarse sand or gravel, then blocks of wood with the fibre vertical, then filling the interstices with sand or gravel. The court took notice, on its own motion, that the broken stone and layer of gravel as a foundation for brick and cobble-stone were old, and found from the specification that the endwise blocks with sand between was old, and said: "The improvement described in the complainants' patent consists, therefore, in simply taking a material well known and long used in the making of pavements—to wit, wooden blocks set vertically, and with them constructing a pavement in a method well known and long used. It is plain, therefore, that the improvement described in the patent was within the mental reach of any one skilled in the art to which the patent relates, and did not require invention to devise it, but only the use of ordinary judgment and mechanical skill. It involves merely the skill of the workman and not the genius of the inventor." *Phillips et al. v. City of Detroit*, 111 U. S. 604.—SUP. CT. 1884.

305. By the court: "The essential parts of the apparatus used by the patentee were known before; and the same controllable pressure had

been applied at various stages of the manufacture, and the application at one stage of the condition of the beer, instead of another, would seem not to involve anything more than a mere mechanical change, which could be employed by any skilled in the art." *New Process Fermentation Co. v. Maus et al.*, 20 Fed. Rep. 725.—DRUMMOND, 1884.

306. Complainant applied to a raw hide fulling machine a device old and well known in washing machines, and took a patent therefor. The patent was held void on the ground that the improvement was a mere double use of an existing device. *Royer v. Chicago M'fg Co.*, 20 Fed. Rep. 853.—DRUMMOND, 1884.

307. Where complainant's patented structure is the same as a prior structure, except a slight variation in the form of a recess, there is not sufficient novelty present to sustain a patent. *Fryer v. Maurer*, 22 Blatch. 268.—WALLACE, 1884.

308. Complainant's patent claimed a hollow-tile flat arch. Hollow tiles were old; flat arches were old; flat arches made of hollow tiles in sections were old; flat arches of sectional hollow tiles with flange joints were old; such arches supported at the ends by girders and used to support the floors of fire-proof buildings were old; such arches thus supported were old, when the end sections of the tiling were provided with a recess to receive the flange of the girder. The substance of the invention was old, except a slight change in the form of the recess in the end sections of the tiling. Complainant's patent was held to be void of substantial novelty.—*Id.*

309. In complainant's patented monkey wrench there was an adjusting screw, for the movable jaw, lying alongside the wrench-bar and journaled at its lower end in a step-plate which encircled the wrench-bar; and on the wrench-bar and just under the step-plate there was a nut which relieved the wooden handle underneath the nut from back pressure. The prior art showed this wrench with the exception of said nut. The prior art also showed another kind of wrench with no step-plate and no adjusting screw alongside the bar, but with a sleeve on the bar exteriorly threaded for adjusting the movable jaw, and resting at its lower end upon a nut on the bar above the wooden handle. The court held that complainant had not made a patentable invention. *Collins Co. v. Coes et al.*, 21 Fed. Rep. 38.—GRAY, 1884.

310. A patentee applied his improvement to car wheels fixed upon the axles. In the prior art a like improvement had been applied to carriage wheels, and also to loose wheels for cars,

and complainant's application of the same device to car wheels fixed upon the axles was held not to amount to invention. *Baltimore Car Wheel Co. v. North Baltimore Passenger R. R. Co.*, 21 Fed. Rep. 47.—MORRIS, 1884.

311. Complainant claimed as his improvement a channel iron for holding the point rails of a railroad frog in place. A similar channel iron had previously been used for holding the wing rails in place, and thereof the court said: "When once the utility of the channel iron, as a means for holding the wing rails in their proper relation to each other, was shown, there was no more invention in using it to hold the point in place and strengthen the web of the point rails than there was in using a bolt or rivet to fasten these channel irons to the rails, bolts and rivets being old." *Wier v. Morden*, 21 Fed. Rep. 248.—BLOGGETT, 1884.

312. Complainant's patent was for an improvement in tools for attaching sheet-metal mouldings; except in matter of size it was substantially the same thing as was previously used to apply mouldings to carriage dashboards, and was held not to be patentable invention. *Peters v. Active M'fg Co.*, 21 Fed. Rep. 319.—SAGE, 1884.

313. Complainant's patent was for what is commonly known as "one piece honey-sections." A prior patent showed a machine for making wooden blanks for box purposes similar to the blanks used for such sections. Thereof the court said: "The invention of such a machine, of course, supposes knowledge of the blanks it was designed to manufacture; and the transfer of the use of a box made from such a blank, from the ordinary purposes to the simple and special purpose of a box or frame for a honey-section, is merely a new use of an old and well-known article which involves no invention." *Fornbrook v. Root*, 21 Fed. Rep. 328.—MATTHEWS, 1884.

314. Complainant's patent was for a ventilating louver, and the claim in issue was practically for certain stiffening flanges upon the gutters, and thereof the court said: "The flanges to the cutters for stiffening them were merely such additions as would be supplied by good workmanship, when needed. They were not new for that purpose. And the use of the flange for attaching reticulated covering would appear to be very obvious." *Hayes v. Bickelhaupt*, 23 Blatch. 463.—WHEELER, 1884.

315. "The application to the turning of machine awls and needles from metal of mechanism old and familiar in the art of wood turning is not invention, and is not patentable." *Hove*

*Mach. Co. v. Nat'l Needle Co.*, 21 Fed. Rep. 630.—NELSON, 1884.

316. The decision of the Supreme Court in the case of the *Pa. R. R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 140, makes it impossible to sustain some patents which were sustainable upon views which prevailed previous to that decision. *Spill v. Celluloid M'fg Co.*, 22 Blatch. 441.—BLATCHFORD, 1884.

317. The combination of a cock and a bung, with a certain recess in the cock, existed in the prior art. The patentee located the recess in the bung, with some resulting convenience; the change was held not to amount to patentable invention. *Matthews et al. v. Iron-Clad M'fg Co.*, 22 Blatch. 427.—BLATCHFORD, 1884.

318. Where a bung for a vessel had its inner face coated with a non-corrosive metal by one method, it is not a patentable invention to coat it with a non-corrosive metal by another method, as by soldering.—*Id.*

319. Complainant's patent was for a mode of soldering the ends of cans by heating the groove in the end of the can and then pouring the solder into the groove. The same thing had previously been done by heating the end of the can and putting it into molten solder. The change was held not to amount to invention. *Adams & Westlake M'fg Co. v. Wilson Packing Co. et al.*, 21 Fed. Rep. 648.—BLOGGETT, 1884.

320. Where the prior art shows a compound containing shellac mixed with "argillaceous earth," to mix shellac with kaolin does not constitute a patentable invention. *Welling et al. v. Crane et al.*, 21 Fed. Rep. 707.—NIXON, 1884.

321. Where the new thing in a compound is the ratio of the elements used, a patentable invention does not result unless some special and marked benefit comes from the said ratio. And where the patented ratio was ten parts of kaolin to one part of shellac, the patent was held not broad enough to cover so substantial a variation as equal parts of kaolin and shellac.—*Id.*

322. The patentee's claim was: "Rotating a capstan placed on the deck of a boat, by means of an auxiliary engine, when said capstan and engine are placed forward of the steam-boilers of said boat, substantially as hereinbefore described and for the purposes set forth." Capstans and auxiliary engines had been commonly placed forward of the boilers in boats, and an auxiliary engine had been used for rotating the windlass, both the engine and the windlass being forward of the boilers. Thereupon the court said: "It is plain, therefore, that no such ingenuity as merited the issue of a patent was required for the improvement, but only the ordi-

nary judgment and skill of a trained mechanic." *Morris et al. v. McMillan et al.*, 112 U. S. 244.—SUP. CT. 1884.

323. Complainants sued defendant for alleged infringement of a patent for a machine for enamelling or preparing moulds for gilding, the patent being dated in 1880. Complainants showed that they had had (and used subsequently) the same machine in 1875, the patented machine being somewhat more complex and, possibly, a little more perfect. The court held the difference to be due to mere mechanical skill. *Glasgow et al. v. Fritts*, 22 Fed. Rep. 391.—BLODGETT, 1884.

324. Where one takes a tool and adapts it to a new use, and the changes necessary to the adaptation are within the common skill and judgment of a proper workman, no patentable invention is produced by such adaptation. *Barry v. Crane Bros. M'f'g Co.*, 22 Fed. Rep. 396.—BLODGETT, 1884.

325. Where the prior art showed a scraper remaining constantly in contact with a wheel, except when turned back by a lever, and complainant's patented improvement consisted in reversing this order of things, so that the scraper ceased to act when the pressure was withdrawn from the lever, the change was held not to involve invention. *McFarlan v. Derre & Manser M'f'g Co. et al.*, 22 Fed. Rep. 781.—BLODGETT, 1884.

326. Complainant's patent was for an improvement in paint cans. The prior art contained a dredge-box having the patented construction, except that the dredge-box, being intended for dry substances, did not have a tight joint, while the patented structure did have, so as to adapt it to hold liquids. The change was held not to involve invention. *Norton v. Haight*, 22 Fed. Rep. 787.—GRESHAM, 1884.

327. The invention in question was a percolator or filter. The prior art showed the material to be filtered put in at the top of the filtering vessel and a diaphragm inserted. In view of this prior art the so-called invention consisted in turning the bottom of the vessel upward, putting in the drug to be filtered, inserting a diaphragm, and then turning the vessel back. This filling of a vessel from the bottom instead of from the top was held not to constitute invention. *Rosenwasser v. Berry*, 22 Fed. Rep. 841.—COLT, 1885.

328. "Not every improvement is invention; but to entitle a thing to protection it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates."—*Id.*

329. Complainant's patented improvement in safes really consisted in cutting an opening in the wedge of an angle-bar to permit the bending of the bar to an angle or curve. This sort of thing in general was shown to be old. The patentee showed how, by the use of a pattern of flexible material, he determined the lines of the cuts and the shape of the opening. The court said: "In this there is no exercise of the inventive faculty. It is only what would occur to a mechanic of ordinary skill." *Mosler Safe & Lock Co. v. Mosler et al.*, 22 Fed. Rep. 901.—SAGE, 1885.

330. "The complainant was the first to employ the combination claimed in the manufacture of round-cornered safes, but the change was only a change in form. The combination is nothing more than an aggregation."—*Id.*

331. Complainants' patented improvement in axle-arms for vehicles consisted in adding to a "half-patent" axle of the prior art an extra collar, which had before been used for like purposes, but which complainants made solid with the axle. The improvement was held to lack patentable invention. *Goodyear et al. v. Hartford Spring & Axle Co.*, 23 Blatch. 159.—SHIPMAN, 1885.

332. For an example of an improvement in beds held to amount to nothing more than mere mechanical skill, see —. *Mellon v. Smith Davis M'f'g Co. et al.*, 23 Fed. Rep. 153.—TREAT, 1885.

333. The patented improvement was the combination of a certain mosaic flooring with a certain soft-wood foundation. The mosaic flooring and the soft-wood foundation, separately considered, were known in the prior art. The mosaic flooring had been laid in sections on single pieces of soft wood, and the specific soft-wood foundation had been used as a foundation for hard-wood veneer. Patented improvement was held to exhibit mechanical skill only. *Kappes et al. v. Hartung*, 23 Blatch. 152.—COXE, 1885.

334. Complainant's patented invention in track-clearers for street-railway cars, was a combination of draw-bars, scraper, and diagonal brace. The only element that was claimed to be new in the combination was the diagonal brace. Its use was held to exhibit mechanical skill only. *Day v. Fair Haven & Westville R. R. Co.*, 23 Fed. Rep. 189.—SHIPMAN, 1885.

335. Complainant's patented bung and bushing were like a prior patented bung and bushing, except that complainant claimed his bung to be of wood, while the prior patent made no statement in that regard. The change, if there



was one, was held to exhibit mechanical skill only. *N. Y. Bung & Bushing Co. v. Doelger*, 23 Fed. Rep. 191.—COXE, 1885.

336. Complainant's patent was for a device for permitting a horse-car driver to open and close the rear door, a rock-shaft extending from end to end of the car being a chief factor in the combination. Substantially such a rock-shaft had been used for operating a window-shutter from inside the window, and this latter device was held to substantially anticipate the patented device. *Stephenson v. Brooklyn Cross Town R. R. Co.*, 31 O. G. 263.—SUP. CT. 1885.

337. A patented device consisted in arranging the bell-cord in a horse-car with dependent pulls along the side of the car instead of in the middle of the car, as formerly; and the change was held to involve no patentable invention.—*Ib.*

338. "Where the public has acquired in any way the right to use a machine or device for a particular purpose, it has the right to use it for all the like purposes to which it can be applied, and no one can take out a patent to cover the application of the device to a similar purpose. If there is any qualification of this rule, it is that if a new and different result is attained by a new application of an invention, such new application may be patented as an improvement of the original invention; but if the result claimed as new is the same in character as the original result, it will not be deemed a new result for that purpose." *Blake v. San Francisco*, *et al.*, 113 U. S. 679.—SUP. CT. 1885.

339. A patented internal revenue stamp consisted of a combination of three parts: [1] a part designed to become a stub when the stamp proper was separated therefrom, and displaying a serial number; [2] a constituent part of the stamp proper designed for permanent attachment to the barrel; [3] a constituent part of the stamp proper displaying the same identifying serial number as the stub, which part, after the stamp proper had been affixed to the barrel, bore such relation to the permanent part that it could be removed therefrom so as to retain its own integrity, but it mutilated and thereby cancelled the stamp by its removal. The first and second elements were well known, and the third, so far as its contents were identical with those of the stub, was not new. Thereof the court said: "Although we find [it] to be new in this sense, that it had not been anticipated by any previous invention of which it could therefore be declared to be an infringement, yet it is not such an improvement as is entitled to be regarded in the sense of the patent laws as an invention." *Hol-*

*lister, Collector v. Benedict & Burnham M'fg Co.*, 113 U. S. 59.—SUP. CT. 1885.

340. Complainant's patent was for a strengthening cord in a woven-wire fabric composed of a plural number of coils. In a prior patent for a woven-wire fabric, it was said that a greater number of spirals can be linked together to give greater strength and stiffness to the web. Complainant's patented improvement was held to be a matter of mere mechanical adjustment. *Hartford Woven Wire Mattress Co. v. Peerless Wire Mattress Co.*, 23 Blatch. 227.—SHIPMAN, 1885.

341. "The recent decisions of the Supreme Court are emphatic in demanding for a patentable invention more than the novelty and utility which may be expected to result from the special knowledge and intelligent skill of the mechanic in the branch to which the invention belongs."—*Ib.*

342. The patent in question was for letters and figures of enamel baked on copper or other metal for signs in windows and other places. Enamelling on copper in this way for other purposes was old, and this mode was held to be the product of mere mechanical skill. *U. S. v. Gunning et al.*, 23 Fed. Rep. 668.—WHEELER, 1885.

343. Complainant's patent was for a certain kind of tap on the sole of a rubber shoe. The same form of tap had been used before, except that it was thinner than complainant's tap. The defendants' was held not to be patentable. *Woonsocket Rubber Co. v. Candee et al.*, 23 Fed. Rep. 797.—WALLACE, 1885.

344. Biscuit-pans of cast-iron united in clusters by a cast connection being old, there is no invention in making such biscuit-pans of sheet-metal and riveting projecting laps together. *Lalancé & Grosjean M'fg Co. v. U. S. Stamping Co.*, 23 Fed. Rep. 800.—WALLACE, 1885.

345. A method of constructing an arch which is old in cultivators cannot be applied to a plough and made patentable. *Pattee Plough Co. v. Kingman et al.*, 23 Fed. Rep. 801.—TREAT, 1885.

346. To apply to a horizontal engine and boiler devices which are old in the precise combinations in which they had previously existed, in engines with vertical boilers, is not invention. *Scheidler v. Trustin et al.*, 23 Fed. Rep. 887.—ACHESON, 1885.

347. Complainant's patented improvement pertained to plaques. The court found that the material used and the combination employed were old in panels for decoration; that moulding of similar substance was common, and was accomplished in most instances in the same way

as by complainant. The only thing which seemed to be new was the application of the material to the formation of a plaque, and as this was simply moulding in a particular form, the presence of patentable invention was doubted. *Deplanque v. Ripka et al.*, 24 Fed. Rep. 278.—BUTLER, 1885.

348. An inventor had taken a patent for a machine applicable to the manufacture of needles. He subsequently took a patent for a needle having the peculiarities which were given by the use of such patented machine. It was held that the latter patent was void. *Excelsior Needle Co. v. Union Needle Co.*, 23 Blatch. 147.—WALLACE, 1885.

349. There is no patentable invention in adding a non-conducting jacket to the otherwise old parts of a knife-box. *Magin v. McKay*, 32 O. G. 1237.—BLATCHFORD, 1885.

350. To simply remove the side fastenings from a wire bed fabric is not invention. *Ames et al. v. Carlton Spring Bed Co. et al.*, 32 O. G. 1238.—BLOGGETT, 1885.

351. To introduce vertical springs underneath a coiled wire bed fabric, such springs having been used in other bed fabrics, is not invention. The new union constitutes a mere aggregation.—*Id.*

352. For an example of a patent on stone burial vaults, held to exhibit mere mechanical skill, see —. *French v. Carter et al.*, 25 Fed. Rep. 41.—SHIPMAN, 1885.

353. Complainants' patented improvement was for the use of water upon a saw or other cutting tool in the making of celluloid combs. Water had previously been used in the same way in making articles out of ivory, and also in sawing knife-handles of celluloid. The improvement was held not to exhibit patentable invention. *Celluloid M'fg Co. et al. v. Noyes et al.*, 25 Fed. Rep. 319.—COLT, 1885.

354. Complainants' claim was: "The described process of making plug tobacco, which consists in impressing letters, or other marks, directly into the side of the plug, during the process of manufacture, and by the pressure employed in making the plug, substantially as described." In the prior art impressions of letters, figures, and other marks, had been made by compression upon plastic substances, such as cakes of soap and chocolate, bars of lead, balls of butter, sealing-wax, and the leather covers of books. Complainants' patent held destitute of patentable novelty. *Miller et al. v. Foree et al.*, 116 U. S. 22.—SUP. CT. 1885.

355. Complainants' patent was for making plugs of tobacco by indented lines, to serve as

guides in cutting up the plug, and also to secure the wrapper to the filling. Bakers had previously made cakes indented in that manner, and a previous patent showed cakes of tea indented in that manner. The patent was held invalid. *Drummond et al. v. Venable et al.*, 26 Fed. Rep. 243.—BLOGGETT, 1885.

356. Complainants' patent was for a corset. A prior patent described a corset having a gusset with non-elastic margins, edges or ends, and the only difference between the device of the prior patent and that of complainants' patent was, that in the former an india-rubber spring was used, while in the latter metal spiral springs were used, and they were grouped. The substitution of material was held not to amount to invention, but it was also held that in substituting the spiral for the rubber springs, a properly skilled person would naturally group them, and complainants' patent was held invalid. *Florsheim et al. v. Schilling*, 26 Fed. Rep. 256.—BLOGGETT, 1886.

357. When it had been "shown how to make an elastic gusset or section for wearing apparel, with non-elastic margins, there was no invention in applying such a gusset or section to a corset, when corsets had already been made with elastic sections, although these older sections did not have non-elastic margins."—*Id.*

358. Complainant's improvement for a gate-operating device related to the gates of railway-cars in which the passengers got on or off the sides of the platform, the gates being arranged to close the side entrances to the cars except when passengers were getting on or off. The device consisted in operating mechanism by which the attendant upon the platform of the car, while standing out of the way of the passengers, and in the gates between the two cars, could simultaneously open and close the gates of both cars. The devices for operating the gate were a link connecting a sliding rod with the gate, and a rod sliding in bearings secured to the guard-rail, with a handle located near the passage-way. Similar devices were shown in prior patents for transom-lifters and blind-shutters. The court held that "any competent mechanic, familiar with devices well known in the state of the art, could have done this readily and successfully upon the mere suggestion of the purpose which it was desirable to effect." *Aron v. Manhattan Railway Co.*, 26 Fed. Rep. 314.—WALLACE, 1886.

359. "It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If

these changes involve only the exercise of ordinary mechanical skill they do not sanction the patent, and in most of the adjudged cases, where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion."—*Id.*

360. Complainant's patent was for an improvement in type-writers. The prior Remington type-writer had a cover or shield located so as to protect the exposed ends of the key-levers, and the key-levers in that machine were levers of the second order. The present patentee merely changed the location of the cover or shield to meet the different points of exposure in its use, the levers being of the third order. The improvement was held not patentable. *Plapp v. Fost*, 26 Fed. Rep. 447.—WALLACE, 1886.

361. The claims in complainant's patent were : "1. A blank key-board covered with a continuous strip or roll of plastic composition, substantially as specified." "2. The within-described process of forming piano or analogous keys, which consists in covering a key-blank with a strip of plastic material and then cutting each key from the coated blank, substantially as specified." The same thing had previously been done in ivory. The improvement was held not patentable. *Celluloid M'fg Co. v. Tower*, 26 Fed. Rep. 451.—CARPENTER, 1885.

362. A process does not become patentable through practising it by machinery instead of by hand. *Marchand v. Emken*, 23 Blatch. 435.—COXE, 1886.

363. In a patent for a fountain-hose-carriage the claim was : "The combined hose-carriage and fountain-standard consisting in the combination of the following elements, viz. : A wheeled carriage, provided with a foot or brace, by means of which it may be sustained in an upright vertical position, a nozzle-holding device, and a reel of large diameter to allow the water to flow through the hose when partially wound thereon, substantially as described." This combination was old except as to the size of the reel, and was held lacking patentable novelty. *Preston v. Maynard et al.*, 116 U. S. 661.—SUP. CT. 1886.

364. Complainant's patent claimed "a scale-dish formed with extended lugs, each having two holes through it, in combination with double suspending bowls passing down through the holes and secured beneath the same, substantially as specified." A scale-pan of glass was old. Metallic scale-pans suspended on branch-

ing bowls, like those of plaintiff's patent, were old. Complainant's patentee attached his branches to the lugs by the obvious method of putting the branches of the bowl through holes in the edges of the dish, or extensions of the edges. Complainant's device was held destitute of patentable novelty. *Forschner v. Baumgarten et al.*, 35 O. G. 137.—WHEELER, 1886.

365. The claim in complainant's patent for a baling-press, was : "In a press having the bale-chamber smaller than the press-box, bevelling the mouth of the bale-chamber substantially as described." The interposition of this bevel was held to be a matter of mere mechanical skill. *Dederick v. Whitman A'g'l Co.*, 26 Fed. Rep. 755.—TREAT, 1886.

366. "The mere change of position of known mechanical devices from one part of the bale-chamber," of a baling press, "to another to effect the same result, involves no patentable invention."—*Id.*

367. The patent in suit was for a permutation lock, and the devices forming its subject-matter differed from a lock of the prior art only in that the rims of the wheels through which the key was introduced were regular, while in the structure of the prior art they were irregular. The change was held to be within the scope of mere mechanical skill. *Yale Lock M'fg Co. v. Greenleaf*, 117 U. S. 554.—SUP. CT. 1886.

368. Where it was found that the essence of the invention had been originally communicated to the patentee, his patent was held void. *Watson v. Belfield*, 26 Fed. Rep. 536.—NIXON, 1886.

369. "A change in the size of the machine, making it larger or smaller, while its mode of operation is not changed, is not a patentable change." *Montross et al. v. Bullard et al.*, 27 Fed. Rep. 64.—BLDGETT, 1886.

370. The patent under consideration was for baking powder, of which the alleged new ingredient was alum, dried so thoroughly as to express all the water. It had been previously used when dried to a less degree. The change was held not to constitute invention. *Smith et al. v. Murray et al.*, 27 Fed. Rep. 69.—BLDGETT, 1886.

371. The claim in complainant's patent was : "The combination of an injector for forcing water into a boiler, a second injector communicating with the well, and communicating with and supplying water to the first, substantially as described." All that complainant's patentee did was to take the forcer which Gifford had arranged in a direct line with the tubes of his [Gifford's] lifter, and arrange or set this forcer alongside of the lifter, instead of allowing it to

extend beyond in the same line, with the lifting pipe, and when thus arranged the forcer of complainant performed the same function that was performed by the injector of Gifford after the lifter had set the column of water flowing into and through the tubes, when, the steam-jet being increased, the instrument became from that time a forcer. No new function was performed by either instrument, in the change of position, and the change was held destitute of patentable novelty. *Hancock Insp. Co. v. Lally*, 27 Fed. Rep. 88.—BLODGETT, 1886.

372. Complainants' improvement in carriages consisted of a corner-post of a single piece of wood, the outer surface of which was oval or semicircular so as to give rounded corners. Running the whole length of the corner-post, on each edge, was a groove for the reception of the side and end panels. At the top of the post, and extending down some distance parallel with the grooves, were recesses for the end-rails, which rails and the upper ends of the corner-posts were constructed with a narrow elevation projecting above the body of the rail to furnish means for retaining the sides, etc. All of the features of construction separately considered, and various combinations of the elements, were old. The court held that mere mechanical construction was exercised in producing the improvement. *Calkins et al. v. Oshkosh Carriage Co. et al.*, 27 Fed. Rep. 296.—DYER, 1886.

373. "Novelty and increased utility in an improvement upon previous devices, do not make it an invention; and . . . a device which displays only the exalted skill of the maker's calling, and involves only the exercise of reason upon material, supplied by special knowledge and facility of manipulation resulting from habitual intelligent practice, is in no sense a creative work such as the Constitution and the patent laws aim to encourage and reward."—*Id.*

374. Complainants' patented improvement was claimed "as a new article of manufacture, a chair-seat constructed of veneers of wood with the grains running crosswise of each other, and connected together, all substantially as described and for the purpose specified." Thereof the court said: "The fabric being old, the suggestion to construct chair-seats out of it being old, the shaping of it in a former being old, the perforation of a seat for perforation and ornamentation being old, and the giving of a concave shape to a wooden seat by pressure, being old, there cannot . . . be anything patentable in the structure." *Gardner et al. v. Herz et al.*, 118 U. S. 180.—SUP. CT. 1886.

375. "A patent cannot be taken out for an

article old in purpose, and shape, and mode of use, when made for the first time of an existing material, and with accompaniments before applied to such an article, merely because the idea has occurred that it would be a good thing to make the article out of that particular old material."—*Id.*

376. The idea of bending-in rather than soldering the ends, or of closing the ends of the spirals of an ornamental chain, "was an idea which would naturally suggest itself to the worker in wire, and did not partake of invention." *Muller v. Ellison et al.*, 27 Fed. Rep. 456.—SHIPMAN, 1886.

377. "To make a suspender-end of flat cord in substantially the same way that suspender-ends of round cord had been made, and in substantially the same way in which flat button-ends had been made, for the purpose of fastening or securing other articles of wearing apparel than trousers, is an exercise of the ordinary skill of the housewife or seamstress. The connection of the ends to the attaching piece gives no patentable character to the loop." *Schenfield v. Nashawannuck Mfg Co. et al.*, 23 Blatch. 541.—SHIPMAN, 1886.

378. "It is not enough that a thing shall be new in the sense that the shape or form in which it is produced shall not have been before known, and that it shall be useful, but . . . it must, under the Constitution and statutes, amount to an invention or discovery on the part of the person claiming the invention." *Adams v. Bellaire Stamping Co. et al.*, 36 O. G. 537.—JACKSON, 1886.

379. "Where the mode of construction of the article claimed, the material employed, the form after construction, and the purpose for which it was to be used had been described separately in earlier patents, although the article itself had never been described in a single patent, and to that extent was novel and new, and of great utility, it did not require invention to produce it, and it was not, therefore, patentable. Improvements although new and useful are necessarily of *prima facie* inventions; they may or may not be patentable. The dividing line between improvements which involve invention and those which do not is often difficult, if not impossible, to define with accuracy. Like the colors of the rainbow, it may often be difficult to distinguish the dividing line between them. Still the law makes the distinction."—*Id.*

380. Substituting glass or a non-corroding lining in the place of tin, in the cap of a fruit-jar, does not amount to patentable invention. *Consolidated Fruit Jar Co. v. Bellaire Stamping Co.*, 28 Fed. Rep. 91.—SAGE, 1886.

381. "Where the mode of construction of the article claimed, the material employed, the form after construction, and the purpose for which it was to be used, had been described separately in earlier patents, although the article itself had never been described in any single patent, and to that extent was novel, and was of great utility, it did not require invention to produce it."—*Ib.*

382. A certain class of mangles with differential speed in the rolls being old, and another class without such differential speed being also old, it is not patentable invention to impart differential speed to rolls of the second class. *Baldwin v. Haynes*, 28 Fed. Rep. 99.—COLT, 1886.

383. Cutters for cutting out crackers, cookies, and cakes of various shapes being old, it is not patentable invention to make a cutter which imitates a hand-made bretzel. *Butler et al. v. Steckel et al.*, 36 O. G. 455.—BLODGETT, 1886.

384. Where the state of the art is such that a certain improvement might or would reasonably suggest itself to a workman skilled in that particular business, such improvement is not patentable. *Adams v. Bellaire Stamping Co. et al.*, 36 O. G. 567.—JACKSON, 1886.

385. To take a lantern-top, such as exists in one class of lanterns, and secure it to the guard of a lantern by a hinge and catch substantially as lantern-tops had previously been fastened to the guard in another class of lanterns, is not patentable invention.—*Ib.*

386. "The mere change of location of the parts of a mechanism, so long as no different or additional function is performed, does not make the change patentable. Such alteration or modification is not aided by the fact that one of the parts thus transposed performs a double function, if the same device had before been used to perform the same functions separately."—*Ib.*

387. The substitution of an old hinge and catch for two old catches involves simply mechanical skill.—*Ib.*

388. A device may be an improvement over a ruder device for the same purpose and yet be only the product of mechanical skill. *Grain Drill M'fg Co v. Hart et al.*, 28 Fed. Rep. 367.—BLODGETT, 1886.

389. The patent in suit was for improvements in rotary cutters for trimming the edges of boot and shoe soles. Rotary cutters were old. The shape of complainants' cutter was old in a hand tool. Complainants' patent was held void of patentable novelty. *Busell Trimmer Co. et al. v. Stevens et al.*, 28 Fed. Rep. 575.—COLT, 1886.

390. Complainants' patent in suit was for a

fishing apparatus, and the object was to keep fish alive which had been caught in a seine. The apparatus consisted of a pocket attached to a vessel's rail and hung upon two booms which projected from the side of the vessel. These booms were attached to the hull of the vessel so as to move freely in different directions; there were guys at the outer ends of the booms for lateral adjustment, and they were raised and lowered by means of tackle extending from the masts to their outer ends; outhauls, connected with the outer corners of the bag, served to raise and lower the outer edge of the bag; lace-lines were permanently attached to the centre of the head-line, and ran each way through grummets fastened to the head-line. The prior patent showed a net for catching fish attached to the side of the vessel, and stretched out upon two movable booms. In view of this prior art the court found no patentable invention present in the patented improvement. *Willard et al. v. Cooper*, 28 Fed. Rep. 750.—COLT, 1886.

391. The patent in suit was for a cider-press. A rack on which to place the pomace was old, and a cloth to cover the pomace lying on the rack was old, the two having been used in connection, and an enclosure was used with them which enabled the operator to make the pomace of uniform depth on each rack, and prevented a lateral spreading of the pomace. A subsequent improver made the guide-frame smaller than the rack. This was held to require only ordinary mechanical skill and judgment. *Clark Pomace Holder Co. v. Ferguson*, 119 U. S. 335.—SUP. CT. 1886.

392. As compared with a nail-carrier having a serrated edge, it is not patentable to make the edge smooth in order to facilitate the passage of the nail. *Cross et al. v. Union Metallic Fastening Co. et al.*, 29 Fed. Rep. 293.—COLT, 1886.

393. Removable partitions in an ice-box being old, it is not patentable to make them removable by another old method. *Leonard v. Lovell*, 29 Fed. Rep. 310.—SEVERENS, 1886.

394. The substitution of a compound lever in order to get an increase of power is not a patentable improvement. Neither is it patentable to cut an incline into one side of a cog-wheel for the operation of a stop-rod. *Puetz v. Branford*, 31 Fed. Rep. 458.—THAYER, 1887.

395. For an example of a change from the prior art held not to amount to patentable invention, see —. *Woodworth v. Carr*, 32 Fed. Rep. 224.—NELSON, 1887.

396. An addition of a non-elastic band or tape to the ribs of a dress-form does not constitute

patentable invention. *Morss v. Manchester et al.*, 32 Fed. Rep. 282.—BENEDICT, 1887.

397. The patent in suit was for an improvement in insulated electric conductors. The improvement consisted in coating an electric wire with a textile fabric, putting on a coat of paint and while the paint was fresh, putting on another coat of textile fabric, thereby producing a non-combustible insulating covering. There had previously existed an electric wire covered with a double coat of thread, each layer being painted, and the second layer being put on after the first layer had become dry. In the use of this prior thing the public had substantially the afterward patented article, but probably not the knowledge of its special advantage, to wit, non-combustibility. The patent was held to be anticipated. *Ansonia Brass & Rubber Co. v. Electrical Supply Co.*, 32 Fed. Rep. 81.—SHIPMAN, 1887.

398. For an example of changes in the construction of school-desks and seats, held, in view of the prior art, not to amount to patentable invention, see —. *Perkins v. Haney M'fg Co.*, 32 Fed. Rep. 395.—SEVERENS, 1887.

399. The claim of the patent in suit was for a process of stretching mitts lengthwise, and thereby contracting them at the desired point, then subjecting them first to the direct action of steam and next to heat, for the purpose of setting the fibres to the desired form. This process was a common one for other things. It was held that the application to mitts did not constitute invention. *Jennings et al. v. Lowenstein et al.*, 31 Fed. Rep. 84.—WHEELER, 1887.

400. "There must be 'something more than the expected skill of the calling;' but when we come to determine what that is, or rather what it was at the date of the alleged invention—for the standard of that date is the test—we must, if we proceed intelligently, consider what those engaged in that calling were seeking to accomplish, and what they were by their skill actually accomplishing. That is, after all, a good practical test of what skill can accomplish. It is not always a complete and certain test. Two or more persons, each acting independently and of his own knowledge alone, may arrive at the same result—undoubtedly invention—at so nearly the same time as to make it difficult to decide who is entitled to priority, as when two or more astronomers almost simultaneously discover a new comet; and yet, if there were, under such circumstances a score of rival applicants for letters-patent, that fact would not negative invention, and the only question is, who first made it? On the other hand, an im-

provement in any department of manufacture or of the useful arts may be made, shortly after the necessity or occasion for it arises, by one person alone. It may be novel and ingenious, and yet, to one familiar to the state of the art, and the handicraft of those engaged in it, it may be clear that skill only, and not invention, is displayed; and the fact that no other one had, at or about the same time, produced the same result, by substantially the same, or by any means, would not make it invention. But when for years skill is unsuccessfully reaching out in all directions for a desired result, and finally some one, by a new device or process, which no one else has thought of, accomplishes it, that fact is strongly indicative of invention, and may be conclusive; for skill had long sought it in vain, and therefore the law may recognize it as a discovery, or as the embodiment, novel and useful, of a mental conception, that is, as an invention." *Wilcox v. Bookwalter et al.*, 31 Fed. Rep. 224.—SAGE, 1887.

401. Although the hardening and tempering of metals generally is very old and very well known in the past, yet to treat a spiral spring to a spring-temper heat, in order to make the metal homogeneous, is patentable. *Cary et al. v. Lovell M'fg Co.*, 31 Fed. Rep. 344.—ACHESON, 1887.

402. The process last mentioned is patentable, although, in the prior art, and in the manufacture of wire-bells for clocks, heat had been applied for the purpose of giving them the desired sound and tone, and although the wire balance-springs for marine clocks had been subjected to heat while coiled in the grooves of a metallic plate for the purpose of permanently settling the coils in proper relations to each other.—*Ib.*

403. In determining upon the validity of a patent, after a careful consideration of all the anticipating matters presented in the testimony, one must allow full scope for the exercise of judgment upon the part of skilled workmen. *Byerly v. Cleveland Linseed Oil Works*, 31 Fed. Rep. 73.—WELKER, 1887.

404. A conical bung-hole bored partly through a barrel being old, it is not patentable invention to make that bore regularly cylindrical. *United States Bung M'fg Co. v. Independent Bung & Bushing Co.*, 31 Fed. Rep. 76.—COXE, 1887.

405. "It is not invention to make a small hole a big hole, or a conical hole a cylindrical hole, especially when no new result and no appreciable improvement on the old method is accomplished. It is a mere change of form, involving not the action of the mind, but the substitution of one tool for another. If such slight and un-

important changes are sufficient, the next applicant has only to make the vent hole elliptical or octagonal, or bore a round hole obliquely, or make it a little larger at the bottom than at the top, and thus secure a patent. The law was never intended to protect such superlative and palpable trivialities."—*Id.*

406. A bung-hole bored partly through a barrel being old, it is not patentable invention to bore it partly through from both sides and leave a web in the centre; neither is it invention to make a circular bore partly through the barrel and leave the core.—*Id.*

407. To use a tape to strengthen gussets, and give stiffness to the parts, is not invention. *Cooke v. Globe Files Co. et al.*, 40 O. G. 1244.—*WHEELER*, 1887.

408. The improvement of the patent in suit was: "A link of a sprocket-chain cast with the hook in the form in which it is to be used, with ribs upon the hook portion of the link to strengthen the hook, and a small projection cast upon the end of the hook, which may be bent or turned down so as to prevent the links from separating when turned or thrown into any position by the use of the chain." The court held that the casting of the ribs on the hooks to make them stronger was not patentable; also, that to leave a portion so that it could be bent to close the hook was not patentable; and found the patent destitute of patentable novelty. *Ewart Mfg Co. v. Moline Malleable Iron Co. et al.*, 30 Fed. Rep. 871.—*BLODGETT*, 1887.

409. A car-wheel having a tire dovetailed to its periphery being old, it is not patentable to make a car-wheel having a dovetailed tenon on the periphery taking into the tire. *Sax v. Taylor Iron Works*, 30 Fed. Rep. 835.—*BUTLER*, 1887.

410. "Utility does not establish invention. Without it, of course, no invention, however ingenious, is patentable. There must be both utility and invention. Great utility may have some bearing on the question of invention. In such case less evidence may establish its existence. Yet great utility sometimes results from changes in mechanical devices which embrace no invention."—*Id.*

411. Dies for stamping out double O-shaped corset-stays being old, there is no invention in adapting such dies, in shape, to stamping out double H-shaped corset-stays. *Henius v. Lublin et al.*, 30 Fed. Rep. 838.—*SHIPMAN*, 1887.

412. The patent in suit was for making fish-glue from salted fish-scales. The identical process had been for many years in use in extracting glue from glue-stock other than salted fish-

scales. The application of the process to salted fish-scales was held not to amount to patentable invention. *Gloucester Isinglass & Gloucester Co. v. Lepage*, 30 Fed. Rep. 370.—*CARPENTER*, 1887.

413. To thicken the base of a post in order to make it stronger is not invention. *Cottle v. Kremenz et al.*, 31 Fed. Rep. 42.—*WHEELER*, 1887.

414. The improvement of the patent in suit consisted in "the combination of a shirt-bosom, bound on the outer edge with a folded and stitched binding, attached to the shirt-body by a separate line of stitching through the binding." Shirts, shirt-bosoms, and bosoms with binding all around their outer edges were not new. Woollen shirts with bosoms bound and attached on one side alone and on both sides by a line of stitches, either through or just inside the binding, and laundered shirts with ruffled or puffed bound bosoms, were well known. The court found no patentable novelty in the improvement. *Cluett et al. v. Clafin et al.*, 30 Fed. Rep. 921.—*COXE*, 1887.

415. An alleged improvement is not to be credited with all the improvements and increased facilities which modern machinery and ingenuity have introduced into the particular traffic.—*Id.*

416. An old process does not become patentable by practising it in a larger vessel or on a wider scale. *Phillips v. Kochert et al.*, 31 Fed. Rep. 39.—*WHEELER*, 1887.

417. The patent in suit was for an improvement in that class of ladies' cloaks known as "Russian Circulars," consisting in extending the inner front parts to the back seams, making a close-fitting waist, and leaving the outer parts loose and flowing. Thereof the court said: "If the designer of such cloaks thought that a close-fitting waist in a Russian Circular would be desirable, the skill of a cloak-maker would readily devise one. The waist, when constructed according to the method of the patent, does not appear to be different from an ordinary close-fitting waist. The tight-fitting garment was not new, and the outside part was not new, and the ordinary skill of those practising the art of cloak-making would appear to be adequate to putting them together. On much consideration, what the patent was granted for appears to fall without the domain of patentable invention." *Landesmann v. Jonasson et al.*, 32 Fed. Rep. 590.—*WHEELER*, 1887.

418. "The statute authorizing the grant of patents seems to contemplate that the invention for which a patent may be granted must be out-

side of the ordinary skill of those who practice the art to which the invention belongs."—*Ib.*

419. The patent in suit was for a self-feeding lubricator, and the claims in issue were: "(1) The open or transparent drip-chamber arranged below the reservoir and feed-regulating device, and in combination with the contracted opening through which the oil or lubricating material escapes from the reservoir, substantially as herein described, to provide for the dripping of said material, and the view of the drip. (2) In combination with the drip-chamber and reservoir, the test *a*, substantially as and for the purpose specified." There were in the prior art, gravity lubricators elevated above the bearings to be oiled, and from which the oil dripped in separate drops upon the bearings; a prior patent, that of Brooks, described a gravity lubricator which had a reservoir at its base, a transparent chamber in which was a supply cock for the purpose of regulating the supply; the oil flowed into a transparent tube and was delivered to the bearing or journal to be lubricated, the chamber being for the purpose of enabling the engineer to watch the flow of the oil. The court held that there was no invention in so changing the Brooks supply tube as to make it discharge the oil through an orifice which should deliver a drip, nor in attaching a transparent standard to each cup to keep it free from dirt and wind. *McNab et al. v. Nathan Mfg Co.*, 121 U. S. 484.—SHIPMAN, 1887.

420. A wire for cutting dough being old, it is not a patentable improvement to cover such a wire and support it centrally of its length. *Roth et al. v. Keebler*, 30 Fed. Rep. 618.—BUTLER, 1887.

421. "There can be no invention in placing a large register where there had previously been a small one." *Filley v. Littlefield Stove Co. et al.*, 30 Fed. Rep. 434.—COXE, 1887.

422. The improvement of the patent in suit was a wash-board. All that the inventor had done was to make the wash-board with one plate instead of two, as in the prior art, and solder the free edge to the lower end, after being bent over a rod to the body of the plate. This was held not to constitute patentable invention. *Pfanschmidt et al. v. Kelly Mercantile Co.*, 32 Fed. Rep. 667.—NELSON, 1887.

## INVENTION—SUFFICIENCY OF.

### CASES.

1. A nail machine in which one lever effects the cutting-off of the [cold] stock, the griping of the blank, and the heading of the nail, is not

anticipated by a machine which requires heated stock and different levers to effect the cutting, griping, and heading. *Gray et al. v. James et al.*, 1 Peters' C. C. 476.—WASH. 1817.

2. Printing with copper plates is a patentable art. *Kneass v. Schuykill Bank*, 4 Wash. 9.—WASH. 1820.

3. "If old materials and old principles in mechanics, or otherwise, are used in a state of combination, so as to produce a new result," the product is a patentable invention. *Pennock et al. v. Dialogue*, 4 Wash. 538.—WASH. 1825.

4. It is clearly immaterial whether the patentee's early experiments were made by himself or another. Giving form and substance to an invention is not invention.—*Ib.*

5. "It is of no consequence whether the thing be simple or complicated; whether it be by accident or by long laborious thought, or by an instantaneous flash of the mind, that it is first done." *Earle v. Sawyer*, 4 Mason, 1.—STORY, 1825.

6. Plaintiff introduced a circular saw in the place of an upright saw, in a shingle mill, the other parts remaining mainly unchanged. Held, to exhibit patentable invention.—*Ib.*

7. "If, by changing form and proportion, a new effect is produced, there is not simply a change of form and proportion but a change of principle also." [Said with reference to plough-plates.] *Davis v. Palmer*, 2 Brock. 298.—MARSHALL, 1827.

8. "The novelty of an invention is either the manufacture produced, or the manner of producing an old one; if the patent is for the former it must be for something substantially new, different from what was before known; if the latter, the mode of operation must be different." *Whitney et al. v. Emmett et al.*, 1 Bond, 303.—HOPKINSON and BALDWIN, 1831.

9. The ingredients of a composition may each and all be old and the composition be new and patentable. *Ryan et al. v. Goodwin et al.*, 3 Sumner, 514.—STORY, 1839.

10. "The simplicity of an invention, so far from being an objection to it, may constitute its greatest excellence and value." The production of such "is not infrequently the peculiar characteristic of the very highest class of minds."—*Ib.*

11. Plaintiff's patent being for an improvement in railroad car-wheels, it was held that a use of substantially the same device in a cotton-mill, or other stationary machinery, did not anticipate his invention, but that if, before his invention, the same combination was in use in ordinary carriages on common roads, then the



patent was void for lack of novelty. *Knight v. Baltimore & Ohio R. R. Co.*, Taney's Dec. 106. —TANEY, 1840.

12. "There is no law which requires an inventor to put his invention in practice or use before obtaining his patent." *Heath v. Hildreth*, 1 MacArthur's P. C. 12.—CRANCH, 1841.

13. An ice-plough, consisting mainly in different chisels arranged one behind the other, and each successive chisel making a deeper cut, is not anticipated by a carpenter's plough having a single chisel. *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

14. Patentable invention may reside in a horizontal position of a shaft and the number of water-wheels thereupon. *Parker v. Hatfield*, 4 McLean, 61.—MCLEAN, 1846.

15. "A novelty in principle may consist in a new and valuable mode of applying an old power, affecting it not merely by a new instrument or form of machine, or any mere equivalent, but by something giving a new and greater advantage." *Hovey v. Stevens*, 1 W. & M. 290.—WOODBURY, 1846.

16. The claim in a patent for a stove was to "the extension of the oven under the apron or upon the hearth of the stove, and the combination thereof with the flues, constructed as above specified, etc." The new thing was the connection of the oven and the flue, and was held to exhibit patentable invention. *Buck et al. v. Gill et al.*, 4 McLean, 174.—MCLEAN, 1846.

17. When an improvement is a combination "it must bring some new feature into the combination, and produce new and beneficial results. And if it does that, it is of no matter how slight is the change. If there is a novelty in the application and in the machine, and if it produces new and valuable results, it is patentable, whether the combination is new, or an important part only is new. There must be something new in relation to it, and it must produce better results than what were produced before." *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

18. "There are instruments invented in which the particular form is a material part of the discovery, and then a departure from the form would be a substantial departure, because the form is essential to the invention." *Many v. Jagger et al.*, 1 Blatch. 372.—NELSON, 1848.

19. "Duplication producing a new and useful result, . . . may be patentable. It is often the material part of the discovery, because it may be that which renders useful what was previously useless." *Parker v. Hulme*, 7 West. L. J. 417.—KANE, 1849.

20. "It is of no consequence, as to the validity of a patent, how much or how little labor, study, or thought the invention cost. . . . The degree of labor and thought may be sometimes evidence to the jury, upon the question of invention; but, although the invention be accidental, or a sudden flash of thought, the party is entitled to the benefit of his discovery." *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

21. A new application of a known mechanical power is, in regard to invention, a new principle. *Foote v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

22. Although the knowledge of the expansion and contraction of a metallic rod by heat and cold may be old, the practical application thereof may be patentable.—*Id.*

23. "Proof of the previous use of a structure bearing some resemblance in some respects to the improvement of the plaintiff, and which might have been suggestive of ideas, or have led to experiments resulting in the discovery and completion of his improvement, will not invalidate his claim under his patent." *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

24. Where a multiplication of parts in a grinding-mill requires for its production something more than mere mechanical skill, patentable invention is present. *Wilbur v. Beecher*, 2 Blatch. 132.—NELSON, 1850.

25. "Many of the patents or inventions which have been upheld are such slight changes from former modes or machines as to be tested in their material diversity chiefly by their better results, such as the flame of gas rather than oil, the hot blast rather than the cold, charcoal used in making sugar, hot water in place of cold in making cloth, etc." *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

26. "There is no doubt that a person, to be entitled to the character of an inventor, within the meaning of the act of Congress, must himself have conceived the idea embodied in his improvement. It must be the product of his own mind and genius, and not of another's." "At the same time, it is equally true that, in order to invalidate a patent on the ground that the patentee did not conceive the idea embodied in the improvement, it must appear that the suggestions, if any, made to him by others, would furnish *all* the information necessary to enable him to construct the improvement." *Pitts v. Hall*, 2 Blatch. 230.—NELSON, 1851.

27. "A formal change, such as a change in proportions, a mere change of form, or a different shape, is not a change within the meaning of the law. An improvement upon an old con-

trivance, in order to be of sufficient importance to be the subject of a patent, must embody some originality, and something substantial in the change, producing a more useful effect and operation. And in determining this question, the jury have a right to take into consideration, in connection with the change, the result which has been produced. Because the result, if greatly more beneficial than it was with the old contrivance, reflects back, and tends to characterize, in some degree, the importance of the change." *Hall v. Wiles*, 2 Blatch. 197.—NELSON, 1851.

28. Although the principles of the Morse telegraph had previously been known in a certain scientific way, that did not prevent Morse from having a valid patent for his practically successful application of those principles of telegraphy. *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—KANE, 1851.

29. "Novelty and utility in the improvement seem to be all that the statute requires as the condition of the granting of a patent." *McCormick v. Seymour et al.*, 2 Blatch. 240.—NELSON, 1851.

30. If, in all of the attempts made by prior experimenters, however good, they fall short of a successful result, they cannot deprive him who afterward succeeds of a patent. *Goodyear v. Day*, 2 Wall. Jr., 283.—GRIER, 1852.

31. "In order to ascertain and determine whether the change in the arrangement and construction of an existing machine is to be considered as a substantial change or not, you must ascertain and determine whether the change is the result of mechanical skill, worked out by mechanical devices—of a knowledge that belongs to that department of labor—or whether the change is the result of mind, of genius, of invention, in which you discover something more than mere mechanical skill and ingenuity. A change in the arrangement and construction is not substantial, unless you find embodied in it, over and above the skill of the mechanic, that inventive element of the mind which is to be found in every machine or improvement that is the proper subject of a patent." *Tatham et al. v. Le Roy et al.*, 2 Blatch. 474.—NELSON, 1852.

32. If the application of plaster-of-Paris as a filing for safes be new and useful, it is the proper subject of a patent. "It is not for the discovery of the fact that the gypsum has certain qualities not before known, to wit, that it was a non-conductor of heat, but it is for the application of the substance possessing such qualities to produce a beneficial result." *Rich et al. v. Lipincott et al.*, 2 Fish. P. C. 1.—GRIER, 1853.

33. "But slight evidence of . . . invention is required when it is shown in what the invention consists, . . . and where proof is given of its practical utility. This is a main and principal test, and this may be shown by the testimony of those who have seen the practical effect or result." *Fultz, in re*, 1 MacArthur's P. C. 178.—MORSELL, 1853.

34. "None of the patent laws have ever required that the invention should be in use or reduced to actual practice before the issuing of the patent otherwise than by a model, drawings, and a specification containing a written description of the invention, and of the manner of making, constructing, and using the same, in such full, clear, and exact terms as to enable any person skilled in the art to which it appertains to make, construct, and use the same." *Seely, S., in re*, 1 MacArthur's P. C. 248.—MORSELL, 1853.

35. "A mere analogous use is not patentable; but where a new or useful manufacture is produced by new contrivances, combinations, or arrangements, a new principle may be constituted, and the application or practice of old things will, of course, be new also in the result. The usual test is whether the production of the article is as good in quality at a cheaper rate, or better in quality at the same rate, or with both these consequences partially combined, and so is the like principle in mechanism." *Smith, H. L., in re*, 1 MacArthur's P. C. 255.—MORSELL, 1853.

36. "It is exceedingly difficult to draw a line between what may be regarded by the eye as a small improvement or invention, and one of magnitude; oftentimes, improvements and discoveries the most important in their consequences, and in their beneficial effects on the business interests of the community, are among the simplest ideas of the mind." *McCormick v. Seymour et al.*, 3 Blatch. 209.—NELSON, 1854.

37. If, in a patented improvement, a new and useful result has been attained, neither the simplicity of the structure nor the greater or lesser amount of intellect employed are of importance in determining the validity of the patent. *Teese et al. v. Phelps et al.*, 1 McAllister, 48.—McALLISTER, 1855.

38. Casting a knob upon one of the levers of a pair of shears so as to make them cease their closing movement at a proper point is patentable over the prior use of a screw for that purpose. *Heinrich v. Luther*, 6 McLean, 355.—McLEAN, 1855.

39. "Before a patent can be issued, the thing patented must appear to be of such a character as to involve or require 'invention' for its production—require the exercise of the genius of

an inventor as contradistinguished from the ordinary skill of a mechanic in construction." *Ransom et al. v. N. Y.*, 1 Fish. P. C. 252.—HALL, 1856.

40. Although a device more or less similar to the patented device may have previously existed, yet, if the patented device involves changes over the prior device, such as would not be obvious to a mechanic skilled in that art, the invention is patentable.—*Id.*

41. "Strong resemblances in external appearances, similarity of products or operation, are not, separately, tests of the identity of the plan, construction, or purpose of the machines; nor is the superiority in products, or in operation, in one over the other, proof of any essential difference, because the slightest change of a machine, which effects a real improvement in it, may be patentable, while great apparent variations may only be disguises under which an older discovery is attempted to be employed and appropriated." *Carr v. Rice*, 1 Fish. P. C. 198.—BETTS, 1856.

42. "The discovery may be the merest causality. It matters not how the thought is acquired, or how brought into action, whether by a sudden conjecture, or some chance experiment, or by the labors and investigations of . . . whole lives, or that it proves pre-eminently serviceable and profitable to the industry and enjoyments of life, or only to a very inconsiderable amount."—*Id.*

43. "A tube that is perforated through its whole length for the purpose of producing a simultaneous explosion of the whole charge, and for expanding the bullet and pressing it laterally into the rifled grooves of the barrel, is, beyond all doubt, a different device, a different means, and for a different purpose from that of . . . a priming tube, for the purpose of igniting the charge at the forward end only, producing a pressure upon the bullet in the direction of the axis of the barrel only." The latter is patentable over the former. *Halsey, J. A., in re*, 1 MacArthur's P. C. 459.—MORSELL, 1856.

44. The inventor "is not the man who may form an imperfect machine, which may suggest to a higher and more practical order of mind valuable ideas; but it is the one who embodies those ideas in a practical working form whom the law protects." *Pitts v. Edmonds et al.*, 1 Bissell, U. S. C. 168.—MCLEAN, 1857.

45. If a combination "was a new and useful combination within the meaning of the patent law, it was the subject-matter of a patent, and it is not important whether it required much or little thought, study, or experiment to make it,

or whether it cost much or little time or expense to devise and execute it." *Furbush et al. v. Cook et al.*, 10 Mo. L. R. 664.—CURTIS, 1857.

46. By the court: "An invention in the sense of the patent law, as I understand it, means the finding out, the contriving, the creating [and I speak now in respect to a machine, or an improvement upon a machine] of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind." *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

47. "A patent may be granted for an improvement upon an existing organization, that existing organization being capable of performing certain functions, or producing certain results only, if that improvement, in addition, enables the machine to accomplish additional and different purposes."—*Id.*

48. "Whenever the change and its consequences, taken together and viewed as a sum, are considerable, there must be a sufficiency of invention to support a patent." *Walsh, J. C., in re*, 1 MacArthur's P. C. 530.—MORSELL, 1857.

49. New and useful applications of old parts are patentable. *Cole, R. H., in re*, 1 MacArthur's P. C. 539.—MERRICK, 1857.

50. An improvement is not anticipated by a prior structure where the result was reached only incidentally and without intent. *Hebbard, Alonzo, in re*, 1 MacArthur's P. C. 543.—MORSELL, 1857.

51. "The validity of the grant is, not to be determined by the amount of invention that was required. If the device is new; if it is useful; if it had not been known before, there is a sufficient amount of invention to authorize a patent." *Potter et al. v. Holland*, 4 Blatch. 238.—INGERSOLL, 1858.

52. "It is no evidence of such a prior knowledge of the invention as will defeat the patent, that other persons have made suggestions to the patentee as to the possibility of making the improvement subsequently patented. Others may have thought upon the subject, and made experiments with reference to it; but unless they accomplished the object, unless their experiments resulted in discovery, such approaches to it would be no bar to the granting of a patent to the one who was successful in making the discovery and perfecting it." *Bell v. Daniels et al.*, 1 Bond, 212.—LEAVITT, 1858.

53. "It is a safe source of testimony, which can be relied upon with some degree of certainty, in order to ascertain whether the same means

are used, to look at the result produced by the means used. Like means, provided the machine is in perfect order, will, in a measure, produce like results. And if like results cannot be produced by two separate devices, it is good evidence for the jury to consider in coming to conclusion as to whether like means were used; because, as a general rule, like results are produced by like means; and if like results are not produced by two separate devices, it is fair for the jury to infer that the means may not be alike in kind or character." *Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co.*, 3 Fish. P. C. 43.—INGERSOLL, 1858.

54. There are cases where defence of lack of novelty is set up, wherein "the defence amounts to no more than this—that the persons who made these supposed originals came so near the patented device or machine, that they might have discovered it if they had only thought of it, or could have anticipated that, at some future day, it could be converted to some useful, practical purpose, for simplifying, cheapening, and improving an important article of our manufacture. It is only when some person, by labor and perseverance, has been successful in perfecting some valuable manufacture, by ingenious improvements and labor-saving devices, that their patents are sought to be annulled by digging up some useless, rusty, forgotten contrivance of unsuccessful experimenters." *Adams v. Jones et al.*, 1 Fish. P. C. 527.—GRIER, 1859.

55. Complainants' patented invention was a double-faced lock, usable for a right or left-hand door. The prior art contained locks which, by slight changes, might have been used in this way, but they never were so used, and the patent was sustained. *Livingston et al. v. Jones et al.*, 1 Fish. P. C. 521.—GRIER, 1859.

56. Although a person with the whole prior art before him might be supposed to find it easy to make the patented improvement, that fact does not militate against the presence of patentable invention. *Stainthorp et al. v. Humiston*, 1 Fish. P. C. 475.—HALL, 1859.

57. A machine for broadcasting seed in horizontal planes is not anticipatory of a machine sowing seed in vertical planes, and needing change and modifications to adapt it to sowing seed in horizontal planes. *Cahoon et al. v. Ring*, 1 Cliff. 592.—CLIFFORD, 1859.

58. That change in a cotton-gin which consists in bringing the metallic rings from which the teeth are cut so near together that burrs or cotton-seeds cannot fall into the channels between them, constitutes a patentable improve-

ment. *Whipple v. Middlesex Co.*, 4 Fish. P. C. 41.—SPRAGUE, 1859.

59. A cotton-gin of the prior art had card-teeth made of round wire stuck in leather. The teeth of the patent were cut in plates of metal fastened upon the cylinder in such a manner as to be both firm and sharp. This improvement was held patentable.—*Id.*

60. The patented improvement being in the teeth of a cotton-gin, one prior structure showed the same form of teeth, and another prior structure showed the same surface or arrangement. The patentee's union of the two was held to be invention.—*Id.*

61. "A new machine, which accomplishes the same end as a former, but by substantially different means, is patentable." *Eames v. Cook*, 2 Fish. P. C. 146.—SPRAGUE, 1860.

62. By the court: "In order to constitute a man an inventor, it is generally necessary that he must have exercised some inventive faculty of his own. I say generally necessary, because there might, no doubt, be cases in which an invention might be the result of pure accident. But the fact that he has received some ideas, hints, or suggestions on the subject from others would not prevent him from being considered an inventor, and entitled to a patent as such. To have that effect, it must appear that the invention was substantially communicated to him by some other person, so that, without the exercise of any inventive power of his own, he could have applied it in practice. Though others may previously have had similar ideas, and may have experimented upon them, the person who first perfected the idea and made it capable of practical use is the inventor, and entitled to a patent." *Matthews v. Skates et al.*, 1 Fish. P. C. 602.—JONES, 1860.

63. "When it is said that an old machine existed applicable to a new use; if this want never existed before, we may readily believe that an old instrumentality may meet it; but when the want has always existed, and not only existed but been pressing, and it is said that an old instrument would always have answered the want, the improbability is so great as to require strong evidence to overcome it." *Howe v. Morton et al.*, 13 Mo. Law Rep. 70.—SPRAGUE, 1860.

64. "Mere conversations about the practicability of an improvement, or suggestions as to the manner in which it might be carried out or accomplished, will not of themselves defeat the claims to originality of him who perfects the idea and secures a patent. Neither will experiments defeat, even if known to the patentee, if it appear that he prosecuted such experiments to final

success; but any information to a patentee, sufficient to enable him to construct the thing itself, would destroy the originality of the invention. But that knowledge must be definite and tangible; it should be sufficient of itself to enable the party to whom it was imparted to construct the improvement." *Judson v. Moore et al.*, 1 Bond, 285.—LEAVITT, 1860.

65. "The mere use of a mechanical structure for a certain purpose is not of itself patentable, but if the new use required a different structure, producing a new and useful result, it is a patentable subject."—*Ib.*

66. "Invention or discovery is required as the proper foundation of a patent, and, where both are wanting, the applicant cannot legally secure the privilege. Consequently, where the claim rests merely upon the application of an old machine to a new use or result, the patent cannot be sustained." "Particular changes, however, may be made in the construction and operation of an old machine so as to adapt it to a new and valuable use not known before, and to which the old machine had not and could not be applied without those changes and under these circumstances and conditions; if the machine as changed and modified produces a new and useful result, it may be patented." "Such change in an old machine may consist alone of a new and useful combination of the several parts of which it is composed, or it may consist of a material alteration or modification of one or more of the several devices which enter into its construction, or it may consist in adding new devices; and whether it be one or another of the suggested modifications, if the change of construction and operation actually adapt the machine to a new and valuable use, not known before, and to which the machine had not been applied, and, without the change suggested, was not in any degree fitted to be applied, and actually produces a new and useful result, then the case falls within the rule already laid down, and a patent may be granted for the same and be upheld." *Bray v. Hartshorn*, 1 Cliff. 538.—CLIFFORD, 1860.

67. Complainant's patented invention consisted "in a process for the manufacture of fat acids and glycerine, by the action of water, in a liquid state, above the ordinary boiling point of water, and, consequently, under pressure, on fatty bodies or substances." *Tilghman v. Werk*, 1 Bond, 511.—LEAVITT, 1862.

68. When old devices are set up as anticipating a patent, the question may well be asked why the old contrivances were never in any considerable use. *Clark Patent Steam & Fère Reg-*

*ulator Co. v. Copeland*, 2 Fish. P. C. 221.—SHIPMAN, 1862.

69. "Old instruments, placed in a new and different organization, producing in such new organization different results, or the same results by a new and different mode of operation, do not prevent such newly-organized mechanism from being patentable."—*Ib.*

70. "With regard to the degree of mental labor and inventive skill required in the work of invention, the law has no nice or rigid standard. There must be some inventive skill exercised, but the degree of the skill is not material. It not infrequently happens, in the progress of the mechanic arts, that the time arrives when the whole atmosphere of inventive thought is quickened with the life of an approaching discovery; that many lines of investigation and experiment converging for a long time toward that point almost, but not quite, reach it; when, at last, some mind, by a happy thought, supplies some new element, or instrument, or mode of organization, and instantly gives birth to the organized idea."—*Ib.*

71. "If" the "inventor . . . has . . . supplied to what was old some new element, instrument, or new organization, and thus produced a better practical result than had been included by the old means, he is entitled to the merit and fruits of his labor."—*Ib.*

72. "Original and first inventors are entitled to the benefits of their inventions if they reduce them to practice, and seasonably comply with the requirements of the patent law in procuring letters-patent for the protection of their exclusive rights. While the suggested improvement, however, rests merely in the mind of the originator of the idea, the invention is not completed within the meaning of the patent law, nor are crude and imperfect experiments sufficient to confer a right to a patent; but in order to constitute an invention, in the sense in which that word is employed in the patent act, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form." *White et al. v. Allen*, 2 Cliff. 224.—CLIFFORD, 1863.

73. A patentable invention may be "a simple but happy conception, which, when reduced to practice, produced surprising results both in the quality of the article manufactured and in the rapidity with which it was turned out. A subject matter to be patentable must require invention, but is not necessarily the result of long and painful study, or embodied alone in complex mechanism. A single flash of thought may reveal to the mind of the inventor the new idea,

and a frail and simple contrivance may embody it. Some inventions are the result of long and weary years of study and labor, pursued in the face of abortive experiments and baffled attempts, and finally reached after the severest struggles, while others are the fruit of a single happy thought." *Magic Ruffle Co. v. Douglas et al.*, 2 Fish. P. C. 330.—SHIPMAN, 1863.

74. "Upon the question of identity of machines or of mechanical devices, whenever that question arises in a patent case, the mode of operation and the result produced are important considerations; and if the modes of operation and the results produced are both clearly and substantially different, when the material or substance brought under their operation is the same, the question of identity must ordinarily, at least, be determined in the negative; and this is generally true, whether the invention patented is an organized machine or an improvement on an existing machine; whether the patent is for a machine or a mechanical device, new in all its parts, or merely for a combination of two or more well-known existing machines or mechanical devices." *Stainthorp et al. v. Humiston*, 4 Fish. P. C. 107.—HALL, 1864.

75. Complainants' invention, as expressed in the claim of their patent, was: "What I claim as my invention, and desire to have secured to me by letters-patent, is constructing a metallic burial-case with the ogee-shaped ends as described, whereby great reduction in weight and economy is secured, and at the same time all the space required afforded." Old Egyptian mummy cases composed of wood, with the parting line much like that of a coffin, were held not to anticipate this patent. *Forbes et al. v. Berstow Stove Co.*, 2 Cliff. 379.—CLIFFORD, 1864.

76. In determining upon patentable novelty a jury "are not to determine about similarities or differences merely by the names of things, but are to look to the machines, or their several devices or elements, in the light of what they do, or what offices or function they perform, and how they perform it, and to find that a thing is substantially the same as the other if it performs substantially the same function or office in substantially the same way to obtain the same result, and that things are not substantially different when they perform different duties, or in substantially a different way, or produce a different result." *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

77. If a person combines old parts in a new way "so that he gets a machine which operates differently and produces a different result in kind, then the law presumes that he has some-

thing that is patentable." *Woodman v. Stimpson*, 3 Fish. P. C. 98.—LOWELL, 1866.

78. "The principle of law is, that he is the original and first inventor of a machine, or combination, or whatever it is, if it was not known or used by others before his discovery or invention; the man who has made an invention that was not known before he made it. That does not mean that he has got his machine into the complete state in which you find it in the patent. Neither does it mean the first moment at which he conceived the idea that it would be a good thing to do that. It means not only when he conceived that such a thing would be a desirable thing to do, but when he had conceived the idea of how to do it substantially as he has done it."—*Id.*

79. If a party is the first to combine old parts, and it was beyond the ordinary knowledge and skill of the mechanic to make the combination, then there is patentable invention exercised.—*Id.*

80. "A new combination of old parts is patentable. If the essential parts which go to make up a combination or arrangement of machinery have never been combined before, it is no matter that they existed separately in other machines, if by their combination a new and useful result is produced, or even an old result, in a better manner."—*Id.*

81. Complainants' patent in suit was for a sewing-machine feed. The "Maynard Primer," a prior structure, contained a similar device, but complainants' patent was sustained. *Potter et al. v. Whitney*, 1 Lowell, 87.—LOWELL, 1866.

82. Complainants' patent was for a machine for repairing railway rails. A prior bayonet machine and a prior angle-iron machine were very much like it, but could not, without change and adaptation, perform successfully the work of the patented machine. The court sustained the patent, saying: "A slight change sometimes of a known machine, or in some of its parts, will effect surprising results, and to protect a party who, by inventing such a change, has produced a new and useful result, was certainly one of the objects of the patent laws." *Turwill et al. v. Ill. Cent. R. R. Co.*, 3 Bissell, 66.—DRUMMOND, 1867.

83. The adaptation of tumblers which in a general sense were old in a key-lock, for use in a keyless lock, the inventor being a pioneer in that matter, involves patentable invention. *Yale & Greenleaf M'fg Co. et al. v. North*, 5 Blatch. 455.—SHIPMAN, 1867.

84. "Originality is the test of invention. If that is successfully exercised its product is protected, and it is immaterial whether it is dis-

played in a greater or less degree, or whether the new idea revealed itself to the inventor by a sudden flash of thought or slowly dawned on his mind after groping his way through many and dubious experiments. It is needless to remark that originality may be found as well in new combinations of old elements as in the production of new ones." *Blake v. Stafford*, 6 Blatch. 195.—SHIPMAN, 1867.

85. Although the annealing of metals generally was well known, to anneal a car wheel for the purpose of avoiding strains in the metal was held patentable. *Whitney v. Mowry*, 2 Bond, 45.—LEAVITT, 1867.

86. The patent in suit was for a snap-hook. Respondents contended that the described transposition of the spring, in connection with the simple device of the sockets for holding it in place, was merely a colorable change of the old snap-hook. But that change affected palpable and useful results, and the patent was sustained. *Middletown Tool Co. v. Judd et al.*, 3 Fish. P. C. 141.—SHIPMAN, 1867.

87. "Whenever a change or device is new and accomplishes beneficial results, courts look with favor upon it. The law, in such cases, has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device.

"A lucky casual thought, involving a comparatively trifling change, often produces decided and useful results; and though it be the fruit of a very small amount of inventive skill, the patent law extends to it the same protection as if it had been brought forth after a lifetime devoted to the profoundest thought and most ingenious experiment to attain it."—*Id.*

88. "Caustic alkali, enclosed in an integument or casing of anti-corrosive impervious fabric," constitutes a patentable invention. *Penn. Salt M'fg Co. v. Gugenheim et al.*, 3 Fish. P. C. 423.—GRIER, 1868.

89. It seems that "bringing the different portions of a single plate or several smaller plates successively into the field of the lens of the camera" is a patentable invention over using a separate plate for each impression. *Ormsbee v. Wood*, 3 Fish. P. C. 372.—BLATCHFORD, 1868.

90. It seems that forming the crown of a bonnet frame by dies at one operation is patentable over forming the same in parts separately by dies. *Doubleday et al. v. Sherman et al.*, 3 Fish. P. C. 369.—BLATCHFORD, 1868.

91. "It appears impossible to consider that to be a new material, patentable as a new product, which is simply a substance long well known to exist in wood and other substances left in a state

'nearly pure,' and consequently fit for the manufacture of paper on being bleached by the removal from it of the intercellulose with which it is found to be combined in wood." *Am. Wood Paper Co. v. Fibre Disintegrating Co.*, 6 Blatch. 27.—BENEDICT, 1868.

92. "Where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they, in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the improved principle, and may be embodied in his patent as a part of his invention.

"Suggestions from another, made during the progress of such experiments, in order that they may be sufficient to defeat a patent subsequently issued must have embraced the plan of the improvement, and must have furnished such information to the person to whom the communication was made that it would have enabled an ordinary mechanic, without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation.

"Persons employed, as much as employers, are entitled to their own independent inventions; but where the employer has conceived the plan of an invention, and is engaged in experiments to perfect it, no suggestions from an employé not amounting to a new method or arrangement, which, in itself, is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. But where the suggestions go to make up a complete and perfected machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belonged to another." *Agawam Co. v. Jordan*, 7 Wall. 583.—CLIFFORD, 1868.

93. The claim in complainant's patent was: "The new article of manufacture, consisting of a turned-down or folded enamelled paper collar, substantially as described." Enamelled paper was old, but it required a particular kind of paper whereof to make the collar, and the patent was sustained. *Hoffman v. Stiefel et al.*, 7 Blatch. 58.—BLATCHFORD, 1869.

94. "Invention is the work of the brain and not of the hands; if the conception be practically complete, the artisan who gives it reflex and em-

bodiment in a machine is no more the inventor than the tools with which he wrought. Both are instruments in the hands of him who sets them in motion and prescribes the work to be done. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought, and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law, it always subsists. The mechanic may greatly aid the inventor, but he cannot usurp his place. As long as the root of the original conception remains in completeness, the outgrowth—whatever shape it may take—belongs to him with whom the conception originated." *Blandy et al. v. Griffith et al.*, 3 Fish. P. C. 609.—SWAYNE, 1869.

95. Complainants' improvement in portable engines was a bed-plate for an engine of a single continuous shell or tube. Somewhat similar prior beds had been used composed of different parts. Complainants' engine was attached to the outer side of the bed-plate, while in those of the prior art the attachment was either upon or over the boiler. Complainants' patent was sustained.—*Id.*

96. Complainants' patent was for a whip having a handle or any other portion covered with a knit fabric. Tubular knit fabrics were old, and the idea of covering a whip-handle was old. The patent was sustained. *Strong et al. v. Noble et al.*, 6 Blatch. 477.—BLATCHFORD, 1869.

97. "There is scarcely a patent granted that does not involve the application of an old thing to a new use, and that does not, in one sense, fail to involve something more. But the merit consists in being the first to make the application, and the first to show how it can be made, and the first to show that there is utility in making it."—*Id.*

98. The claim in complainant's patent for a new and useful "means for rendering joints steam tight" was: "'I claim the method described of causing steam to become a packing to itself in steam cylinders or other parts of steam machinery, by allowing the steam to act in one or more grooves, substantially as specified.'" The grooves were old, and had been used for a substantially similar purpose in air-blowing engines. The court held this to be a claim for an art or process, and sustained the patent. *Poillon v. Schmidt*, 6 Blatch. 299.—BLATCHFORD, 1869.

99. "Similarities in construction are usually found in inventions relating to the same subject, and they may comprehend every device but one

in the machine, and yet the second improvement may be of great value." *Howes v. Nute*, 4 Cliff. 173.—CLIFFORD, 1870.

100. The claim in complainants' patent was: "'The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described.'" The court construed this to be a claim including not only the plate of hard rubber for holding artificial teeth, or teeth and gums, but the process or mode by which they are constructed. Vulcanite was then old, but the patent was sustained. *Goodyear Dental Vulcanite Co. et al. v. Gardner*, 3 Cliff. 408.—CLIFFORD, 1870.

101. "Doubtless change of form of the constituents of a combination is often no substantial change. It may be only the substitution of an equivalent. The combination remains the same, though the form of the things combined greatly varies. But there are cases in which a change of form destroys the combination. They are those in which form is necessary to secure the beneficial result, and when, of course, a change of form of one or more of the things combined works a different result." *Am. Nicholson Pavement Co. v. City of Elizabeth et al.*, 4 Fish. P. C. 189.—STRONG, 1870.

102. If an inventor "had discovered the practical mode and contrived the practical means of accomplishing the result he might be entitled to a patent for his new and useful art, although ignorant of the philosophical or abstract principle which was involved in the exercise of the art itself." *Piper v. Brown et al.*, 1 Holmes, 20.—SHEPLEY, 1870.

103. "Changing one of the elements of a combination that will not produce a desired effect, and substituting another that makes it effective, is to produce a new and patentable combination; and even if the elements are unchanged, yet if, with one arrangement they are incompetent to an end for which a different arrangement makes them competent, such new arrangement becomes patentable, unless it is such as would naturally suggest itself to a person skilled in the art to which the subject makes it akin." *Woodward v. Dinsmore*, 4 Fish. P. C. 163.—GILES, 1870.

104. "Invention generally [as distinguished from discovery] consists in new modes of employing what was before known, so as to produce thereby effects either not produced before, or not produced in that manner, or not produced so usefully." *Hailles et al. v. Van Wormer et al.*, 7 Blatch. 443.—WOODRUFF, 1870.

105. It seems that making, by dies operated by machinery, a staple which was old as a mat-



ter of hand manufacture, is patentable invention. *Rogers et al. v. Sargent et al.*, 7 Blatch. 507.—BLATCHFORD, 1870.

106. "Although a griping-pawl operated by hand in an engraving machine is old, it is patentable to operate the same by machinery and automatically." *Singer et al. v. Braunsdorf et al.*, 7 Blatch. 521.—BLATCHFORD, 1870.

107. "Particular changes may be made in the construction and operation of an old machine so as to adapt it to a new and valuable use not known before, and to which the old machine had not been and could not be applied without those changes; and, under those circumstances, if the machine, as changed and modified, produces a new and useful result, it may be patented, and the patent will be upheld under existing laws." *Seymour v. Osborn*, 11 Wall. 516.—SUP. CT. 1870.

108. "In the fossils of geology, belonging to certain classes of animals, regular graduations from a low form of organism to a much higher one are found to exist. The contrast between the highest and the lowest is very striking. The same thing takes place in the progress of inventions. Models and machines in the same series, upon inspection not unfrequently exhibit curious points of analogy to such fossils. Sometimes one will be found to reach almost the highest point afterward attained, but to fall short of it." *Wood et al. v. Cleveland Rolling Mill Co.*, 4 Fish. P. C. 550.—SWAYNE, 1871.

109. "There are many cases in which the materiality of an invention, whether it be a machine or process, can be judged of only by its effect on the result, and this effect is tested by the actual improvement in the process of producing an article, or in the article itself introduced by the alleged invention." *Roberts v. Dickey*, 4 Brews. 260.—STRONG, 1871.

110. The method of increasing the flow of oil wells by exploding a torpedo therein is patentable over the practice of such a thing, in wells, for other purposes.—*Id.*

111. A distinguishing feature of complainants' improvements in fruit jars was that they obtained an exclusive circumferential pressure of the cover upon the jar. Prior fruit jars had approximate devices, but none attained this peculiarity, and complainants' patent was sustained. *Watson et al. v. Cunningham et al.*, 4 Fish. P. C. 528.—MCKENNAN, 1871.

112. Complainant's improvement was: "A metallic can for hermetically sealing paints and other substances, and having attached thereto a rim or ring of thin brass or other soft metal in such a manner that the top or cover may be re-

moved by severing the said rim or ring of thin brass or other soft metal with a penknife or other sharp instrument." Defendant showed that he had, prior to complainant's invention, made a can having a hole in the middle of its top, covered by a thin brass cap, which brass cap could be easily removed by inserting a knife under its edge and prying it up, or by severing it. Complainant's patent was sustained. *Masury v. Tieman*, 8 Blatch. 426.—BLATCHFORD, 1871.

113. Complainant's patented process for purifying coal oil, etc., consisted essentially in filtering the coal oil through bone-black. In the prior art animal charcoal had been used to render filthy water inodorous; rancid oil had been deprived of smell and taste by repeated filtration through such charcoal, and the yellowish tint of olive oil had been removed by mixing with animal charcoal, and subsequent filtration. The patent was sustained. *National Filtering Oil Co. v. Arctic Oil Co.*, 8 Blatch. 416.—BLATCHFORD, 1871.

114. Uniting deflecting plates upon both sides of a saw, with the prior art showing such plate upon one side of the saw only, is patentable. *Myers et al. v. Frame et al.*, 8 Blatch. 446.—BLATCHFORD, 1871.

115. The claim in plaintiff's patent for improvement in bridges was: "'2. The construction and arrangement of the arched or curved stay-plates or channel-irons in combination with arched bridges, for the purpose specified.'" Thereof the court said: "The channel-iron of the King bridge presents in a single piece of metal what had been before accomplished, if at all, only by the union of several distinct pieces, or parts, which were attached with great additional expenditure of material and labor, and consequent cost. It dispenses with angle irons and numerous rivets, and in one solid, firm construction, complete in itself, furnishes this essential feature of an iron arch bridge. It certainly cannot be the doctrine of the patent law that an invention apparently so valuable for its simplicity and increased economy should be antedated by more complex and expensive combinations, which do not contain the essential feature of the King invention." *King v. Hammond et al.*, 4 Fish. P. C. 488.—SHERMAN, 1871.

116. Defective turn-down enamelled paper collars were old. Complainant's inventor produced a successful article by improving both the paper and the enamel. The patent was sustained. *Hoffman v. Aronson et al.*, 8 Blatch. 324.—BLATCHFORD, 1871.

117. The invention of complainant's patentee—the same being a door-bolt—consisted in mak-

ing the barrel in which the bolt slides of one piece of sheet metal, with prongs passing through holes in the plate, by which it was riveted to the plate itself. The prior art contained a device in which a short barrel and a long barrel were secured to the plate in the same way. The court found patentable novelty in complainant's patent. *Stanley Works v. Sargent & Co.*, 8 Blatch. 344.—SHIPMAN, 1871.

118. "Utility is not an infallible test of originality. The patent law requires a thing to be new as well as useful in order to entitle it to the protection of the statute. To be new in the sense of the act it must be the product of original thought or inventive skill, and not a mere formal and mechanical change of what was old and well known. But the effect produced by a change is often an appropriate though not a controlling consideration in determining the character of the change itself."—*Id.*

119. To substitute india-rubber in the place of cloth, as a covering for wringer-rolls, is important, and valuable enough to be patentable. *Bailey Washing & Wringing Mach. Co. v. Lincoln et al.*, 4 Fish. P. C. 379.—LOWELL, 1871.

120. Complainant's patent was for a clamp to be used in making hoop-skirts. A prior patent showed such a clamp, but not with its teeth clinched as in the patent. Patent was sustained. *Doughty v. Day et al.*, 9 Blatch. 262.—BLATCHFORD, 1871.

121. The location of a subsidiary engine for working the capstan, in a particular locality on the deck of a vessel, may be patentable invention. *M'Millin et al. v. Barclay et al.*, 4 Brews. 275.—MCKENNAN, 1871.

122. "If a new and useful result is effected by means before well known, or any useful result is produced by a new mechanical device or combination of old mechanical devices, in both cases the exercise of invention must necessarily be presumed, because both are the proper subjects of a patent."—*Id.*

123. "A patentable subject must not only be new and useful, but it must involve some exercise of the inventive faculty, and it must not be merely the application of an old thing to a new use." *Penn. Salt M'fg Co. v. Thomas*, 8 Phil. 144.—MCKENNAN, 1871.

124. "The patentability of an alleged invention is, in many cases, most satisfactorily shown by its utility."—*Id.*

125. Complainant's patented improvement in putting up caustic alkali consisted in pouring the molten caustic alkali into the casing, and then making the casing air-tight. Small metal cans were old in the prior art, likewise the

knowledge of preserving caustic alkali in air-tight packages. The patent was sustained.—*Id.*

126. Complainant's patent was practically for the automatic spinning of brass kettles. A prior patent showed somewhat similar machinery for polishing, but was not adapted for spinning. Complainant's patent was sustained. *Waterbury Brass Co. v. E. Miller & Co.*, 9 Blatch. 77.—WOODRUFF, 1871.

127. The patent in suit was for the slow cooling of cast-iron car wheels. Annealing some kinds of castings was old, but the patent was sustained. *Mowry v. Whitney*, 14 Wall. 620.—SUP. CT. 1871.

128. "Making a prior device which will serve the like useful purpose is not necessarily anticipating an invention. Where the mechanical means employed are different, and the mechanical result is different, one does not anticipate the other. If this were not so, an inventor who had made a machine which would serve a useful purpose would exclude all others from the right to a patent for other mechanical devices or combinations, producing the like useful result in other modes, or producing a different mechanical result which served the same purpose." *Buerk v. Valentine*, 9 Blatch. 477.—WOODRUFF, 1872.

129. Complainant's patented prepared paste for bookbinders consisted of common paste, with additions in substantially the following proportions: "Flour, two pounds; chloride of sodium, one ounce; alum, one quarter ounce; bichloride of mercury, six grains; and so made and compounded as to obviate the objection which would naturally arise from the use of the rank poison, corrosive sublimate, in this composition, by the well-known fact in chemistry that the gluten of the flour acts as an antidote to the poisonous qualities of the bichloride of mercury, thus rendering the compound innocuous and harmless."

Preserved paste had previously been made containing every one of these ingredients separately, and every one in combination except salt. Complainant's patent was sustained. *Woodward v. Morrison et al.*, 1 Holmes, 124.—SHEPLEY, 1872.

130. The distinguishing feature of complainant's patented pad for harness saddles was an impervious bearing surface of vulcanized rubber. The same pad, with bearing surface of different material, was old in the art. Complainant's patent was sustained. *Am. Saddle Co. v. Hogg*, 1 Holmes, 133.—SHEPLEY, 1872.

131. "The patenting a material for one purpose does not necessarily invalidate patenting it

for a different and not analogous purpose.” *Jenkins v. Walker et al.*, 1 Holmes, 120.—SHEP-  
LEY, 1872.

132. An English patent showed a hard rubber compound for journal boxes ; a later home patent was for a somewhat similar compound for valve packings. The home patent was sustained.—*Id.*

133. The process of grinding wood for making paper-pulp, which consists in having the grinding surface moving across the fibres, and in the same plane with them, is patentable over a prior process of grinding the ends of the fibres, or of grinding diagonally across the fibres. *Miller v. Androscoggin Pulp Co.*, 1 Holmes, 142.—SHEPLEY, 1872.

134. Defendants contended that complainant's patented invention was communicated to him by a third party. The court found that the third party did not communicate to complainant sufficient facts to enable complainant to make a model of the invention, and sustained the patent. *Putnam v. Hickey et al.*, 3 Bissell, U. S. C., 157.—MILLER, 1872.

135. Tilghman's sand-blast for working glass and the like is patentable over projecting a stream of sand, with steam, from a locomotive engine for the purpose of driving cows from the track of a railroad. *Tilghman v. Morse*, 9 Blatch. 421.—BLATCHFORD, 1872.

136. The claim in complainant's patent was : “The button, formed of a single piece of metal, with the edge turned over, and with one central hole, as a new article of manufacture, as specified.” Prior buttons contained one or two of the three features of complainant's patent, but complainant's patent was sustained on this point. *Platt v. U. S. Patent Button, Rivet, Needle & Mach. M. Co.*, 9 Blatch. 342.—BLATCHFORD, 1872.

137. Complainants' invention in hand-mirrors consisted “in mounting the glass on a base-piece of wood or other material, having a stiffened extension running into the handle, and embedding the whole in a composition of cement of suitable description, that upon hardening forms the back, edges, and outside handle of the mirror.” This was held patentable over a hair-brush in which the bristles, inserted through a perforated plate, were embedded and held firmly in a suitable cement, which cement, at the same time, combined the plate and an extension of the plate with the handle, forming the back and handle of the brush. *Clark et al. v. Scott*, 9 Blatch. 801.—BLATCHFORD, 1872.

138. “Many a useful and valuable invention has been of a device so simple and so seemingly

trifling that men wonder that it was not made long before. The inquiry is, Was such a device before known?” *Kirby et al. v. Dodge & Stevenson Mfg Co. et al.*, 18 Blatch. 307.—WOODRUFF, 1872.

139. “Invention may be as necessary to reform or adapt an existing machine to the performance of work which it would not, as originally constructed, perform, as it is to make a new machine ; and whether this is done by removing a device or by adding one, by removing a bolt or by inserting a bolt, by making an apparently great mechanical change or a small one, the principle governing the subject is the same.”—*Id.*

140. Complainant's invention consisted in securing, along the edge of the rubber cushion of a billiard table, a strong, narrow cord to receive the impact of the ball, and protect the cushion against such impact. In a prior device there was a piece of elastic material along the upper face of the rubber, to be lifted by the force of the ball when the ball struck the rubber beneath, and by this spring action hug the ball down to the table and prevent its hopping. The patent in suit was sustained. *Decker v. Grote et al.*, 10 Blatch. 331.—BLATCHFORD, 1872.

141. Complainant's improvement was the firmly securing along the corner of the rubber cushion of a billiard table of a strong, narrow cord, to receive the impact of the ball, and protect the cushion against such impact. In a prior device a strip of horn was used as a facing to the rubber pad, or inserted in a slit cut into the pad and made fast therein by rubber cement. The patent was sustained.—*Id.*

142. “On the argument, it was insisted that a patent is void if the patentee did not reduce the invention to practical use before the patent was obtained. This proposition is wholly unsound. No such condition is required by the act of Congress ; and if it were true that a patent would be void on that ground, no patent could properly be granted unless proof was furnished that the invention claimed had gone into practical use, which is not and cannot, under the statute, be made a condition of granting the patent. It is enough that the inventor has perfected his invention and is able to furnish to the Patent Office such specifications and model as the law requires. Having done this, the patent, in so far as prerequisites to its validity, either by way of experiments or use, are material, is valid.” *Wheeler, Jr., v. Clipper Mower & Reaper Co.*, 10 Blatch. 181.—WOODRUFF, 1872.

143. An invention, as stated in the claim of a patent, was : “The use of phosphoric acid or

acid phosphates, when employed with alkaline carbonates, as a substitute for ferment or leaven in the preparation of farinaceous food." Thereof the court said: "The fourth claim is a claim to the use of the acid and an alkaline carbonate, as a substitute for ferment or leaven, in the preparation of farinaceous food. This is a claim to the actual use of such acid and alkali in making raised dough. Nothing is shown which anticipates this claim, and the invention covered by it is patentable. Horsford was the first to use phosphoric acid, or an acid phosphate, for the purpose. It required experiment and invention to find out whether phosphoric acid could be used in place of tartaric acid practically and successfully, and with safety to health." *Rumford Chemical Works v. Lauer*, 10 Blatch. 122.—BLATCHFORD, 1872.

144. A reversible wrist-band or cuff constitutes patentable invention over a non-reversible cuff. *Union Paper Collar Co. v. Van Deusen et al.*, 10 Blatch. 109.—BLATCHFORD, 1872.

145. The cases are "often met with in the history of patents where an invention, once perfected, has shown itself to be so useful and so highly appreciated as to have gone at once into so extensive use that it is inherently impossible it should have been known before and not have gone into general use. Its success leads infringers and rival inventors to set up crude and unsuccessful experiments as anticipating it, and dim recollections are stimulated and conscience is strained to clothe with living flesh what was an inert and useless skeleton." *Hitchcock v. Tremaine et al.*, 9 Blatch. 550.—BLATCHFORD, 1872.

146. Complainant's patent being for a corset-spring, and defendant claiming that it was anticipated by a prior carriage-spring, the court sustained the patent, and said: "The carriage-spring differed from the corset-spring in not having that flexibility at the centre of its length which the corset-spring has and must have, and in not curving in one direction at one end and in the other direction at the other end, as the corset-spring is shown in the drawings of the patent to do. In other words, the carriage-spring was not a corset-spring, and could not be used as such, without such a change as involved invention." *Barnes v. Straus*, 9 Blatch. 553.—BLATCHFORD, 1872.

147. "Though a competent mechanic would easily adapt a treadle to a hay-rake, yet the idea of the combination was of itself a meritorious invention and a new one." *Brown v. Whittemore et al.*, 5 Fish. P. C. 524.—LOWELL, 1872.

148. The Adams' patent for electro-plating of

nickel being under consideration, the court said: "However suggestive the experiments of others may have been in electro-deposition of nickel from different solutions, or in the mere casting of nickel, they cannot be made available to defeat a patent granted to one who, after all the experimenters had failed to secure a practical and successful result beneficial to the community and a valuable contribution to the useful arts, first succeeded so as to be able to disclose to the public a practically useful and successful process, by him first brought to perfection and first made capable of useful application." *United Nickel Co. v. Authes*, 1 Holmes, 155.—SHEPLEY, 1872.

149. Complainant's patented improvement consisted in "applying foreign heat to a hot chilled wheel at the point of time when it has reached a particular stage of cooling, by means of such foreign heat bringing the whole casting up to a higher and uniform temperature, and maintaining an equable abatement of heat in the furnace or chamber under the control of the operator." Annealing in various ways with various materials and for various purposes was old. Complainant's patent was sustained. *Mowry v. Whitney*, 14 Wall. 620.—SUP. CT. 1872.

150. Although a form of bonnet may be old when made of one thickness of muslin, "it might be a patentable improvement to make the bonnet of two thicknesses." *Baldwin v. Bernard et al.*, 5 Fish. P. C. 442.—BLATCHFORD, 1872.

151. Complainant's patented improvement in valves was the arrangement of an annular chamber or cup, containing an elastic packing, with a raised seat, in connection with two bearing surfaces outside of the cup and the raised seat. It was held that the prior construction, consisting of a raised seat and a metallic receptacle fitting over it, did not anticipate the invention; likewise that a prior valve with a raised seat and cup, and a packing of lead or tin filled into the cup, did not anticipate the invention. *Jenkins v. Johnson et al.*, 9 Blatch. 516.—BLATCHFORD, 1872.

152. "It is not enough to defeat the novelty of an invention that prior contrivances are produced which might, with a little change, have been made into the patented contrivance, though not so intended by the maker." *Cooke et al. v. Ernest et al.*, 5 Fish. P. C. 396.—WOODS, 1872.

153. A compound which in a thin state has been used as a paint is, in a thicker state, patentable as a pavement. *Plastic Slate Roofing Joint Stock Co. et al. v. Moore*, 1 Holmes, 167.—SHEPLEY, 1872.

154. A fruit jar which is old in all its parts except as to an improvement in the bearing of the cover on the rubber packing is a patentable improvement. *McCully et al. v. Cunningham et al.*, 3 Pittsb. 366.—MCKENNAN, 1872.

155. A hotel register with marginal advertisements is a patentable improvement. *Hawes v. Washburn et al.*, 5 O. G. 491.—WOODRUFF, 1872.

156. Complainants' improvement in the making of bonnet bodies consisted of a bonnet body embossed in imitation of straw and other braid by dies, which at the same time gave to it its ultimate shape, such body being made of two or more thicknesses of muslin or other suitable fabric united by starch or other suitable stiffening substance. It was old in the art to make bonnet frames of two or more thicknesses of muslin stuck together by paste and stamped into shape by means of smooth dies. It was old in the art to stamp, with flat engraved dies, two or three-ply buckram in imitation of straw braid to be used in making bonnets. Complainants' patent was sustained. *Baldwin et al. v. Schultz et al.*, 2 O. G. 319.—BLATCHFORD, 1872.

157. A skirt wire made by folding the fabric over one or more wires and securing it by sizing or glue or pressure is patentable over a wire with the fabric woven around it. *Young v. Lippman et al.*, 9 Blatch. 283.—BLATCHFORD, 1872.

158. Although certain corrugations for strengthening snuffers may be old, yet to use the same for strengthening the handles of spoons with different adaptations is patentable invention. *Grosjean v. Peck, Stow & Wilcox Co. et al.*, 11 Blatch. 54.—BLATCHFORD, 1873.

159. "Old elements placed in new and different organizations, producing in such new organizations different results, or the same results by a new and different mode of operation, do not prevent such newly organized mechanisms from being patentable." *Child v. Boston & Fair Haven Iron Works Co.*, 1 Holmes, 303.—SHEPLEY, 1874.

160. "Is the mere location of devices, such devices not being new, patentable? To this the answer must be that it is not. If the result is the same, and nothing new is required to adapt an apparatus to operate in its new location, nothing has been done that can be called invention. If such change of location produced a new combination of devices, producing a new result, then, indeed, something patentable may have been devised; but mere change of location is not invention.

"On the other hand, where change of location

involves the employment of new devices to adapt an apparatus for use in the new position, and a beneficial result is produced, then this location, in its combination with such new devices—that is, the means by which the result is produced, and not the result itself—is patentable. And where such change of location brings into existence a new combination of devices, operating by reason of such new combination to produce a new and useful result, the new combination is patentable." *Marsh v. Dodge & Stevenson M'fg Co.*, 6 Fish. P. C. 562.—WOODRUFF, 1873.

161. Complainants' invention was the rendering of the interior of a rotary blower-case true by means of plaster-of-Paris or its equivalent. This was held patentable over a pump lined with molten metal. *Roots et al. v. Hyndman*, 6 Fish. P. C. 439.—EMMONS, 1873.

162. "Novelty and utility are both required to constitute a patentable invention within the meaning of the patent law, but where both of these qualities are combined, it is settled law that the right to a patent does not depend upon the 'quantity of thought,' ingenuity, skill, labor, or experiment, or the amount of money which the inventor may have bestowed or expended upon his production." *Jones et al. v. Sewall*, 3 Cliff. 563.—CLIFFORD, 1873.

163. Although the packing and preserving of beets, carrots, peas, and beans may be old, yet the packing and preserving of green corn in a peculiar manner is patentable.—*Id.*

164. The utility and hence the patentability of a new combination is shown by extensive demand, for use, thereof. *Robertson v. Secombe M'fg Co.*, 10 Blatch. 481.—BLATCHFORD, 1873.

165. Certain mechanisms were old in the prior art for making hat bodies. Complainant's patentee arranged them together in one machine, and a patent thereof was sustained. *Eichenmeyer Hat Blocking Mach. Co. v. Pearce et al.*, 10 Blatch. 403.—BLATCHFORD, 1873.

166. "The uniform, continuous, and coherent deposit of one metal upon the surface of another, so as to produce a coating of the desired thickness, purity, uniformity, coherence, and permanency of adhesion, as distinguished from the mere electrolysis or electro-deposition of a metal out of a solution, whether such electro-deposition be or be not on the surface of another metal," amounts to patentable invention. *United Nickel Co. v. Keith*, 1 Holmes, 328.—SHEPLEY, 1874.

167. Complainant's patent being for a truss or abdominal supporter, it was sought by the defendant to have the patent anticipated by a prior supporter applicable to a different purpose,

or rather applicable to deformed persons. The court held complainant's improvement patentable. *Moody v. Taber*, 1 Holmes, 325.—SHEPLEY, 1874.

168. Complainants' patented improvement in paint for ships' bottoms was the same as a prior compound, less one ingredient before supposed to be essential. It was held patentable. *Tarr et al. v. Folsom*, 1 Holmes, 813.—SHEPLEY, 1874.

169. The patent in question was for a reflector for gas-lights, having a glass lining. Defendants contended that as the prior art contained such reflectors with a substitute for the glass lining, complainant's improvement did not involve patentable invention. The court held otherwise. *Frink v. Petry et al.*, 11 Blatch. 422.—BLATCHFORD, 1874.

170. An inventor's changes, from previous arrangements, may be small to appearance, but if they produce practical success in what was before substantially useless they amount to patentable invention.—*Ib.*

171. Making the cross-bar of a shawl-strap rigid is patentable invention. *Crouch v. Speer et al.*, 1 Bann. & Ard. 145.—NIXON, 1874.

172. Complainants' patent was for revolving glass-cutters. In the prior art there was a similar but larger cutter for finishing grindstones. The court limited the patentee to a particular form of cutter by construction, and held that the accidental presence of that form in the grindstone finisher was not material. *Monce et al. v. Adams*, 12 Blatch. 1.—SHIPMAN, 1874.

173. Complainants' patent was for a small revolving glass-cutter. A pipe cutter of the prior art had a larger, similar revolving cutter. Complainants' patent was sustained.—*Ib.*

174. Complainant's improvement in apparatus for carburetting air was: "The arrangement of the carburetter with a motor-wheel, said wheel being driven by a descending weight or other equivalent mechanical power applied to force air through the carburetter to the burners, said carburetter being placed within a vault, by itself, separate from the building to be lighted, the whole arranged and connected with pipes, substantially as herein . . . 'described and set forth.' " The placing of the carburetter in a vault in the earth was the feature of novelty, and the patent was sustained. *Gilbert & Barker Mfg Co. v. Tirrell*, 12 Blatch. 144.—WOODRUFF, 1874.

175. The patented improvement was "a bracelet . . . made of base metal plates, coated with a more costly metal or other material, and the foundation plate of which is provided with beads at its edges, at such a distance apart that they

hug closely the fellow piece of the bracelet, and that, after the two parts of the bracelet have been united, no uncovered portion of the base metal remains visible." A prior device had the edges of the base-plate turned over so as to make an underlaying lip or slide on each edge of the bracelet, but the maker thereof, instead of soldering a fellow piece to the base-plate at the inside of the beads, slid bits of metal with projecting lips under the lips or slides of the base-plate. Complainants' patent was sustained. *Barclay et al. v. Thayer et al.*, 12 Blatch. 107.—BLATCHFORD, 1874.

176. Complainant's patent was for grain separators. The court found invention in "the manner in which the screens and boxes are located and constructed, their width, inclination, and motion, as well as relation to the blast from the fan through the vertical spout," the combination generally being old. *Booth v. Parks*, 1 Flippin, 381.—WELKER, 1874.

177. A dental vulcanite plate is patentable over the prior dental plates of gutta-percha, tin, platinum, and porcelain. *Goodyear Dental Vulcanite Co. et al. v. Smith*, 1 Holmes, 354.—SHEPLEY, 1874.

178. "Strictly speaking, no new manufacture is anything more than a new combination and arrangement of old materials; and whenever such new combination and arrangement produces a new and useful result, there being diversity of method and diversity of result, the invention is patentable."—*Ib.*

179. There is a "rule . . . frequently relied on to uphold the novelty of inventions, which deduces the fact of novelty from the extent of the revolution immediately resulting in that department of the arts in which they are employed." *Goodyear Dental Vulcanite Co. et al. v. Willis*, 1 Flippin, 388.—EMMONS, 1874.

180. "This is the history of the art in relation to most of the important discoveries and inventions of the present day. . . . The want which the discovery or invention is to supply is first felt, and the genius of invention is aroused, and the thoughts and efforts of inventors are directed in a particular channel. When one achieves success, it not infrequently appears that prior inventors have been travelling in the same path; and, in the light of his success, we look back with wonder at the omission of those who started earlier in the race to take the last short step which separated them from the goal. But it is the last step in the race of discovery or invention that counts, and he who first crosses the dividing line between experiment and success wins the prize over those who, having started

earlier in the race, are but a single step behind at the goal." *Pike v. Providence & Worcester R. R. Co. et al.*, 1 Holmes, 445.—SHEPLEY, 1874.

181. The patented brush in suit had a brush-head with an annular groove and a rubber ring fitting therein. A prior door-stop had an annular groove in it with a rubber ring fitting therein in the same manner. The door-stop was held not to anticipate the patent for the brush. *Murphy et al. v. Kissling et al.*, 1 Holmes, 432.—SHEPLEY, 1874.

182. The prior art showed the combination with a locomotive engine of a pilot truck fitted to allow lateral motion, but incapable, when in combination with the engine, of swivelling on a king-bolt at its centre. The later combination of a locomotive engine with a truck capable not only of lateral motion, but also of free rotation around the king-bolt at its centre, was held patentable. *Locomotive Engine Safety Truck Co. v. Penn. R. R. Co.*, 1 Bann. & Ard. 470.—STRONG, 1874.

183. The improvement in dispute was an apparatus for conveying heated masses of iron from a furnace to a rolling-mill, and the means employed consisted "of a power-driven hauling mechanism with a chain, one end of which is secured to a shaft parallel with the rolls, and turned by the machinery which turned the rolls; the other end of the chain is furnished with grappling-hooks for seizing the pile before it leaves the furnace, and between the latter and the rolls there is a swinging crane from which a platform is suspended." "Prior to this invention, the manner in which the fagot was transferred was by means of a truck or carriage which received it when withdrawn from the furnace, and it was then dragged by ten or a dozen men, stationed on each side, to the rolls." The improvement was held to possess patentable novelty. *Pennock, J. L., In re*, 1 MacArthur's P. C. 531.—MACARTHUR, 1874.

184. "Whether the inventive faculty has been exercised is mostly a question of evidence, and is always to be considered in reference to the condition of the art and the results accomplished; and where the combination is confessedly new and the benefit great, the presumption is strongly in its favor. It is not always safe to consider that there has been no invention because it appears obvious and simple, for simplicity is often the chief merit of a patent."—*Id.*

185. Although the shape of the links of a patented chain may be old, making them of tubing, giving them certain new and useful qualities, constitutes patentable invention. *Mulford*

*et al. v. Pearce et al.*, 13 Blatch. 173.—SHIPMAN, 1875.

186. A change in the needle-bar of a loom for weaving irregular fabrics, which materially assists in overcoming obstacles which had interfered with the success of irregular weaving, is a patentable improvement. *Carsteadt v. United States Corset Co.*, 13 Blatch. 199.—SHIPMAN, 1875.

187. A patented improvement in bottle-stoppers consisted in a bail of round wire. The prior art contained a similar device of flat metal. As the wire would imbed in the cork when the flat metal would not, and as it presented a better surface for the thumbs of the operator, the flat metal bail was held patentable. *Putnam v. Weatherbee et al.*, 1 Holmes, 497.—SHEPLEY, 1875.

188. Although paper and cloth had been united as a fabric for maps, etc., it was yet patentable to make a collar out of such fabric. It was something more than the mere application of an old thing to a new purpose. It was the production of a new device by giving a new form to an old substance, and by suitable manipulation making its peculiar properties available to a use to which it had not before been applied. *Union Paper Collar Co. v. White*, 2 Bann. & Ard. 60.—MCKENNAN, 1875.

189. Although Westinghouse was not the first to conceive the idea of operating railway brakes by air pressure, and although he was not the inventor of the larger part of the devices employed for such purposes, such fact does not detract at all from his merits or rights as a successful inventor. For a successful air-brake is of immense importance on railroads, and the Westinghouse apparatus was the first practically successful one. *Westinghouse, Jr., v. Gardner & Ranson Air Brake Co.*, 2 Bann. & Ard. 55.—SWAYNE and WELKER, 1875.

190. Where prior devices fail to come into practical use, and the later patented device does come into extensive practical use, the facts are strong evidence of a sufficiency of invention in the patented machine. *Weston et al. v. Nash et al.*, 1 Holmes, 488.—SHEPLEY, 1875.

191. Hinging a joint forward of an evenner instead of back of it, where a new and useful result is produced, amounts to patentable invention. *Calkins v. Bertraud et al.*, 6 Bissell, 494.—BLATCHFORD, 1875.

192. The substitution of wire for a bottle stopper of tin-plate, where the use of the wire gives the advantage that the stronger the pressure upon the cork or stopper the more securely will the fastener hold, amounts to patentable inven-

tion. *Putnam v. Yerrington*, 2 Bann. & Ard. 237.—NIXON, 1876.

193. In a stove, combining a water reservoir in such relation to the top plate and partial back plate that the reservoir performs both the functions of the reservoir and the partial back plate of the stove, amounts to patentable invention. *Bussey et al. v. Wager et al.*, 2 Bann. & Ard. 229.—WALLACE, 1876.

194. The substitution of vulcanized rubber for cork, leather, or soft metal in the valve of a steam-cock is a patentable invention, and the prior application of sheets of vulcanized rubber to the edges of man-holes is not so analogous in its nature as to defeat the patent. *Dalton et al. v. Nelson et al.*, 13 Blatch. 357.—SHIPMAN, 1876.

195. "A chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence and no knowledge of a method of its employment is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim of him who first discovers the principle, and, by putting it to a practical and intelligent use, first makes it available to man." *Andrews et al. v. Carman*, 13 Blatch. 307.—BENEDICT, 1876.

196. When an improvement produces a great change in the art to which it appertains, that goes far to prove patentable novelty.—*Id.*

197. "Mere change of location is not patentable; but when change of location brings into existence a new combination of devices operating, by reason of such new combination, to produce a new and useful result, such new combination is patentable." *Gilbert & Barker M'fg Co. v. Walworth M'fg Co.*, 2 Bann. & Ard. 271.—SHEPLEY, 1876.

198. A carriage top for a child's carriage adjustable both before and behind the child is patentable over a prior carriage top which is only adjustable rearward. *Richardson et al. v. Noyes et al.*, 2 Bann. & Ard. 398.—CLIFFORD and LOWELL, 1876.

199. The Cummings' dental plate, as stated in the patent, "consists in forming the plate, to which the teeth, or teeth and gums, are attached, of hard rubber, or vulcanite so called, an elastic material possessing and retaining in use sufficient rigidity for the purpose of mastication, and at the same time being pliable enough to yield a little to the motions of the mouth." "The process of forming the plate by the use of . . . moulds was well known, and so was the process of converting a vulcanizable compound into vulcanite by heating it and allowing it to cool in moulds." The patent was sustained. *Smith v. Goodyear Dent. Vul. Co. et al.*, 93 U. S. 486.—SUP. CT. 1876.

200. An improvement in lamps for burning kerosene which dispenses with a chimney is not anticipated by prior smoke-consuming devices which will answer the purpose with some slight changes. *Irwin et al. v. Dane et al.*, 9 O. G. 642.—DRUMMOND and BLODGETT, 1876.

201. The complainant's patent in suit was for a pair of dies for pressing, polishing, and trimming the edges of the rubber coating of harness trimmings so as to imitate stitching, and to finish each article without hand labor. Complainant's inventor was not the first to use dies in the manufacture of rings, buckles, terrets, and other harness mountings, nor the first to imitate leather stitching on rubber-coated articles, nor the first to densify and polish with dies plastic compositions surrounding a metal core, by heat and pressure. Complainant's patent was sustained. *Albright v. Celluloid Harness Trimming Co.*, 2 Bann. & Ard. 629.—NIXON, 1877.

202. A peculiar form and shape of the coil in plug tobacco is patentable where the result is to permanently retain the moisture and prevent decay. *Eppinger v. Richey et al.*, 14 Blatch. 307.—SHIPMAN, 1877.

203. The patent in suit was for a self-closing faucet. The patented combination of the screw-follower with a quick-threaded screw, valve, and spring was to be found in earlier patents, but the patentee in the patent in suit had simplified the parts and made structural changes therein. The patent was sustained. *Zane et al. v. Peck Bros. & Co.*, 3 Bann. & Ard. 36.—SHIPMAN, 1877.

204. Reversing the direction of the rotation of a beater-bar in a corn-sheller, producing thereby a marked improvement in operation, is patentable invention. *Adams v. Joliet M'fg Co.*, 3 Bann. & Ard. 1.—BLODGETT, 1887.

205. As regards the floats and buckets of water-wheels, "form is material, substantial, and functional, and very slight changes of form and proportion involve functional changes of great importance." *Swaine Turbine & M'fg Co. v. Ladd*, 2 Bann. & Ard. 488.—SHEPLEY, 1877.

206. For an example of change of form and proportions of a spinning spindle held to constitute patentable invention, see —. *Pearl et al. v. Ocean Mills et al.*, 2 Bann. & Ard. 469.—SHEPLEY, 1877.

207. "No more difficult task is imposed upon the court in patent causes than that of determining what constitutes invention, and of drawing the line of distinction between the work of the inventor and the constructor. The change from the old structure to the new may be one which one inventor would devise with the expenditure of but little thought and labor, and another



would fail to accomplish after long and patient effort. It may be one which one whose mind is fertile in invention will suggest almost instantaneously, when the skilled hand of the constructor will fail to reach the apparent simple result by the long and toilsome process of experiment. It may be one which, viewed in the light of the accomplished result, may seem so simple as to be obvious almost to an unskilled operative, and yet the proof may show that this apparently simple and obvious change has produced a result which has for years baffled the skill of the mechanical expert, eluded the search of the discoverer, and set at defiance the speculations of inventive genius."—*Id.*

208. Although the improvement may be a small feature of construction, yet if it has novelty and merit it will support a patent. *Miller & Peters M'fg Co. v. Du Brul*, 2 Bann. & Ard. 618.—SWAYNE, 1877.

209. Complainant's patented machine was for manufacturing augur bits, and in that machine, by the action of the swaging dies upon the bit held in the clamping dies, the floor-lips were drawn and spread into proper shape and the cutting edges brought into line with the thread of the pivot. A prior machine performed all of this except the rolling out of the floor-lips. The patent was sustained. *Bruff v. Ives*, 14 Blatch. 198.—SHIPMAN, 1877.

210. Complainants' patented improvement consisted of "a plug of tobacco having a hard label pressed into one of its faces, as specified." Of this improvement the court held that, "simple as it is, it nevertheless involved reflection and experiment to bring it to practical maturity, and its evident utility, indicated by its prompt displacement of other identifying devices, and its very extensive use, even by the respondents, strongly attests its patentable merit." *Lorillard et al. v. McDowell et al.*, 2 Bann. & Ard. 531.—MCKENNAN, 1877.

211. An improvement in saw-mills "consisted of the combination of the saw with a pair of curved guides at the upper end of the saw, and a lever, connecting-rod or pitman, straight guides, and slides or blocks and crank-pin, or their equivalents, at the opposite end, . . . giving to the saw in its downward movement a rocking or rolling motion, by means of the combination of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw, with the crank-pin." In the device of a prior patent the saw was fixed at the upper end between two blocks, and

at an angle to the perpendicular of forty-five degrees or thereabouts; these were placed in grooved guides in which the blocks, with the saw attached, were arranged to slide; these guides were fastened to and supported by the saw frame; the top of the saw was fastened directly to a short rod connected to the extremity of a fly-wheel. The court found patentable novelty in the patent in suit. *Hamilton v. Rollins*, 5 Dillon, 495.—NELSON, 1877.

212. Where the last step in the process of manufacture is new, it impresses upon the whole method the character of novelty. *Klein v. Park et al.*, 3 Bann. & Ard. 145.—MCKENNAN, 1877.

213. Complainant's patented invention consisted in covering the tread of a carriage-step with vulcanized rubber clothing having an undulating surface, whereby projections of rubber were presented upward to receive the pressure of the foot, also providing a permanent surface to the step, resilient under the foot. In the prior art rubber had been used as a soling to stirrups and applied to shoe-soles; the prior art also showed iron treads with channels running to the margin, for doorsteps and the like. Complainant's patent was sustained. *Rubber Step M'fg Co. v. Metropolitan R. R. Co. et al.*, 3 Bann. & Ard. 252.—SHEPLEY, 1878.

214. In a printing-press the combination of a fixed knife with a sheath is patentable over a prior combination of a spring-knife with a sheath. *Bullock Printing Press Co. v. Jones et al.*, 3 Bann. & Ard. 195.—WHEELER, 1878.

215. "The slight change, obvious perhaps to an inventor, of admitting air to a meter, and using the meter-wheel as an air-pump, although it had before been used with similar machinery to increase the force of the gasometer, was a patentable invention." *Munson et al. v. Gilbert & Barker M'fg Co.*, 3 Bann. & Ard. 595.—LOWELL, 1878.

216. Ordinarily "mere change of material is unimportant, but when the question is, Who first completed the working device? the change of material by which the result is for the first time obtained is very important." *Foote v. Frost et al.*, 3 Bann. & Ard. 607.—LOWELL, 1878.

217. Complainant's patent was for a broom for railroad rails, with the face fitted to the shape of the rail. The court sustained the patent, saying: "It is not invention to change one well-known material for another, or to apply a well-known process, without some adaption more than every skilled mechanic could apply, to a new art or subject; but a change in the form of a machine or instrument, though slight,

if it works a successful result, not before accomplished in a similar way in the art to which it is applied, or in any other, is patentable." *Isaacs v. Abrahams*, 3 Bann. & Ard. 616.—LOWELL, 1878.

218. The improvement in complainant's patent in suit was to make a reed-board of an organ or the like, so that a third of the three sets of reeds should be acted upon instantly and simultaneously by the rush of air upon opening the valve; and this result was effected by placing two sets of reeds on the same horizontal plane, and placing the other set on an inclined plane, each with its base on the same level as the first and second sets. Previous to this improvement the same operation existed in reed-boards having three or more full sets of reeds, but did not exist before in a reed-board having three sets of reeds in a reed-board no larger than that theretofore used for full sets. Complainant's patent was sustained. *Burdett v. Estey et al.*, 15 Blatch. 849.—BLATCHFORD, 1878.

219. Complainant's patented improvement was: "The combination of gutta-percha and metallic wire in such form as to encase a wire or wires, or other conductors of electricity, within the non-conducting substance, gutta-percha, making a 'submarine telegraph cable,' at once flexible and convenient, which may be suspended on poles in the air, submerged in water, or buried in the earth, to any extent, for atmospheric and submarine telegraphic communication, and for other electric, galvanic, and magnetic uses, as hereinbefore described." Thereof the court said: "The claim is valid, even though a metallic wire covered with gutta-percha existed before the plaintiff's invention, if it was not known that gutta-percha was a non-conductor of electricity and could be used to insulate the wire. The use by the patentee of the wire so covered to conduct electricity was not a double use of the wire, even though the covered wire existed before, nor was it a use of it for a purpose at all analogous to any use before made of it, if such prior use of it was not to conduct electricity along the wire, and if it was not before known that gutta-percha was a non-conductor of electricity and could be used to insulate a metallic wire used as a conductor of electricity." *Colgate v. Western Union Telegraph Co.*, 15 Blatch. 365.—BLATCHFORD, 1878.

220. The use of gutta-percha instead of india-rubber to insulate a wire is not a mere change of material, not an obvious substitution, and is therefore patentable.—*Id.*

221. "When change of form produces a new and beneficial result, such a change may be

patentable." *Thatcher Heating Co. v. Carbon Stove Co.*, 4 Bann. & Ard. 68.—NIXON, 1878.

222. Complainant's patent was for a skirt protector, as a new article of manufacture, bound with or composed of enamel cloth or other waterproof material. A prior patent described a binding for skirts presenting an india-rubber or similar flexible edge intending to protect the skirt; this binding was a part of the skirt. Complainant's patent was upheld by the court as a patentable novelty. *Macdonald v. Blackmer et al.*, 4 Bann. & Ard. 78.—LOWELL, 1878.

223. The Sarven wagon-wheel consisted of a wooden hub mortised to receive each alternate spoke, the other alternate spokes being shaped at the base in the form of a wedge to fit between the alternates first mentioned; circular angle irons were then driven upon the hub, on the sides of the spokes, and then fastened together with small bolts through the spokes. Complainants' patented improvement had the mortised central hub and the metallic ring surrounding it—not two rings held together by bolts, but a single ring with its flanges connected by webs forming mortises into which the tenons of the spokes were driven. This latter improvement was held to involve patentable novelty. *Hall et al. v. Jones et al.*, 3 Bann. & Ard. 455.—NIXON, 1878.

224. Complainants' patented improvement in ornamental chains consisted in a box link having three or more perforated sides, each made of a separate piece of plated metal bevelled at its edges, so that, when the several sides were put together, they formed a mitre joint and were united by soldering from the inside of the link, the plated surface being on the outside. In this manufacture no gold or silver was wasted on interior plating. This construction was held patentable over a similar construction plated on both sides. *Simmons et al. v. Blackington et al.*, 3 Bann. & Ard. 481.—LOWELL, 1878.

225. The complainant's patented thing was a new and useful composition for a table beverage, consisting in a mixture of water, sugar, oil of wintergreen, cut in alcohol, brewers' yeast, and burned sugar. All of the ingredients had been mixed together before except the oil of wintergreen. The bark of birch-tree had also been used for flavoring beer. Complainant's patent was sustained. *Rogers v. Ennis*, 15 Blatch. 47.—BLATCHFORD, 1878.

226. Complainants' patent in suit was for a roofing fabric composed of a layer of bituminous material between sheets of saturated paper, increased in thickness by the addition of alternate layers of material and paper when and as de-

sired. A prior English patent was for a coating of layers of adhesive material and broken glass on paper and boards; another prior fabric was composed of a sheet of cloth between two layers of bitumen; a third prior fabric consisted of a central web of cloth covered on both sides with adhering layers of water-proofing, the outward side of one of which was covered with a layer of paper fixed thereto by contact, in a warm and plastic state; on the outward side of the other layer of water-proof was a layer of sand or its equivalent. The patent in suit was sustained. *Ready Roofing Co. et al. v. Taylor et al.*, 15 Blatch. 94.—WHEELER, 1878.

227. It is a patentable improvement to perforate with holes the shell surrounding the revolving beating instrument of a grain scourer and thus cause, by the action of the fan, the matter detached by the scourer to pass through such holes. *Hovves et al. v. McNeal*, 15 Blatch. 103.—BLATCHFORD, 1878.

228. "Where the patented thing is an entirety, consisting of a machine or product, the respondent cannot escape the charge of infringement by alleging or proving that a part of the thing patented is found in one prior patent or machine and another part in another prior patent or machine, and from the two or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the improvement in question." *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

229. "The patent law protects simplicity and economy of construction, as against prior complex and expensive combinations." *Gottfried et al. v. Phillip Best Brewing Co.*, 5 Bann. & Ard. 4.—DYER, 1879.

230. "It is a pertinent question, if the mechanism described in the prior patent was substantially the same as complainants', organized and capable of operating substantially in the same way, why, during the period that the former was known to the world, it has not been applied to the same use as complainants'."—*Ib.*

231. "Any prior machine which would not produce substantially the same results as the one patented could not be substantially the same machine, no matter how strongly the prior machine may resemble the patented machine in its construction."—*Ib.*

232. "Mere change in the form and proportions of a well-known instrument or machine, however great, will often be held merely colorable or unessential. The inquiry is whether that indescribable quality called invention has been employed in making the change." *Miller's Falls*

*Co. v. Backus*, 5 Bann. & Ard. 53.—LOWELL, 1879.

233. Although metallic springs having a parallel number of strips were old, it was held patentable novelty to make a spring of a parallel number of strips bolted together. *Ladd v. Tucker M'fg Co.*, 4 Bann. & Ard. 344.—LOWELL, 1879.

234. Complainants' patent in suit was for an improvement in railroad switches and the claims were for combinations, the new element of which was certain rail sections. Prior switches lacked the rail sections. The patent was sustained. *Cooke et al. v. N. Y. Central & Hudson River R. R. Co.*, 4 Bann. & Ard. 398.—BLATCHFORD, 1879.

235. Where an apparently simple article was attained only after various trials and tests, and where many patents had been granted upon attempts approaching the same object, such facts are conclusive of the exercise of patentable invention. *Campbell v. James et al.*, 17 Blatch. 42.—WHEELER, 1879.

236. A claim of complainant's patent in suit was: "I claim a metallic cuspidor having a heavy base, A, and a light upper portion B, C, formed and combined substantially as and for the purposes herein set forth." Prior to this invention many articles had been made of three or more pieces of sheet metal joined together by horizontal seams. Lead bottoms had been used on other articles. This patented cuspidor was very successful in the market. Patentable novelty found to be present. *United States Stamping Co. v. King et al.*, 17 Blatch. 55.—BLATCHFORD, 1879.

237. Corrugating a known form of nail may amount to patentable invention. *Dunbar et al. v. Albert Field Tack Co. et al.*, 4 Bann. & Ard. 518.—LOWELL, 1879.

238. "The patent law requires the presence of what it calls invention, as contradistinguished from constructive ability; but it furnishes no test, for all cases, by which they can be discriminated. The decision does not necessarily depend upon the amount of thought, or even experiment, which may have been had in reaching the result. Thus, if an old machine or process is put to a new use, invention is positively excluded, although the new use may apparently be very remote from the old, requiring experiment to ascertain its practicability; and although the actual operation of the machine or process may not be exactly the same in the new as in the old application, provided no new means are, in fact, employed."—*Ib.*

239. Complainant's patent in suit was for

"combined dead-beat and recoil escapement made by bending from flattened steel." The article of the prior art was not made by bending, and the patent was sustained. *Terry Clock Co. v. New Haven Clock Co.*, 4 Bann. & Ard. 121.—SHIPMAN, 1879.

240. A successful result where previous experimenters wanted to obtain the result but failed leads to the conclusion that the patentee was not merely contending with mechanical difficulties, but that he had a problem which required the skill of an inventor to solve.—*Id.*

241. It seems that employing rubber packing in the seam between the ends of the staves of a tub and a cover extending over the entire tub, when others had employed paste or canvas, amounts to patentable invention. *Van Marter v. Miller et al.*, 15 Blatch. 562.—WALLACE, 1879.

242. "An invention is not like a will, depending on intention. It is a fact, and, if the fact exists, it does not appear to be material whether it came by design, or accidentally without being bidden." *Badische Anilin & Soda Fabrik v. Cochrane et al.*, 16 Blatch. 155.—WHEELER, 1879.

243. By the court: "Many chairs have been made that resembled the plaintiff's in many particulars, and which might easily have been modified so as to embody his invention; but they do not appear to have been so modified before his time." "Invention often involves a new result, first thought of by the patentee; and in such cases the fact that the mechanical changes he has made are not difficult is often unimportant." *Stewart v. Mahony*, 5 Fed. Rep. 302.—LOWELL, 1879.

244. Complainant's patented cutting attachment for a sewing-machine differed somewhat from former cutting attachments, and had some utility over them. The change held patentable. *Barber v. Hallett*, 10 Fed. Rep. 130.—LOWELL, 1879.

245. The addition of pulverized quartz to a former existing soap in order to produce a scouring soap is a patentable invention. *Eastman v. Hinckle et al.*, 5 Bann. & Ard. 1.—BUTLER, 1879.

246. A concave flange arranged on the leg of a table or similar article and coated on the under side with chalk as a barrier to insects is a patentable invention, although the use of the concave flange is old and the use of chalk as a barrier to insects is old. *Strong, Ex parte*, 17 O. G. 446.—CARTTER, 1880.

247. A skirt protector of water-proof material to hang inside and below the skirt, to protect

the same, is patentable over a dress facing of the same material used inside of the dress. *McDonald v. Shepard et al.*, 4 Fed. Rep. 228.—LOWELL, 1880.

248. By the court: "It is said that fastening horizontal plates together by a bolt and nut, as these are, was old and well known before Kelly's invention, which is doubtless true; but it was not a known method of forming a head for a burner to a gas-stove to make use of such plates." *Sharp v. Tiff*, 18 Blatch. 132.—WHEELER, 1880.

249. Complainants' rotary sand-paper holder for finishing shoe-soles was "a cylinder formed of two halves hinged together; around each half sand-paper was wrapped, and its edges were brought together on the inside of the cylinder and kept tight by pins and dowels; journals were shown to which each end of the cylinder was attached by screws." The old form of holder was solid, with the sand-paper tacked on. A hand-tool, elliptical in form, of two halves hinged together and held together by the hand was old. The patented device was held to exhibit patentable invention. *Buzzell et al. v. O'Connell*, 4 Fed. Rep. 325.—LOWELL, 1880.

250. A patented ratchet-wrench had the advantage, over the ratchet-wrench attempted to be proved in the prior art, that the operating lever would take and hold fixed positions, while the lever of the prior art was liable to be turned too far either way and to require attention when adjusted. *Held*, that the patented wrench exhibited patentable invention. *Sinclair et al. v. Backus*, 4 Fed. Rep. 539.—LOWELL, 1880.

251. Where differences are minute, the fact that the patentee's improvement gives advantages in "work" is evidence of the exercise of patentable invention. *Dunbar et al. v. Estabrook et al.*, 4 Fed. Rep. 545.—LOWELL, 1880.

252. Although wire fences, including those of strands twisted together, were old, and fences armed with spikes were old, a wire fence armed with barbs is patentable. *Washburn & Moen M'fg Co. et al. v. Haish*, 10 Bissell, 65.—BLODGETT and DRUMMOND, 1880.

253. "If there is any invention required, then the law will not attempt to measure its extent and degree." . . . "In the absence of any other test, the courts have seemed to assume that the fact of the acceptance of a new device or combination by the public, and putting it into extensive use, was evidence that it was the product of invention."—*Id.*

254. Complainant's patent was for "the employment of finely powdered flint, quartz, or feldspar, mixed with oil or other fluent sub-

stance," as a wood-filler. A prior patent (defendants') was for "the use of silicious marl or infusorial earth for the purpose of filling and polishing wood." Powdered rotten stone and the like had been previously used for the same purpose. Defendants infringed the first-mentioned patent and attempted to justify under the second, showing that the materials mentioned in both patents were chemically alike. Complainant's material had the advantages of being non-absorbent and of being angular in its particles. *Held*, that complainant's patent was not anticipated by defendants'. *Bridgeport Wood Finishing Co. v. Hooper et al.*, 18 Blatch. 459.—SHIPMAN, 1880.

255. The patentee of a horse-rake was the first to utilize the entire power of both wheels, at the middle of the rake-head, in tilting the rake. Power had thus been applied for running harvesters, etc. The tilting device, of itself, was old. But the union of the two features was held patentable. *Wisner et al. v. Grant et al.*, 7 Fed. Rep. 485.—WALLACE, 1880.

256. A car wheel having two arches between the rim and the hub does not anticipate a wheel having one arch and a plate. *Atwood v. Portland Co.*, 10 Fed. Rep. 283.—LOWELL, 1880.

257. Billings and Bissell had made certain full-sized beds which Farnham saw before beginning upon his afterward patented invention. In that patented invention he embodied ideas which were in the Billings and Bissell beds. The court said thereof: "What Billings and Bissell may have done may have suggested to Farnham the device he finally adopted; but this does not invalidate the patent. He seems to have been the first to achieve success, and . . . what these others had done should not defeat his patent." *Whittlesey et al. v. Ames et al.*, 9 Bissell, 225.—BLODGETT, 1880.

258. A prior structure—in time-locks—had a dial with a series of holes in it, and a single pin which was to be placed in one or the other of the holes according to the time when it was desired to unlock. An expert testified that by the use of a succession of duplicate pins the lock-bolt could be held unlocked for a desired time and then allowed to lock, and that this use of the duplicate pins would be a matter of common mechanical skill. The court held otherwise. *Yale Lock Mfg Co. et al. v. Norwich Nat'l Bank*, 19 Blatch. 123.—SHIPMAN, 1881.

259. By the court: "Assertions by ingenious and able experts in the year 1880, after invention in safes has been greatly stimulated, of what could have been done by mechanical skill

prior to 1874, do not press with great weight on my mind."—*Id.*

260. If it be true that a prior structure for a different purpose would suggest the application made in the patent, yet if the new application required the power of inventing to adapt and apply it, "there is all the invention which the law requires."—*Id.*

261. The above was said of a time-lock for safes which differed from prior chronometric devices for other purposes mainly in a "dog" required between the time mechanism and the bolt-work.—*Id.*

262. Combination key-locks being old and clock-locks being old, it was held a patentable combination to combine a key lock and a clock-lock upon the same safe doors and same bolt-work.—*Id.*

263. The substitution of an intermittent rotary seed-wheel for an oscillatory seed-wheel will support a patent. *Brown v. Deere et al.*, 2 McCrary, 422.—TREAT, 1881.

264. Complainant's patented combination of blower, ice-chest, and pipes was designed to "equally distribute" the air in the apartment to be cooled. A prior structure had the combination, except the feature of equal distribution. Patent sustained. *Bate Refrigerating Co. v. Toffey et al.*, 6 Fed. Rep. 514.—NIXON, 1881.

265. The claim of a patent was: "As an improved article of manufacture, a feather duster having the stems of the feathers split longitudinally and a part thereof severed from the remaining part, substantially as specified." The inventor had been endeavoring, while getting up this patent, to make the stems of the feathers limber by the use of chemicals; his wife suggested splitting the stems, and this mode was adopted. This suggestion was held not to invalidate the patent. *National Feather Duster Co. v. Hibbard*, 11 Bissell, 76.—BLODGETT, 1881.

266. "The invention of plaintiff consisted in numbering or lettering each galley holder, and putting a series of pins and hooks, with corresponding letters or numbers, upon the upper part of this piece of furniture." *Held*, patentable. *Brainard v. Pulsifer et al.*, 7 Fed. Rep. 349.—LOWELL, 1881.

267. The prior art, as regards lawn sprinklers, showed a rotating rose containing a semi-globular chamber, with ridges indented in it and holes in one side of those ridges. Complainants' rose differed therefrom in having a circular chamber, with standing holes and no ridges. Patent sustained. *Pennington et al. v. King*, 7 Fed. Rep. 462.—LOWELL, 1881.

268. "An arrangement is none the less an

invention because it brings into operation the laws of nature." *Hammerschlag v. Seamoni*, 7 Fed. Rep. 584.—BLATCHFORD, 1881.

269. Glassware graduated on its inner face is patentable over glassware graduated on its outer face, and over metalware graduated on its inner face. *Hobbs et al. v. King et al.*, 8 Fed. Rep. 91.—ACHESON, 1881.

270. Complainants' patented buckle was hinged to the same middle cross-bar to which the tongue was hinged, and the plate had two prongs to go through the strap and bend toward each other at the points. The prior art showed a buckle the same, "except that the permanent connection with the straps was not made by clamping, but by inserting the end of the plate, which is formed with two projections, into a slit, and turning it half round;" also another buckle the same except it had "a metal box to receive the . . . end of the strap." Patent sustained. *Emerson et al. v. Howe*, 8 Fed. Rep. 327.—LOWELL, 1881.

271. "In . . . patents for small articles slight differences are often important; and, if such things are patentable at all, it must almost always be in virtue of a more useful adaptation to the needs of commerce by small changes of structure, which in a great machine might be merely alternate modes of reaching a part of a general result."—*Id.*

272. By the court: "Much is said in the evidence on the part of the defendants as to the obvious character of this or that arrangement, and that any mechanic would know enough to do this or that. This is the often-repeated story, in belittling inventions. The invention consists primarily in finding out what mechanical operation is necessary to produce the practical result arrived at. When such operation is hit upon, the mechanical work is easy. It is easy, when the mechanical operation is seen, to say that it was obvious that certain mechanical arrangements would effect it; but mechanical arrangements are tried and tried in vain to reach a practical result, because the mechanical operation which is to effect such result is not yet seen. In looking at the completed thing, the mechanical operation is there; but the inventor, though he knew all about cams and levers and other mechanical arrangements, did not have in advance before him the coveted mechanical operation." *Wooster v. Blake et al.*, 8 Fed. Rep. 429.—BLATCHFORD, 1881.

273. When the results following a change are very marked it evidences the presence of patentable invention.—*Id.*

274. It is not material that the inventor was

not entirely successful with the invention before he patented it, so long as the invention worked successfully afterward. *Am. Bell Telephone Co. et al. v. Spencer et al.*, 8 Fed. Rep. 509.—LOWELL, 1881.

275. Complainants' patented package for carrying eggs had rows of cells, leaving an outer row all around next the box, of which the box formed the wall. The prior art showed these boxes with cells for other articles, but none with interior cells having a row of wall cells all around. Patent sustained. *Coburn et al. v. Schroeder et al.*, 19 Blatch. 377.—WHEELER, 1881.

276. "In sewing-machines having bracket-arms, tension was given to the thread by a thumb-screw on the face-plate, accessible with convenience to the left hand of the operator, working a lever of the third order, made elastic to relieve against the action of the thumb-screw, and connected by a standard passing through the inner with the outer one of the two disks, on the face-plate, between which the thread passed." Complainant's patentee "continued to adjust the disks by a thumb-screw on the top of the face-plate, readily accessible to the right hand as well as to the left of the operator, working an elastic lever of the first order inside the face-plates and connected in the same manner as the other with the disks." The change held patentable. *Singer M'fg Co. v. Henry Stewart M'fg Co. et al.*, 8 Fed. Rep. 920.—WHEELER, 1881.

277. Duplication of parts, resulting in improved operation, is patentable. *Shannon v. J. M. W. Jones Stationery & Printing Co.*, 10 Bissell, 498.—BLODGETT, 1881.

278. A patent was for a process of preserving meats, "a combination comprising two elements or constituents: [1] enveloping the meats in a covering of fibrous or woven material; and [2] subjecting the same to the action of a continuous current of air of suitably low or regulated temperature. Neither was new." The result was an improvement in the appearance of the meat, and the improvement was held patentable. *Bate Refrigerating Co. v. Gillett et al.*, 9 Fed. Rep. 387.—NIXON, 1881.

279. Complainants' patented head-covering consisted "of a support of buckram or the like, a top layer of flock, and a canton flannel or other similar lining." The prior art showed these fabrics used in various combinations, but none precisely like that of complainants, which was held patentable. *Selden et al. v. Stockwell Self-Lighting Gas-Burner Co.*, 19 Blatch. 544.—BLATCHFORD, 1881.

280. The horizontal band of wire bird-cages had been held in place by looping the vertical wires through the band and holding it there by a key. Complainant held the band in place by a bend in the vertical wire. The difference was held so broadly patentable as to underlie all forms of holding the band in place by bending the vertical wires. *Maxheimer v. Meyer et al.*, 20 Blatch. 17.—WHEELER, 1881.

281. The invention in dispute was a pronged tin label pressed into the surface of a plug of tobacco to denote the maker, the quality, etc., to the consumer. Screws, nails, coins, and other similar things pressed into plugs of tobacco for other purposes, initial letters and trade names impressed into some plugs of a lot, and tin labels for the corks of bottles were old. The patent was sustained. *Lorillard & Co. v. Dohan, Carroll & Co.*, 20 Blatch. 63.—WHEELER, 1881.

282. By the court: "The fact that the defendant incurs the hazard and expense of a patent suit, rather than give up using it, shows that, in his judgment, it is an improvement upon any of the other basins in use." *Stockton v. Maddock*, 10 Fed. Rep. 132.—NIXON, 1881.

283. Where a patent is granted for a machine, and also a later patent to the same party for a product made by the machine, the machine is not open to the public to use, after the machine patent expires, for making the product in question. *McKay et al. v. Dibert*, 5 Fed. Rep. 587.—NIXON, 1881.

284. That all the elements of a patented combination may be singly found in prior structures is not a pertinent fact. "It will not answer to say that any mechanic might have selected the parts and combined them. . . . The fact that no mechanic did select and combine the parts, . . . notwithstanding the great need for it, is a sufficient answer to the suggestion." *Dederick v. Cassell et al.*, 9 Fed. Rep. 306.—BUTLER, 1881.

285. Simple but useful differences, as compared with the prior art, are patentable. *Searles v. Bouton et al.*, 20 Blatch. 426.—WHEELER, 1882.

286. A perforated rubber disk, for insertion in a whip-socket, was old. The improvement made by complainant's patentee consisted in cutting away portions of the edge of such disk so that it kept more firmly in its seat. The improvement was held patentable.—*Id.*

287. Hat-brims containing straight untwisted wires were old. Giving a permanent twist to a resilient wire was old. A hoop for hat-brims made of twisted wire whereby a droop was attained, was held to embody invention. *Mallory*

*Mfg Co. v. Marks et al.*, 20 Blatch. 32.—BLATCHFORD, 1881.

288. "Almost all inventions at this day, that became the subject of patents, are the embodiment and adaptation of mechanical appliances that are old. In that consists the invention. . . . It is easy, after the desired thing is obtained, to see how an old thing could have been adapted or altered." *Crandall v. Walters et al.*, 20 Blatch. 97.—BLATCHFORD, 1881.

289. "A wire blind-fastener, having a horizontal spring arm A, projecting end G, inclined or brace arm E, intermediate coil spring E, and horizontal eye F, the same being constructed and adapted to be applied to the blind or shutter, substantially as and for the purpose set forth," was held patentable over a prior device, the same except that the coil operated differently; also over a prior device that did not have the inclined or brace arm to any useful extent; also over a prior device that had no coil. *Shedd v. Washburn et al.*, 9 Fed. Rep. 904.—LOWELL, 1882.

290. "It is always difficult to determine what degree of improvement takes a case out of the mere exercise of mechanical judgment and puts it in the domain of invention or discovery. The general rule upon the subject is that any change in the position of old elements, whereby new and better results are accomplished, is a sufficient exercise of the inventive faculty to warrant the issuing of letters-patent." *Stockton v. Maddock*, 10 Fed. Rep. 132.—NIXON, 1881.

291. The invention in dispute consisted of figures in printing type cast upon a block equal to two thirds the width of the body of the "em" [which was old], and, at the same time, increasing the size of the figure without increasing the size of the type of the letters and the body of the line [which was new]. Patent sustained. *Bruce v. Marder et al.*, 20 Blatch. 355.—WHEELER, 1882.

292. By the court: "This shows that he discovered and put to use what others skilled in the art had overlooked; that it was very desirable when known, and would very probably have been found out before if ordinary skill in that art could have discovered it."—*Id.*

293. The patented device was a sleeve-supporter consisting of two clasps, one at each end of a piece of webbing. The clasps were old. A webbing with unhandy catching devices at the end was old. The patent was sustained. *Lindsay v. Stein*, 20 Blatch. 370.—BLATCHFORD, 1882.

294. Making the teeth of frictional gearing a certain distance apart, where advantage flows

therefrom, is patentable. *Delamater et al. v. Woodruff*, 11 Fed. Rep. 414.—SHIPMAN, 1882.

295. The patented invention being the combination of a lever with the upright part of a whip-socket, it was held that prior devices having the same kind of a lever, but not in the same connection, did not anticipate the invention. *Searles v. Worden et al.*, 11 Fed. Rep. 501.—BROWN, 1882.

296. Complainant's patent was for "a rubber eraser having soft-finished erasive surfaces," being, in fact, produced by *tumbling* in a tumbling barrel. "This operation, which is called tumbling, was applied to manufactures of india-rubber before the date of the patent, but for a somewhat different purpose, and with somewhat different results. It seems to us, as at present advised, that the article produced by this process was patentable." *Lockwood v. Cutter Tower Co.*, 11 Fed. Rep. 724.—LOWELL, 1882.

297. By the court: "Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty, and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent." *Webster Loom Co. v. Higgins et al.*, 105 U. S. 580.—SUP. CT. 1882.

298. A prior device, which will not satisfactorily perform the work of the patented device, is not a substantial anticipation of the patent. *Brainard v. Cramme*, 20 Blatch. 530.—WALLACE, 1882.

299. Where complainant produced an article of manufacture [a silver-plated steel spoon], which was commercially and practically successful, by a succession of old processes which, though separately old, had not been practically grouped together in the order in which he used them, the patent for his process was sustained. *Wallace v. Noyes et al.*, 21 Blatch. 83.—SHIPMAN, 1882.

300. The accidental use of a process by a person who did not discover the special utility arising therefrom, will not anticipate a patent granted to him who discovers the utility of the patented

process. *Boyd v. Cherry*, 4 McCrary, 70.—MCCRARY, 1883.

301. Complainant's patented shutter-hinge being one where the opposite surfaces were first horizontal and then oblique so as to hold the shutter open, a prior hinge having the oblique surfaces at the beginning, was held not to be an anticipation. *Lull v. Clark et al.*, 21 Blatch. 95.—BLATCHFORD, 1882.

302. *Intimated*, that the number of parts of a structure may sometimes be an element of invention.—*Id.*

303. By the court: "It is the policy of the law to encourage useful improvements, and I am unwilling to hold that the complainant's device, consisting of old elements combined and operated as stated in the specification, practically superseding as it does, all other known means of pitching kegs and other small receptacles, and greatly superior, as it confessedly is, to Sibel's machine for pitching large casks, is the mere equivalent of the latter, or of any other device." *Gottfried v. Crescent Brewing Co.*, 13 Fed. Rep. 479.—GRESHAM, 1882.

304. "Although two devices, which consist of a combination of old parts, may attain, in their operation, substantially the same results, yet the mechanical construction of the two may be so different, and may be so far novel, that each may be patentable." *Allis v. Buckstaff et al.*, 22 O. G. 1705.—DYER, 1882.

305. Although long flexible tubes had been used for passing gas to an elevator-cab while in motion, that does not prevent the patenting of the combination of a similarly connected electric wire with the enunciator in such a cab. *Western Electric M'fg Co. v. Chicago Electric M'fg Co.*, 11 Bissell, 427.—BLODGETT, 1882.

306. Where the patented improvement consisted of a duplication of prior existing parts *plus* a slot, it was held that the change involved invention. *Starrett v. Athol Mach. Co. et al.*, 14 Fed. Rep. 910.—LOWELL, 1883.

307. By the court: "The accomplishment of the same result is not an anticipation unless it is done by the same means in substantially the same way." *Hall et al. v. Stearn et al.*, 15 Fed. Rep. 463.—WHEELER, 1882.

308. Although the edge-rolling of metal generally may be old, yet he who first makes a spring in that way, attaining a special advantage thereby, is entitled to a patent therefor. *Miller et al. v. Pickering*, 16 Fed. Rep. 540.—MCKENNAN, 1883.

309. The patented invention being an edge-rolled spring having one edge thicker than the other, the invention was not impugned by find-



ing in prior existence bars which might have been rolled into springs having one edge thicker than the other.—*Ib.*

310. The patented invention was a tip for the insoles of shoes made of muslin, stiffened with shellac, and pressed into shape by dies. Leather tips were old; vulcanized rubber tips were old; and it was old, as to other things, to press muslin into shape by dies. The patented tip was greatly appreciated by the trade. Patent sustained. *Shuter et al. v. Davis et al.*, 16 Fed. Rep. 564.—WALLACE, 1883.

311. Where the patented thing was closely approached by the prior art, but complainant offered evidence of practical tests to show practical advantages, and defendant met the evidence only by theories, the complainant's improvement was held patentable. *Crosby Steam Gauge & Valve Co. v. Ashcroft M'fg Co.*, 17 Fed. Rep. 85.—LOWELL, 1883.

312. Although mere change of location does not present a patentable improvement, yet changes of location may sometimes require the employment of inventive skill to attain the operation of the parts in the new location. *Moffett v. Cavanaugh*, 17 Fed. Rep. 336.—SHIPMAN, 1883.

313. When a machine combines the merits of two single prior machines, and has the advantage of convenience, simplicity, and cheapness, there is sufficient invention present to support a patent. *Fifield v. Whittemore*, 17 Fed. Rep. 513.—LOWELL, 1883.

314. By the court: "If a certain machine or organization is capable of a certain use only under unusual, and, as I may say, abnormal conditions, so that a person of skill and knowledge in the art to which it relates, or a person using the machine, would not, unless by accident, discover that it was capable of such mode of operation, it shall not be considered an anticipation of a machine or organization which is founded upon such mode of operation." *Am. Bell Telephone Co. v. Dolbear et al.*, 17 Fed. Rep. 604.—LOWELL, 1883.

315. Although coal-carts were old and chutes for conveying the coal from the cart were old, in cases where a shovel was used to transfer the coal from the cart to the chute, yet a combination of cart and chute dispensing with a shovel, is patentable. *Wood et al. v. Packer*, 17 Fed. Rep. 650.—NIXON, 1883.

316. A patent being for an adjustable support to prevent the bottoms of trays from sagging, it was held to be a "narrow invention, but patentable." *N. Y. Grape Sugar Co. v. Buffalo G. Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1883.

317. Although "a metallic tube or frame with

a neck and flanges for fastening purposes has been used for a considerable time upon harnesses as well as upon articles of tin ware," a combination of such devices, with a box-loop for harnesses, is a patentable invention. *Brighton v. Wilson*, 18 Fed. Rep. 378.—COLT, 1883.

318. The patent under consideration being for improvements in scoops, the court said: "The first scoops, so far as shown, were struck up, by hammering, in one piece, except the handle. Then they were made of sheet metal cut into shape in one piece, bent up, and fastened at the joints, ready for the handle. They had oval surfaces, and would not rest firmly and hold their contents securely when set down. The orator's scoop was made from one piece of sheet metal, cut into such peculiar shape that when bent up and fastened it had a flat surface on which it would rest when set down, full or partly full, so as to hold the contents securely; and the acting parts were well shaped and strengthened in making them of this form. To fix upon the necessary pattern for the sheet metal to produce this result, must have required calculation and experiment beyond the practice of mere mechanical skill and good workmanship. It seems to be entitled to be classed as invention." *Davis v. Fredericks*, 21 Blatch. 556.—WHEELER, 1884.

319. By the court: "A new thing was produced better for some purposes than had been produced before, although many skilled workmen had been practising the making of those known before, and making as good as they could without reaching this. He hit upon this while no one else did, although it appears to be easy of accomplishment. This success seems to be within the benefits of the patent law."—*Ib.*

320. An improvement in lanterns being the subject in dispute, the court said: "The difference between the lantern of the second patent and that of the first consists only in a new location of the hinge and spring-catch, and the employment of a horizontal guide to form the upper rim of the basket for the purpose of this new location. This change of location seems to have been a very simple thing after it was made; but, simple as it may have been, it remedied a great difficulty in the lantern of the first patent, and the advantages which it introduced were immediately recognized by the public. Others who were actively experimenting in the same field of improvement, failed to discover how readily this change could be made, and what advantages would result by its being made." *Adams et al. v. Howard et al.*, 22 Blatch. 47.—WALLACE, 1884.

321. Where the patentee accomplished by a bolt what required three bolts in the prior structure, he was held to have exercised patentable invention. *L. S. & M. S. R. R. Co. v. Nat'l Car Brake S. Co.*, 110 U. S. 229.—SUP. CT. 1884.

322. Complainants' patent was for a cluster of cake-pans united to a plate, having an aperture for each pan, by a double-seamed joint, formed from the rim of the cup, turned outward, and the edge of the plate about the aperture turned upward on the upper side of the plate. Cake-pans and other similar things had been fastened to plates in other ways, but the patented mode was the better one, and the patent was sustained. *Bell et al. v. U. S. Stamping Co.*, 22 Blatch. 27.—WHEELER, 1884.

323. The prior art showed welding steel to wrought iron, and rolling the same. The complainant's patented invention was for putting wrought iron in a mould and welding steel thereto by casting it upon the wrought iron. A sufficiency of invention was held to exist. *Doyle v. Spaulding et al.*, 27 O. G. 300.—NIXON, 1884.

324. A patented horse-nail differed from the nails of the prior art chiefly in a hardness that differed in degree at different points in the nail, those of the prior art being equally hard throughout. The patented nail was held to embody patentable novelty. *Globe Nail Co. v. U. S. Horse Nail Co.*, 19 Fed. Rep. 819.—NELSON, 1884.

325. Where a man takes an existing mechanism, uses it for a new purpose, and, in so using it, is required to make adaptations, a sufficiency of invention is present to support a patent. *Western Electric Dynamo Mach. Co. v. Arnoux et al.*, 20 Fed. Rep. 112.—WALLACE, 1884.

326. In complainant's patented improvement in friction clutches for hoisting machines, the patentee dispensed with one of the friction cones and flanges found in the prior art, rearranged and simplified the machine, and put the spring where it was needed. "This appears, after it was done, to have been easy to do; but no one did it before, and it makes a more compact, economical, and useful machine." *Mundy v. Lidgerwood M'fg Co.*, 20 Fed. Rep. 114.—WHEELER, 1884.

327. Where complainant's inventor took a pre-existing lock and bag-handle and attached them to the walls of a bag, so that the walls strengthened the frame at the handles, his patent was held to exhibit a sufficiency of invention. *Roemer v. Simon et al.*, 20 Fed. Rep. 197.—WHEELER, 1884.

328. All of complainant's patented combination, except a certain automatic valve mechanism, was to be found in a certain prior patent

which showed the valve operated by hand. The automatic valve devices were also old in principle. Their union was held to involve sufficiency of invention to support a patent. *Albany Steam Trap Co. v. Felthousen et al.*, 22 Blatch. 169.—WALLACE, 1884.

329. The fact that no such device as that of complainants' patentee was in existence or use before that patentee originated the same, although there was a wide necessity for its employment, and the device was of obvious utility, is strong evidence in favor of the presence of a sufficiency of invention in the patented thing. *Patterson et al. v. Duff*, 20 Fed. Rep. 641.—BRADLEY and McKENNAN, 1884.

330. Where the change that the patentee makes over the prior art was simple but effective, and other intelligent and skilful mechanics working toward the same end had failed to discover it, there is a sufficiency of invention exercised to support a patent. *Sewing Mach. Co. v. Frame*, 28 O. G. 96.—BUTLER, 1884.

331. Complainants' patent was for an improvement in box-loops for carriage tops. Defendant urged as an anticipation a prior patent for an improvement in gaiter fastenings. The court said that in size, shape, object, position, and mode of operation the gaiter-fastening apparatus was unlike that described in the patent, and would not, as the court thought, suggest the latter to a skilled mechanic, and it therefore held the prior patent not an anticipation. *Crandall et al. v. Parker Carriage Goods Co.*, 28 O. G. 369.—COXE, 1884.

332. Complainants' patented improvements in closets consisted in a ventilating flue from underneath, the operation of which had a tendency to draw fresh air down through the holes in the seat. A prior structure, where the air was admitted below the seat, having some tendency to force the heated air up through the holes in the seat, was held not to be an anticipation. *Cottier et al. v. Stimson et al.*, 20 Fed. Rep. 906.—DEADY, 1884.

333. In complainant's patented fire extinguisher there was a portable cylindrical vessel provided with a flexible hose-tube and nozzle, and in its use a gas was to be generated which would put the liquid contents under pressure, while at the same time the liquid contents were permeated by the gas. In the prior art there was a small portable, water-tight vessel into which atmospheric air had been pumped, so as to put the liquid contents (water and pearlash) under pressure. There was also in the prior art the well-known soda-water fountain, with provision for generating gas inside, but no hose

and nozzle and no suggestion of use for fire extinguishing. The patentee was held to have exhibited a sufficiency of invention. *Graham, Adm'r, v. Johnston et al.*, 21 Fed. Rep. 40.—MORRIS, 1884.

334. Complainant's patent was for a trunk fastener. Defendants offered in evidence prior patents for trunk-locks approaching very closely the patented device, and thereof the court said: "I am of the opinion that the Taylor patent ought not to be held invalid because of inventions that preceded it, which belong in the trunk-lock class." *Sessions v. Romadka et al.*, 21 Fed. Rep. 124.—DYER, 1884.

335. Complainants' patent was for covering the entire upper surfaces of a key-board of a piano or the like with a sheet of celluloid to be fastened to the wood with the usual celluloid cement, and afterward sawing out the keys. Previously the keys had been covered with ivory (each sheet separately), and in one instance the entire upper surface of two keys was once covered with a single sheet of ivory; but this was an exceptional feat, performed with an exceptionally beautiful and evenly grained piece of ivory. Patent sustained. *Celluloid M'fg Co. et al. v. Pratt et al.*, 23 Blatch. 367.—SHIPMAN, 1884.

336. Electric protection for the outside of houses will not prevent the granting of a legal patent for an adaptation of the same idea to safes. *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 21 Fed. Rep. 458.—WHEELER, 1884.

337. By the court: "The fact that these older devices, which it is now claimed were susceptible of being modified by mere mechanical skill into a machine in its operation and effect like that shown by the complainant's patent, rested without any such modification until the present patent was promulgated, is quite conclusive proof to me that it required something more than mere mechanical skill to produce what is shown in this patent." *Brown M'fg Co. v. Deering et al.*, 21 Fed. Rep. 709.—BLODGETT, 1884.

338. Though the difference between a patented thing and the prior art may be slight, yet if the difference involves a new and valuable result, it is patentable. *Hancock Inspirator Co. v. Jenks*, 21 Fed. Rep. 911.—BROWN, 1884.

339. Large sales of the patented thing by the complainant, coupled with the adoption of the patented thing by defendant, is strong evidence of patentability.—*Id.*

340. Although devices to be found in the prior art closely approach the patented device, yet, if

they are devoid of the feature which gives life and value to the patented thing, there is a sufficiency of invention in the patented thing, although the change from the prior art be apparently small. *Con. Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157.—SUP. CT. 1885.

341. "Criticism that an invention is so plain that it must be perceived by all, comes with poor grace from those who did not themselves perceive it." *McFarland et al. v. Spencer et al.*, 23 Blatch. 155.—COXE, 1885.

342. Complainants' patented improvement was a metal tenon for blind-slats consisting of a metal trunnion attached to a sheet to be affixed to one side of the slat. The prior art showed such a trunnion carrying a tenon fitting on the end of the slat; the prior art also showed such a trunnion with a forked strip embracing the end of the slat; the prior art also showed a shutter repaired with a tenon like complainants'. The improvement was, however, held patentable.—*Id.*

343. The patented improvement was a canopy for a child's carriage which could be set both forward and backward, and was held to exhibit sufficiency of invention over a prior structure, which did this imperfectly. *Parker, Trustee, v. Stow*, 23 Fed. Rep. 252.—SHIPMAN, 1885.

344. Complainant's patented fabric for collars and cuffs consisted of outer sheets of celluloid, and an interlining of textile or fibrous material. The suggestion had been made that celluloid in a liquid state might be coated upon textile fabrics, but that suggestion when carried out, was useless for the purpose in question, and was held not to anticipate the invention. *Celluloid M'fg Co. v. Crolithion Collar & Cuff M'fg Co.*, 31 O. G. 519.—COXE, 1885.

345. "A century of Reiss would never produce a speaking telephone by mere improvement in construction." *Am. Bell Telephone Co. v. Molecular Telephone Co.*, 23 Blatch. 253.—WALLACE, 1885.

346. Complainants' patent was for an improvement in a device for packing shoe-shanks upon a table after leaving the cutting and forming dies. Some similar contrivances were found in prior printing-presses and the like, but as they would not do the work of the device of complainants' patent, they were held not to anticipate that patent. *Jenkins et al. v. Gurney*, 23 Fed. Rep. 898.—COLT, 1885.

347. A barb for wire fences consisting of a serrated wheel being old, and another barb like the hub of a wheel with spokes being old, and another barb consisting of a diamond-shaped

plate being old, it still required invention to devise that form of barb which consists of a wire pointed at both ends and twisted around the wire.<sup>1</sup> *Washburn & Moen M'fg Co. et al. v. Grinnell Wire Co. et al.*, 24 Fed. Rep. 23.—BREWER, 1885.

348. Where it is doubtful whether an alleged improvement embodies invention, the fact that it is of great utility is fair matter for consideration in determining the fact of patentability. And where the comparison of the improvement with its predecessors shows it to have been the successful thing, that is conclusive evidence of patentability.—*Id.*

349. The invention patented to complainants consisted in subjecting steel wire springs of conical form to "spring temper heat—about six hundred degrees," for restoring the wire to its normal condition by producing a complete homogeneity of the metal. Substantially such a process had been used for tempering metal previously, but the court sustained the patentability of the invention for the said purpose. *Carey et al. v. Wolff et al.*, 23 Blatch. 92.—WHEELER, 1885.

350. A patent in suit was for a construction of collars and cuffs. The prior art showed a collar or cuff made of two layers of muslin, with the wearing edges folded to prevent unravelling and attain improved appearance, all cemented together by a mixture of starch, spermaceti, and indigo. The improvement of said patent was for a collar or cuff made of a single thickness of celluloid or other pyroxyline material, with the edges turned over upon itself and cemented down to form a hem. The patent was held to exhibit sufficiency of invention. *Celluloid M'fg Co. et al. v. Chrolithion Collar & Cuff Co. et al.*, 32 O. G. 383.—WHEELER, 1885.

351. A patented baby-jumper differed from the prior art principally in a backward curve of the suspension rod to avoid contact with the child, and this difference was held to be sufficient to support the patent. *Spoooner v. Dorn et al.*, 24 Fed. Rep. 700.—BLODGETT, 1885.

352. In a patented automatic fire-extinguisher the gist of the improvement consisted in locating the seal on the outer end of the water conduit. This, resulting in practical advantages, was held sufficient invention to support a patent. Defendant, in making this seal, used a semi-spherical cup in place of the patented flat cup, and its flanges pressed into the pipe instead of outside thereof; defendant was held to infringe. *Parmlee et al. v. A. Burritt Hardware Co.*, 24 Fed. Rep. 735.—SHIPMAN, 1885.

353. For an example of an arrangement of

leaves in a pocket check-book held patentable over former arrangements, and of a variation by defendant held to be an infringement, see —. *Norrington v. Merchants' Nat'l Bank*, 25 Fed. Rep. 199.—COLT, 1885.

354. The patent in suit being that to Dr. Adams for nickel-plating, it was held that Dr. Borttgers's prior laboratory experiments—his process never having gone into practical use—did not constitute an anticipation of the patent. *United Nickel Co. v. California Electrical Works*, 25 Fed. Rep. 475.—SAWYER, 1885.

355. The patent in issue was for collars and cuffs made from celluloid. The celluloid in sheets had previously been produced. A number of difficulties were overcome by the patentee in making the collars and cuffs, the court saying: "We do not regard this as a great invention, but we do consider it a very useful one;" and the patent was sustained. *Celluloid M'fg Co. v. Chrolithion Collar & Cuff Co.*, 25 Fed. Rep. 482.—COXE, 1885.

356. By the court: "A company of sportsmen enter a copse in search of game, a bird arises, seen plainly by a few; the others catch but a passing glimpse. Several shots are fired; some wide of the mark, others dangerously close. The pursuit begins and continues with varying fortune. The coveted bird is wounded by one of the sportsmen, and is almost within the grasp of another, but he alone who finally brings home the game is entitled to place it in his pouch."—*Id.*

357. The patented machine was for pouncing hat-bodies, and the claim in issue was for the combination of a rotary pouncing cylinder with a vertical supporting horn, wherein the horn was used to support the whole body during the operation of pouncing. A prior machine had a similar horn, but longer. The patent was sustained. *Nat'l Hat-Pouncing Mach. Co. v. Thom et al.*, 25 Fed. Rep. 496.—COLT, 1885.

358. Complainant's patented machine was for pouncing hats. A prior machine for polishing boot-heels was similar, and, although it could possibly be used for hat-pouncing, it was not shown that it could be so used satisfactorily, and the patent was sustained.—*Id.*

359. Complainants improvement as expressed in the claim was: "Fire or hydraulic hose of more than one ply composed of cotton, linen, or other analogous material, woven whole in a cylindrical or expanded form, with two or more weft threads interwound and packed with the woof (warp) threads, in concentric helical coils, one with another, and without any short bends, thus possessing substantial uniform strength and

a uniform appearance around its entire body, substantially as described." Of this the court said: "It required invention not of a high order to accomplish this, and the complainant is entitled to the benefit of all good results that have followed such a combination of old instrumentalities. That this is considerable is evidenced by the fact that fire-hose thus constructed has driven all the older forms from the market." *Reed v. Street*, 34 O. G. 339.—NIXON, 1885.

360. A gas-burner made of insulated material was old, but was not used in an electric lighting system. The patented improvement consisted in making a gas-burner for an electric lighting system of the same material, and providing a shoulder as a support for the conductors. The improvement was held to exhibit patentable invention. *Birdseye et al. v. Heilner et al.*, 26 Fed. Rep. 147.—WALLACE, 1885.

361. Complainant's patented machine consisted in the adaptation of a mowing-machine to a boat for the purpose of cutting grass, weeds, and the like, under water. A prior patent showed a common scythe-blade dragged under water at the stem of a boat; another patent showed the adaptation of a mowing-machine to cutting grass and weeds along the side of a railroad track by attachment to a car. Another patent was for a pile-cutting machine showing circular or reciprocating saws working under water. Complainant's device was held to exhibit patentable invention. *Piper v. Shedd et al.*, 26 Fed. Rep. 151.—BLODGETT, 1885.

362. The patentee's improvement in a fare-register had a tell-tale hand, which, when set with the trip-hand at zero, moved with it, indicating the true number of fares registered, and could not be set back to zero unless the trip-hand were also set there, and which, when the trip-hand was set only a part of the way back to zero, remained at the place where it stopped, thus indicating where the trip-register was started and showing any attempt to cheat. A prior thermometer had a hand on a dial to indicate the highest and lowest temperatures, and a steam-gauge had a similar hand. In neither the thermometer nor the steam gauge was there the combination of a tell-tale hand with a trip-register required to be set to zero at each trial. The fare-register was held to involve patentable invention. *Railway-Register M'fg Co. v. Steventh Ave. Railroad Co.*, 34 O. G. 921.—WHEELER, 1886.

363. Rotating moulds were old, the object of the rotation being the exertion of the centrifugal force on the molten material. A later inventor used the rotating mould not for the purpose of

the exercise of this centrifugal force, but for the purpose of depositing the molten metal in subdivided portions intermittently so as to allow gases to escape, and thus avoid blow-holes. The later invention was held patentable. *Adams et al. v. Bridgewater Iron Co. et al.*, 34 O. G. 1045.—COLT, 1886.

364. The feature of the patented invention in complainant's patent for a kerosene stove consisted in holding the chimneys between the upper and lower plates, so that the lower plate rested directly over the burners, and, as a general rule, contained the cones of the burners of the kerosene lamps while the upper plate furnished facilities for holding the cooking utensils. Various prior devices approached this patented construction, but the court said: "It may seem now to have been but a small matter to fasten the chimneys between these two plates, but I gather from the proofs that it marks the point between failure and success in this class of devices." *Adams & Westlake M'fg Co. v. Rathbone et al.*, 26 Fed. Rep. 262.—BLODGETT, 1886.

365. "It is quite common for those who are appropriating the results of another's labor or inventive genius to attempt to belittle the device so appropriated, and insist that it required no exercise of the inventive faculty to produce it." —*Ib.*

366. For an example of different devices in the prior art held not to anticipate complainant's patented door-check, see —. *Norton Door-Check & Spring Co. v. Elliot Pneumatic Door-Check Co. et al.*, 26 Fed. Rep. 320.—COLT, 1885.

367. In a patented bottle-washer there was organized for the first time the whole group of instrumentalities going to make a practical and complete bottle-washing machine. This group consisted of a water-supply-pipe, a brush or scraper rotated at the end of a shaft, and having the capacity of compression and expansion, a funnel-shaped mouth-piece, against which the neck of the bottle was to be placed, and a sleeve into which the brush was withdrawn and which would rotate with the brush when not in use, thus saving it from wear. Prior patents showed some of these devices, but in none of them were found the sleeve within which the brush was withdrawn and rotating with the brush, so as to protect it from wear. The patent was sustained. *Hoyt et al. v. Slocum et al.*, 26 Fed. Rep. 329.—COLT, 1886.

368. One McBurney took a patent for a packing for stuffing-boxes. The improvement of complainant's patentee consisted in adding to McBurney's packing an elastic packing or

cushion of vulcanized india-rubber, which not only rendered the whole more compact, and more elastic, but being compressed between the follower and the sides of the stuffing-box, acted as a spring to hold the packing continuously against the piston-rod, thus making a tight joint, which had not been attained under the McBurney invention; and the improvement was held patentable. *N. Y. Belting & Packing Co. v. Magowan et al.*, 34 O. G. 1159.—NIXON, 1886.

369. "Whether the thing produced is due to the genius of the inventor or to the mechanical skill of a workman is often a difficult question to determine. The line between them is not always clearly drawn. Invention indicates genius and a production of a new idea. Mechanical skill is applied to an idea and suggests how it may be modified and made more practical, and . . . , such mere modification is not patentable unless some new and useful result is secured."—*Ib.*

370. Where the sufficiency of an alleged invention is under discussion, it is a fact not to be overlooked, and has much weight, that the patented thing went at once into such extensive public use as almost to supersede all other articles of the kind. "Such a fact is pregnant evidence of its novelty, value, and usefulness, and accounts for the defendants' infringement."—*Ib.*

371. Combinations are "patentable where a new and useful result is produced by their joint action, or an old result in a cheaper or otherwise more advantageous manner. . . . An old result may be sufficient when it is produced by the combination in a cheaper or otherwise advantageous manner." *Railway Reg. M'fg Co. v. North Hudson County R. R. Co. et al.*, 26 Fed. Rep. 411.—NIXON, 1886.

372. Although a machine prior to the patented machine, and used for a different purpose than the patented machine, may contain mechanism similar to that of the patented machine, yet if it falls short of the capabilities of the patented machine it is not an anticipation thereof. *Hartford Mach. Screw Co. v. Reynolds et al.*, 26 Fed. Rep. 528.—SHIPMAN, 1886.

373. Complainant's invention was for a piston or bucket-pump having a base or inwardly extending flange cast therewith, and having a barrel whose length was not greater than the diameter thereof. There were prior pumps in which the diameter of the barrel was greater than the length, and there were also prior pumps with an inwardly extending flange at the bottom of the barrel, but in no prior pump was there to be found the inwardly extending flange of such

construction that it could be used wholly for the base of the pump, and thus do away with any frame-work. Complainant's patent was sustained. *Russell v. Laughlin et al.*, 26 Fed. Rep. 699.—COLT, 1886.

374. Complainant's patent for making parti-colored glassware consisted first in making amber-colored glass by the use of the known "gold ruby compound," then reheating a portion of it, and in that portion developing a ruby color. In the prior art there was a compound for an opal shade due to the mixture of bone with the glass. In the prior art there was another article of pink and white, but what the coloring agent was did not appear. In the old process of making amber-colored glass it was sometimes found that a portion of the article, which had escaped in some degree the reheating process, retained the amber color. The improvement was held patentable. *Libbey v. Mt. Washington Glass Co. et al.*, 26 Fed. Rep. 757.—COLT, 1886.

375. For an example of devices in the prior art, approaching, but held not to anticipate a claim for an improvement in permutation locks, see —. *Yale Lock M'fg Co. v. Sargent*, 117 U. S. 537.—SUP. CT. 1886.

376. Although the old fencing mask belonged to the prior art, a base-ball mask with head-rest and chin-rest is a patentable invention. *Thayer v. Spaulding*, 27 Fed. Rep. 66.—BLODGETT, 1886.

377. "A great majority of patents are for improvements in old and well-known devices, or on patented inventions. Changes in the construction of an old machine which increase its usefulness are patentable. . . . So a new combination of old devices, whereby the effectiveness of a machine is increased, may be the subject of a patent." *Cantrell et al. v. Wallick*, 117 U. S. 689.—SUP. CT. 1886.

378. "Two patents may both be valid when the second is an improvement on the first, in which event if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent."—*Ib.*

379. For an example of a mode of counterbalancing a drill-bar somewhat approximated in the prior art, but having substantial advantages, and therefore held patentable, see —. *Niles Tool Works v. Betts Mach. Co.*, 27 Fed. Rep. 301.—WALES, 1886.

380. "It has always been the law that a patentable invention, although new and useful, must be the result of something more than, and different from mere mechanical skill; but the

existence of novelty and utility in a patented thing was potent in the determination of the question of its patentability." *Celluloid M'fg Co. v. Comstock & Cheney Co.*, 27 Fed. Rep. 358.—SHIPMAN, 1886.

381. The decision in *Hollister v. Benedict & Burnham M'fg Co.*, "makes independent evidence of the existence of inventive skill, apart from the inferences of such existence which may be drawn from novelty and utility, to be of greater importance than has been understood heretofore."—*Id.*

382. Complainant's patented improvement consisted in covering the whole key-board of a musical instrument with a thin sheet of celluloid cemented thereon and then cutting out the keys. A continuous ivory key-board had been attempted but was practically and commercially a failure. Celluloid for single keys had been attempted and was also a failure. Complainant's patent was sustained, the court saying: "While the mind may hesitate whether one or the other line of argument predominates, I think that there was the creative faculty of invention in the abandonment of the ineffectual and mechanical attempt to make single celluloid keys in imitation of the ivory single keys, and in the conception of the idea of covering a whole key-board with a single celluloid sheet—an idea which, when embodied, turned into commercial success what had previously been only an unsuccessful theory in regard to a similar use of ivory."—*Id.*

383. A round ring for a hog's snout being old, a triangular ring to fit the snout and keep its place, is patentable. *Hill v. Biddle et al.*, 27 Fed. Rep. 560.—BUTLER, 1886.

384. "While it is true that the utility of a machine, instrument, or contrivance, as shown by the general public demand for it when made known, is not conclusive evidence of novelty and invention, it is nevertheless highly persuasive in that direction, and, in the absence of pretty conclusive evidence to the contrary will generally exercise controlling influence."—*Id.*

385. For an example of a combination of a number of old elements held patentable, see —. *Donoughe v. Hubbard et al.*, 35 O. G. 1561.—BRADLEY, 1886.

386. Complainants' patented improvement in gas and water-pipes was: "The combination of a composition of hard boiled tar and sawdust with wooden pipes, applied in the manner and for the purpose set forth." Pitch used for preserving wood was old; pitch had been used for coating wooden pipes; tarred pipes rolled in sand were old; and sawdust was known as an absorbent of sticky substances. Complainants'

patent was sustained. *Hobbie et al. v. Smith et al.*, 27 Fed. Rep. 656.—COXE, 1886.

387. The Bell telephone was not anticipated by the Reiss telephone since the latter could not be made to transmit articulated speech except by changes of some form in the instrument itself or by the employment of Bell's method. *Am. Bell Telephone Co. et al. v. N. I. Telephone Co. et al.*, 27 Fed. Rep. 663, *per curiam*, 1886.

388. "What constitutes invention, in the legal sense, is difficult of exact definition in terms. Where, however, an old device or machine in general use, with acknowledged serious defects, which have long been endured because no one has previously discovered a means of obviating them, is taken in hand, and, by changing its form or structure, they are removed, and a different and improved result obtained, it may safely be affirmed that the change required invention. Where the improvement, and consequent public benefit, is great, very little evidence of invention is required." *Asmus v. Alden*, 27 Fed. Rep. 684.—BUTLER, 1886.

389. Dispensing with the forehearth of an iron smelting furnace, and thereby converting it into a closed breast furnace, is patentable invention.—*Id.*

390. In that class of ornamental chains known as "roller chains" solder was used in fastening the wire of the rings, or the wire straddled the adjacent links of the outside links, and so projected beyond the edges of the chain. Dispensing with the use of solder, and confining the connecting wire within the edge of the outside rings was held to be a patentable invention. *Church v. Spaulding*, 28 Fed. Rep. 101.—CORT, 1886.

391. "A new combination of old parts, for attaining an object, may sometimes, and, perhaps, often, be so obvious 'as to merit no title to invention' and, in ordinary cases, while novelty and utility are evidence of inventive skill, there should be other evidence to show that it existed. This is often found in the machine, which itself shows that it came from a creative mind, or the necessary evidence may sometimes be found in the history of the invention." *Enterprise M'fg Co. v. Sargent et al.*, 28 Fed. Rep. 185.—SHIPMAN, 1886.

392. Although the machine in question may be a simple one, yet where it is manifest that the inventor accomplished a new and beneficial result by means which other people had been near to, and apparently wanted to find but failed to see, a patentable invention has been made.—*Id.*

393. Where the inventors of a process were the first that were actually successful in a long attempt to make an article which should be both

attractive and useful, there is sufficient evidence present of patentable invention. *Celluloid M'fg Co. v. Am. Zylonite Co. et al.*, 28 Fed. Rep. 195.—SHIPMAN, 1886.

394. Complainants' patent in suit was for an improvement in paper for card and circulars. The purpose of the invention was to supersede the old method of pasting separate cards upon wedding invitations and the like, by substituting therefor a card having two or more folds upon which the desired number of panels to represent cards were embossed or pressed. On these raised panels the printing was done, the unsightly cavities produced by the embossing being concealed from view by one of the flaps. The art of embossing was old, and cards having smaller printed cards pasted upon them were old. The court found that the improvement presented patentable novelty. *Butler et al. v. Brainbridge et al.*, 37 O. G. 1124.—COXE, 1886.

395. On the question of sufficiency of invention "it is by no means easy to give an entirely satisfactory answer. Each case must depend upon its own facts and circumstances. The perplexities which surround such controversies cannot always be solved by an examination of adjudicated cases. They serve to illuminate the paths to be traversed, but he who desires to select the right one must depend largely upon his own judgment."—*Id.*

396. Although the improvement may be such that one may think that a mechanic skilled in the art might have produced it if he had happened to have thought of it, yet, "it is the presence of a thought like this which raises an ordinary mechanic to the plane of the inventor. Invention requires thought; mechanical skill does not. The one is the result of mental, the other of manual, action. Grant that the invention is a simple one, that when viewed from our present standpoint it is hard to understand why the idea did not occur to some one long before, and yet the fact remains that it never did, though something of the kind was long wanted."—*Id.*

397. When it is argued that the change in a patented device over the prior art requires merely mechanical skill, then in view of conceded advantages the fact that no prior patent suggested the entire combination, and no skilled mechanic ever thought of the improvement, if a doubt exists upon the question, it should be resolved in favor of the patent. *Dudgeon v. Watson et al.*, 29 Fed. Rep. 248.—COXE, 1886.

398. Although a prior device might be imperfectly used for the purpose of the afterward patented device, yet, if such use was never intended or practised the patent will hold. *Consolidated*

*Bunging Apparatus Co. v. Woerle*, 29 Fed. Rep. 449.—BLODGETT, 1887.

399. The patent in suit was for a circular knitting machine for the manufacture of plush-back stockinet. In the old machine the thread was raised by a blending wheel which worked imperfectly and was of little value. The present improvement consisted primarily in combining with the other parts of the machine a divided push-back and a landing and a pressure wheel situated where the push-back was intermitted, forming a successful mechanism. Wheels similar to that used in the improved machine were old in common knitting machines, but the new combination was held patentable. *Osborne v. Glazier*, 31 Fed. Rep. 402.—BUTLER, 1887.

400. Saturating the textile covering of electric wires with paint, and thereby producing a non-combustible insulating covering, is not anticipated by textile covering saturated with paraffine and india-rubber, which are combustible. *Ansonia Brass & Copper Co. v. Electric Supply Co.*, 32 Fed. Rep. 81.—SHIPMAN, 1887.

401. The holding of a crude mass of celluloid firmly down upon a grooved plate, then heating and cooling it under pressure, then cutting it while still warm and plastic into sheets, then stretching these sheets on a form to dry, smoothly, constitutes a patentable invention. *Celluloid M'fg Co. v. Am. Zylonite Co. et al.*, 31 Fed. Rep. 904.—GRAY, 1887.

402. The patent in suit was for a fire-proof flooring composed of hollow arched tiles resting upon flanged iron girders, and the novelty of the invention consisted in substituting a filling strip, which was practically a soffit tile, for the mortar previously used, adapted for a fire-proof floor and ceiling. The novelty of the patent was sustained. *Fryer v. Mutual Life Ins. Co.*, 30 Fed. Rep. 787.—WALLACE, 1887.

403. Where defendant has a patent of his own, which is practically for the same improvement as that of complainant's, and defendant justifies his acts under his own patent, it hardly lies with defendant to insist that there is no patentable novelty in complainant's improvement.—*Id.*

404. An improvement, as expressed in the claims of the patent, was: "(1) The herein described method of inserting and supporting artificial teeth, which consists in attaching said artificial teeth to continuous bands fitted and cemented to the adjoining permanent tooth, whereby said artificial teeth are supported by said permanent teeth without dependence upon the gum underneath. (2) An artificial tooth cut away at the back so as not to present any contact with the gum except along its front



lower edge, and supported by rigid attachment to one or more adjoining permanent teeth, substantially as and for the purpose set forth." Prior to this invention there was an artificial denture consisting of three teeth fastened upon a backing of metal; the tooth at each end of this denture was provided with a pin; these pins entered into holes drilled in the natural teeth, and in this way the denture was held in place. In another prior device the artificial teeth were attached to metallic bars, which bars were secured at either end to natural teeth by forming cavities in the natural teeth, inserting the ends into the cavities, and then filling the cavities with gold. The improvement of the patent was held to be patentable. *International Tooth Crown Co. v. Richmond et al.*, 30 Fed. Rep. 775.—WALLACE, 1887.

405. "It is not difficult after the fact to show by argument how simple the achievement was, and, by aggregating all the failures of others, to point out the plain and easy road to success. This is the wisdom after the event that often confutes the invention, and levels it to the plane of mere mechanical skill."—*Id.*

406. The patent in suit was for a process of making paper bags. Complainants' inventor turned over the whole bottom of the bag, after the leading corner of the diamond fold was cross-folded. Defendants urged that all that this inventor did was to fold the body of the bag with a flap in making the second cross-fold, and this was not invention but was within the common knowledge and skill of everybody. The court found this to be invention. *Eastern Paper Bag Co. et al. v. Standard Paper Bag Co. et al.*, 30 Fed. Rep. 63.—COLT, 1887.

407. "The most marked improvements in the arts are often the simplest, when . . . discovered."—*Id.*

408. The improvement under discussion, as expressed in the claim, was: "A collar or cuff made of celluloid or other pyroxyline material from a single thickness of material having the edges turned over onto itself to form a hem, substantially as specified." This was held to be patentable. *Celluloid M'fg Co. v. Zylonite Novelty Co.*, 30 Fed. Rep. 617.—WALLACE, 1887.

409. For an example of a pump approached by the prior art, but held to be patentable, see —. *Temple Pump Co. v. Goss Pump & Rubber Bucket M'fg Co. et al.*, 30 Fed. Rep. 440.—BLODGETT, 1887.

410. The patent in suit was for a drinking-trough, for animals, having a supply pipe, valve and float in the interior, covered by a case, with open water on all sides and preventing injury

to the mechanism. This was held patentable over devices which had the float, etc., at the surface. *North American Iron Works v. Fiske*, 30 Fed. Rep. 622.—WHEELER, 1887.

411. The patent in suit was for an improvement in the art of making beer, and the claim in issue was: "The process of preparing and preserving beer for the market, which consists in holding it under controllable pressure of carbonic-acid gas from the beginning of the kraeusen stage until such time as it is transferred to kegs and bunged, substantially as described." Thereof the Supreme Court said: "The Circuit Court in its opinion (20 Fed. Rep. 725, 733) held that the most that could be claimed by the patentees was that they applied the controllable pressure created by the carbonic-acid gas in a state of fermentation at an earlier stage than was before known; that the essential parts of the apparatus used were known before; that the same controllable pressure had been applied at various stages of the manufacture; that the application at one stage of the condition of the beer instead of another would seem not to involve anything more than a mere mechanical change which could be employed by any one skilled in the art, and that the claim of the patent for a particular process, irrespective of the mechanical devices claimed (which the defendants had not used), could not be sustained. But we think that in this view the court erred, and that the third claim of the patent is a valid claim for the process covered by it and described in the specification." *New Process Fermentation Co. v. Maus et al.*, 121 U. S. 413.—SUP. CT. 1887.

412. "An old machine or process, either patented or not, cannot be applied to a new purpose and patented, if its operations in the new purpose are the same as in the old, and producing the same results, because it lacks invention and novelty. So patents are not valid where the change from the old to the new device or process, and for which a patent is claimed, is only the result of the exercise of mechanical skill, because such exercise of skill is not invention. A patent for a device or process, used for one purpose, cannot be patented to be used in the same way for another similar purpose; but where a new and useful result is produced thereby it is patentable." *Byerly v. Cleveland Linseed Oil Works*, 31 Fed. Rep. 73.—WELKER, 1887.

413. The patent in suit was for a cluster of bake-pans, the pits of which were joined to the plate by a double seam joint peculiarly adapted to the purpose. Pits in the bottom of a wash-boiler joined in the same manner were relied

upon to defeat the patent. The court sustained the patent. *Bell et al. v. United States Stamp- ing Co.*, 32 Fed. Rep. 549.—WHEELER, 187.

414. A patent for a composition for casting ornamental figures consisting of paraffine, stearine, and pulverized sugar is not anticipated by a composition of paraffine, beeswax, and gypsum. *Kiesele v. Haass et al.*, 32 Fed. Rep. 794.—COXE, 1887.

415. The existing artesian well, and the instruments used in making the same, did not anticipate the Green driven well. *Eames v. Andrews et al.*, 122 U. S. 40.—SUP. CT. 1887.

## JOINDER OF INVENTIONS.

### CASES.

1. A patent cannot embrace various distinct improvements. A patent cannot be for combination and also for parts severally. *Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

2. Doubted that a patent—granted under the general act—can cover a combination of machines and also the machines severally. *Evans v. Eaton*, 3 Wheat. 454.—SUP. CT. 1818.

3. Where the plaintiff claims distinct improvements in the same machine, he is entitled to recover against the use of any one of them. *Moody v. Fiske et al.*, 2 Mason, 112.—STORY, 1820.

4. Though distinct improvements in the same machine may be patented in the same patent, distinct improvements in different machines cannot be. Neither can the same patent cover a combination of different machines, and distinct improvements in each.—*Id.*

5. "If"—in one patent—"two machines are patented, which are wholly independent of each other, and distinct inventions, for unconnected objects" the objection is fatal. "The same rule would apply to a patent for several distinct improvements upon different machines having no common object or common connected operation." *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

6. "One patent may be taken for different and distinct improvements made in a single machine"—*Id.*

7. It seems that the patentee may "lawfully unite in one patent all the modes in which he has contemplated the application of his invention, and all the different sorts of machinery or modifications of machinery by which or to which it might be applied; and if each were new there would seem to be no just ground of objection to his patent reaching them all."—*Id.*

8. Two distinct machines [a saw and an ice-plough] intended to co-operate to a common end may be included in one patent.—*Id.*

9. "There is . . . no difference in maintaining the validity of a patent . . . for a machine containing several distinct improvements, each of which is the invention of the patentee, and also of including in the same patent a right to each of these several improvements." *Brooks v. Byam et al.*, 2 Story, 535.—STORY, 1843.

10. Three separate machines, contrived with a view of being used conjointly and conducing to a common end in the propulsion and navigation of a ship, may be embraced in one patent, although they are capable of being used independently. *Emerson v. Hogg et al.*, 2 Blatch. 1.—BETTS, 1845.

11. "The same patent may include a patent for a combination and an invention of some of the parts of which the combination consists." *Root v. Ball et al.*, 4 McLean, 177.—MCLEAN, 1846.

12. "There seems to have been no good reason at first, unless it be a fiscal one, on the part of the Government, when issuing patents, why more than one in favor of the inventor should not be embraced in the same instrument, like more than one tract of land is one deed, or patent for land." *Hogg et al. v. Emerson*, 6 Howard, 437.—SUP. CT. 1848.

13. "It is a well-established exception that patents may be united if two or more included in one set of letters, relate to a like subject, or are, in their nature or operation, connected together."—*Id.*

14. "A patent for more than one invention is not void if they are connected in their design and operation." *Hogg et al. v. Emerson et al.*, 11 Howard, 587.—SUP. CT. 1850.

15. "If one set of letters-patent is permissible for one combination consisting of many parts, as is the daily practice, surely one will suffice for two or three portions of that combination."—*Id.*

16. "There can be no question but there may be a claim for two inventions in the same patent, if they both relate to the same machine or structure." *Lee et al. v. Blandy et al.*, 1 Bond, 361.—LEAVITT, 1860.

17. A patent may properly have various claims of invention. *Swift et al. v. Whisen et al.*, 3 Fish. P. C. 343.—LEAVITT, 1867.

18. "Undoubtedly, independent things, separable and separate things, where any combination arises, provided they be cognate, relate to the same invention and have relation to the subject, the same object to be accomplished, un-

doubtedly these separate claims can be made in the same patent. If they have no such tie of connection . . . ; if they are for separate and entirely different things, then the patent would be void because it attempted to unite what cannot be united ; but if they are connected by a common tie, a common object or purpose, then undoubtedly these different claims can be united in one and the same patent." *Densmore et al. v. Schofield et al.*, 4 Fish. P. C. 148.—SWAYNE, 1868.

19. "A patentee may claim and obtain a patent for an entire combination or process, and also for such parts of the combination or process as are new and useful, or he may claim and obtain a patent for both." *Railroad Co. v. Dubois*, 12 Wall. 47.—SUP. CT. 1870.

20. "There may be a claim for two inventions in the same patent, if they both relate to the same machine or structure, and an action can be sustained for the infringement of either one or the other of these separate inventions, when claimed as separate and distinct in their character." *McComb et al. v. Brodie*, 1 Woods, 153.—WOODS, 1871.

21. "Two inventions or discoveries may be secured by separate patents, or . . . they may both be included in the same original patent if made the subject of separate and distinct claims." *Milligan & Higgins Glue Co. v. Upton*, 1 Bann. & Ard. 497.—CLIFFORD, 1874.

22. A process and its product may both be claimed in the same patent, "but in such a case the description of the invention in the specification and claims should disclose that the inventor had both results in his mind." *Welling v. Rubber-Coated Harness Trimming Co.*, 2 Bann. & Ard. 1.—NIXON, 1875.

23. "Cases arise where a patentee having invented a new and useful combination, consisting of several elements, which in combination compose an organized machine, also claims to have invented new and useful inventions consisting of fewer members of the same elements, and in such cases the law is well settled that, if the several combinations are new and useful, and will severally produce new and useful results, the inventor is entitled to a patent for the several combinations. . . . He may, if he sees fit, give the description of the several combinations in one specification, and in that event he can secure the full benefit of the exclusive right to each of the several inventions by separate claims." *Stevens v. Pritchard*, 2 Bann. & Ard. 390.—CLIFFORD, 1876.

24. "Patents may doubtless be granted for a new device, and for the same in combination

with old elements, and, if both inventions are properly described and claimed, the patent will be valid for both." *Sanford v. Merrimac Hat Co.*, 2 Bann. & Ard. 408.—CLIFFORD, 1876.

25. Different improvements capable of connected operation may be joined and patented in the same patent. *Burke v. Partridge*, 58 N. H. 349.—FOSTER, 1878.

26. A process and its product may be joined in the same patent. *Kelleher et al. v. Darling*, 3 Bann. & Ard. 438.—CLIFFORD, 1878.

27. "Separate patents for several parts of the same invention may be granted, although the whole invention is fully described in each of them to explain the purpose and mode of operation of the parts covered by the claims in such patents." *McMillan et al. v. Rees et al.*, 1 Fed. Rep. 722.—MCKENNAN, 1880.

28. "The connection or combination of a patented device or improvement with the device may be the subject of a subsequent valid patent."—*Id.*

29. A claim for a bird's feed-cup and a claim for a mode of sustaining the horizontal bands of the cage may be embraced in one patent on a bird-cage. *Maxheimer v. Myer et al.*, 20 Blatch. 17.—WHEELER, 1881.

30. Complainant joined in one patent different improvements applicable to trunks, and the court, before permitting a decree in complainant's favor, compelled complainant to file a disclaimer to some of the claims of the patent on the ground that these different improvements could not be properly joined in one patent. *Sessions v. Romadka et al.*, 21 Fed. Rep. 124.—DYER, 1884.

31. There cannot be in the same patent a claim for a machine and a claim for the process of using that machine. *Gage v. Kellogg et al.*, 23 Fed. Rep. 891.—COXE, 1885.

## JOINDER OF INVENTORS.

### CASES

1. Where two persons agree to procure a joint patent, but one of them procures a sole patent, the patentee is a trustee for the other party. *Reutgen v. Kanovors et al.*, 1 Wash. 168.—WASH. 1804.

2. A joint patent may be granted for a joint, but not for a sole invention. *Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

3. A prior sole patent is not an absolute estoppel against a subsequent joint patent for the same invention.—*Id.*

4. Where a patent is granted to a person as a

sole inventor, the affidavit of a single witness that the invention was not sole but joint, made after the lapse of considerable time, is "not sufficient to outweigh the oath of the patentee and the general presumption arising from the grant of the letters-patent." *Woodworth et al. v. Sherman*, 3 Story, 171.—STORY, 1844.

5. The grant of a patent for a joint invention is *prima facie* evidence that the invention was, in fact, joint. *Hotchkiss v. Greenwood et al.*, 4 McLean, 456.—MCLEAN, 1848.

6. If an invention was really sole but patented as joint, the patent is void. *Ransom et al. v. New York*, 1 Fish. P. C. 252.—HALL, 1856.

7. He who undertakes to defend against a patent issued to two persons as joint inventors upon the ground that the invention was sole, takes upon himself the burden as to such defence. *Ashcroft v. Cutler et al.*, 6 Blatch. 511.—BLATCHFORD, 1869.

8. The patent in suit was for a sash-lock, and a claim thereof was: "'A vibrating lever, provided with a bolt, in combination with a striking plate or hook, and with a catch segment, behind which the bolt can pass, formed upon the plate upon which the lever is pivoted, the whole constituting a sash-fastener, and the parts enumerated in the claim being and operating substantially as specified.'" The difference between complainant's device and respondents' device consisted in the fact that in defendants' device the bolt moved in a line perpendicular to the line of the lever, instead of moving in a line parallel to the line of the lever, and engaged with a socket upon the base plate instead of engaging with a projection from the base plate. This invention was a joint invention. The joint invention was within a very narrow compass, and it was held that the device, claimed to be equivalent, had anticipated it, and that the joint invention could not be made to relate back and include the pre-existing devices, although they were the sole invention of one of the joint patentees. *Hopkins & Dickinson M'fg Co. v. P. & F. Corbin et al.*, 14 Blatch. 396.—SHIPMAN, 1878.

9. Where an invention is completed by two persons acting jointly, after a series of experiments—not resulting in a perfected or an operative device—had been made by one of the inventors acting alone, a court does not carefully dissect the invention to ascertain what parts of the whole were furnished by each person.—*Ib.*

10. Where a joint patent is subsidiary to the prior invention of one of the patentees, such patent should not be extended so as to embrace the said prior invention.—*Ib.*

11. "Where an invention is merely a combination subordinate to pre-existing devices, and has been limited to such sub-combination by the language of the claim, the patentee cannot successfully insist that he is entitled to the pre-existing devices, and that this is true when one of the joint inventors of the junior invention is also the inventor of the senior inventions."—*Ib.*

12. "To overthrow the presumption of joint invention, created by the filing of a joint application upon a joint oath, the evidence should be clear and unequivocal. . . . If one suggests an idea in a general way, and the other falls in with it, and by his aid develops it, and gives it definite practical embodiment, the two may be considered joint inventors." *Gottfried et al. v. Phillip Best Brewing Co.*, 5 Bann. & Ard. 4.—DYER, 1879.

13. Marinoni and Chandre had jointly taken French, Belgian, and British patents on the invention in question. Marinoni, making the usual oath of sole invention, took a United States patent for the same invention. On the trial Chandre testified that he was a joint and equal inventor of the improvement. *Held*, insufficient to overcome Marinoni's said oath and the United States patent sustained. *Hoe et al. v. Cottrell et al.*, 17 Blatch. 546.—SHIPMAN, 1880.

14. Where a patent is granted, as for joint invention, then to show the invention to have been made by one of the inventors shows that it was not a joint invention. *Union Paper Bag Mach. Co. v. Atlas Bag Co.*, 6 Fed. Rep. 398.—BUTLER, 1881.

15. The patent sued on was granted to Jordan and Smith as joint inventors. After decree by court that defendants had infringed, defendants moved to reopen the case on the ground that Jordan was the sole inventor. Jordan so made affidavit—Smith being dead—and shopmates made affidavit that Jordan originally spoke of himself as the sole inventor and that Smith made no such pretension. Jordan swore, in obtaining the patent, that both were joint inventors; the patent had been sold to complainant many years before. *Held*, that the evidence did not warrant the grant of the motion. *Collins Co. v. Coes et al.*, 8 Fed. Rep. 517.—LOWELL, 1881.

16. A patent to joint inventors, being for a nut under the step-plate of a monkey wrench, it was shown that before the two inventors came together one of them made a wrench wherein the step-plate was supported by a lateral set screw. The court held that such a wrench was within the patent, and if it had been made and successfully used it would have limited the scope of the

claim just that much, but that it was a mere "experiment, on the way to the completed invention, and has no effect at all."—*Id.*

17. Parol proof of loose statements and admissions explained or denied so that they fall short of clear proof will not avail to show that an invention patented as joint is really sole. *Coburn et al. v. Schroeder et al.*, 19 Blatch. 377.—WHEELER, 1881.

18. "There can be no doubt that if the circumstances are such as to show that two persons contributed to an improvement, and such improvement is the result of mutual contributions of the two, they are to be treated as joint inventors, and a joint patent should be taken out. In such cases the joint patent stands for, and must be supported by, a joint invention; and as an error in this particular is fatal to the validity of the patent, . . . it should be made clearly to appear that the patentees were not joint inventors, before the court would be justified in annulling the patent upon that ground." *Worden et al. v. Fisher et al.*, 11 Fed. Rep. 505.—BROWN, 1882.

19. "To constitute two persons joint inventors it is not necessary that exactly the same idea should have occurred to each at the same time, and that they should work out together the embodiment of this idea in a perfected machine. Such a coincidence of ideas would scarcely occur to two persons at the same time. If an idea is suggested by one, and he even goes so far as to construct a machine embodying this idea, but it is not a complete and working machine, and another person takes hold of it, and by their joint labors, one suggesting one thing and the other another, a perfected machine is made, a joint patent may properly issue to them. If, upon the other hand, one person invents a distinct part of a machine and another person invents another distinct and independent part of the same machine, then each should obtain a patent for his own invention."—*Id.*

20. A caveat mistakenly taken as for a sole invention does not preclude a subsequent joint patent. *Hoe et al. v. Kahler*, 20 Blatch. 430.—BLATCHFORD, 1882.

21. A patent to two joint inventors cannot be construed broadly enough to cover a prior device invented by one of these joint inventors for which he applied for a patent, which application was rejected. *Hopkins & Dickinson Mfg Co. v. Corbin et al.*, 103 U. S. 786.—SUP. CT. 1882.

22. The grant of a patent to two persons as joint inventors creates a presumption that such persons actually were joint inventors. *Hoe et*

*al. v. Kahler*, 23 Blatch. 354.—BLATCHFORD, 1885.

23. Where a patent is taken, as for a joint invention, and the fact is that one inventor proposed one part and another suggested another part—one suggesting a certain thing and another suggesting modifications—then the patent is valid. *Royer et al. v. Coupe*, 29 Fed. Rep. 358.—CARPENTER, 1886.

24. Where a person is attempting to make an invention and proceeds therewith, but does not reach a satisfactory result, and another person joins with him, and a satisfactory result is reached, the two are properly joint inventors. *Consolidated Bunting Apparatus Co. v. Woerle*, 29 Fed. Rep. 449.—BLODGETT, 1887.

25. "When two persons are jointly engaged in the work of invention, it must always be extremely difficult to determine how much of the successful result is due to each. The mere fact that two or more persons unite in an application for a patent as the product of their joint inventive efforts certainly creates a very strong presumption that the device is the result of their united ingenuity. It may be that the conception of the entire device is due to but one of them; but the other makes a suggestion of practical value in working out the idea, and making it operative. But that suggestion may be the very thing the first failed to think of, and which was needed to make the conception a success."—*Id.*

26. Where a patent is taken as for a joint invention it cannot be sustained as to a part thereof which was the sole invention of one of the inventors. *Stewart et al. v. Tenk et al.*, 32 Fed. Rep. 665.—GRESHAM, 1887.

## JOINT OWNERS OF PATENTS.

### CASES.

1. The patent in question was for certain devices for making bedsteads. A owned certain territory under this patent, and B owned certain other territory. The products manufactured by A were sold in B's territory. B claimed infringement, and the court held that there was no infringement. *Boyd v. Brown*, 3 McLean, 295.—MCLEAN, 1843.

2. The grantee of an exclusive right to make and use and vend a patented machine has the right to vend the product of said machine outside the territory. *Simpson et al. v. Wilson*, 4 Howard, 709.—SUP. CT. 1846.

3. "In case of joint patentees, where no agreement of copartnership exists, the relation of copartners certainly does not result from their con-

nection as joint patentees ; and, when one joint owner of a patent transfers his undivided interest to a stranger, the assignee does not become the partner of his coproprietor. In both cases, the parties interested in the patent are simply joint owners, or tenants in common, of the rights and property secured by the patent ; and their rights, powers, and duties, as respect each other, must be substantially these of the joint owners of a chattel.

"Part owners of goods and chattels are either joint owners or tenants in common, each having a distinct, or at least an independent, although an undivided interest in the property. Neither can transfer or dispose of the whole property ; nor can one act for the other in relation thereto, but merely for his own share, and to the extent of his own several right and interest ; and, at common law, the one had no action of account against the other, for his share of the profits derived from the common property." *Pitts et al. v. Hall*, 3 Blatch. 201.—HALL, 1854.

4. "The grant of the exclusive right to make, use, and vend to others to be used, is to the patentees jointly and not to either severally. The right, the property secured by the patent, may be granted to others by license or assignment, or by the sale of machines by the patentees jointly ; and a license or assignment or sale of a machine by them is a transfer, *pro tanto*, of the property secured by the patent. One joint owner can legally grant, assign, license, or sell only in respect to his own share or right. He cannot sell and give a good title to his co-owner's right, for the same reason that one joint owner of a chattel cannot transfer the share of his coproprietor. And if he appropriates any portion of the exclusive right or common property to his separate use or benefit, either by the use or sale of the patented machine, he does what is in principle the same as the conversion, by destruction or sale, of the joint property by a tenant in common, which authorizes his cotenant to maintain trover."—*Ib.*

5. "The joint owner of a patent can sustain his action for an infringement against his co-owner, in which he can recover his actual damages, according to his interest in the patent. His rights are invaded by the act of his coproprietor, and he is entitled to his legal remedy. This invasion is tortious, and no action founded upon a contract can be sustained unless this tort is waived, and the tortious act confirmed ; for no action exists upon which such an action can be founded, without such waiver and confirmation. The injury is a violation of the exclusive right secured by the patent ; and, for this

injury, the action for an infringement is the appropriate remedy, and one which enables the court, without the violation of legal principles, and in the most direct and convenient mode, to do justice between the parties. In such an action, the plaintiff may recover, as he should, his actual and proper damages, proportioned to the extent of his undivided interest in the exclusive right, without regard to the amount which his coproprietor has received by means of the infringement."—*Ib.*

6. Joint owners of patents are tenants in common thereof. "One tenant in common has as good right to use, and to license third persons to use, the thing patented as the other tenant in common has." *Clum v. Brewer et al.*, 2 Curtis's C. C. 506.—CURTIS, 1855.

7. A written conveyance conveyed to complainant the exclusive right "to make, use, and vend to others to construct and use," the Woodworth planing machine within certain designated territorial limits. It was held that complainant thereby had the right to make and sell machines, outside those limits, only to such persons as were duly licensed to use such machines. *Jenkins v. Greenwald*, 1 Bond, 126.—LEAVITT, 1857.

8. Goodyear conveyed to A the right to use his patented compound, known as "vulcanized india-rubber," in the manufacture of "hose pipe and tube," or "conduit hose pipe and tube," and no further. He conveyed to B the exclusive right to use the said rubber "in combination with all wringing, washing, and starching machines." The licensee, A, sold rubber pipe to C, who used it in the manufacture of wringer rolls. C was held not to be an infringer. *Metropolitan Washing Mach. Co. et al. v. Earle et al.*, 2 Fish. P. C. 203.—GRIER, 1861.

9. As between joint owners of patents, either may practise the patented improvement without contribution to the other. *Vose v. Singer*, 4 Allen, 226.—CHAPMAN, 1862.

10. Two persons, who were partners, applied for a patent, and the application was rejected ; subsequently one of the partners obtained a sole patent. It was held that the two partners jointly owned the same. *Vetter v. Lentzinger*, 31 Iowa, 182.—COLE, 1870.

11. "The purchase of a patented article, lawfully manufactured and sold without restriction or condition within his territory by the territorial assignee of a patent right, conveys to the purchaser the right to use or sell the article in another territory for which another person has taken an assignment of the same patent." *Adams v. Burke*, 1 Holmes, 40.—SHEPLEY, 1871.

12. A held a full grant under a patent for a

certain territory. B lived outside that territory, but came into that territory, there bought the patented article of A, and used it outside of A's territory and in the territory of C. C brought suit against B for infringement, and the court held B not to be an infringer. The patented article was an improvement in coffin lids.—*Id.*

13. One of two joint owners of a patent can legally grant, assign, or lease his own individual interest in the patent. *May et al. v. Chaffee et al.*, 2 Dillon, 385.—NELSON, 1871.

14. "An owner of a patent can make an assignment in regard to it the same as he can make in regard to any other species of personal property."—*Id.*

15. A convenience under letters-patent read as follows: "We, William Sisson and Clinton H. Sage, aforesaid, have assigned, sold, and set over, and by these presents do assign, sell, and set over, unto the said Willard M. Fuller and David M. Ford, the sole and exclusive right to manufacture and sell machines of the said invention as secured to us by the said letters-patent and assignment, in the city of Chicago, county of Cook, State of Illinois, and in no other place or places, the same to be held and enjoyed by the said Willard M. Fuller and David M. Ford, for their own use and behoof, and their legal representatives, to the full end of the term for which such letters-patent have been granted, as fully and entirely as the same would have been held and enjoyed by us had this sale and assignment not been made." Defendants bought one of the patented machines in Chicago from Fuller & Ford, and used it outside of Chicago; defendants, being sued for infringement, were held not to infringe.—*Id.*

16. The purchase of a patented article, lawfully manufactured, and sold without restriction or condition by a territorial assignee of a patent right, within his territory, conveys to the purchaser the right to use and sell the article in another territory for which another person has taken an assignment of the same patent. *McKay v. Wooster et al.*, 2 Sawyer, 373.—SAWYER, 1873.

17. May 30th, 1863, letters-patent were granted to Merrill and Horner for improvement in coffin lids. March 13th, 1865, Merrill and Horner gave a grant under the same to Lockhart & Seeley for the territory in a circle whose radius was ten miles, having the city of Boston as a centre. An undertaker, Burke, in Natick, bought the improved coffin lid of Lockhart & Seeley in Boston, and used the same in Natick, which is not included in the territory given by Lockhart & Seeley's grant. Adams, owner of

the Natick territory, brought suit against Burke for infringement. The Supreme Court said that the precise point in issue had never been decided before by that court, and that the vast pecuniary results involved admonished that court to proceed with care, "and to decide in each case no more than what is directly in issue." The court held that, as regards the kind of patented improvement in question, "an instrument or product of patented manufacture which perishes in the first use of it, or which by that first use becomes incapable of further use and of no further value," one who, like Burke, had purchased it of the grantee and used it outside of the grant, was not an infringer. (Justices Bradley, Swaine, and Strong dissented.) *Adams v. Burke*, 17 Wall. 453.—SUP. CT. 1873.

18. "Especially may one having a license to make and sell within a limited territory only deliberately contract to supply the patented invention for use in other territory, provided his manufacture and his actual negotiation of sales are within the privileged limit, and may practically avail himself of the markets of the whole country." *Dorsey Revolving Harvester Rake Co. et al. v. Bradley M'fg Co.*, 12 Blatch. 202.—WOODBURY, 1874.

19. A licensed B to use a patented machine in Newark, N. J. B sold the machine to C, who took it to New York and there used it. It was held that B had no right to use the machine in New York, and could convey none. *Wicke v. Kleinknecht et al.*, 1 Bann. & Ard. 608.—BLATCHFORD, 1874.

20. Joint owners of patents are not partners, "yet no doubt they are tenants in common, each owning only an undivided part. Each, in extent of his ownership, has a right to the use of the patent, or to manufacture under it; but neither can be made by his co-owner to join in such use and work, or be made liable without his consent for the loss which such co-owner may incur in using or working the patent. Neither co-owner can be made to contribute to the other as to profits or loss." *De Witt v. Nobles M'fg Co.*, 5 Hun, 301.—BOARDMAN, 1875.

21. A license given by one of the joint owners of a patent is valid. *Dunham v. Indianapolis & St. Louis R. R. Co.*, 7 Bissell, 223.—DRUMMOND, 1876.

22. "What is the position of the patentees with reference to their right to use the thing patented? The patentees are tenants in common of the right. One of them has no superiority over the other. One of them can manufacture and use the thing patented without the consent of the

others—that is, each has the same right, although one may own a greater share of the thing patented than the other. . . . One of the patentees cannot grant what does not belong to him, and if he gives a license or makes a contract for the use of the thing patented, he can only grant that which he has himself, and not the rights of the other patentees ; still, he can clothe his grantee or his licensee with the same right that he has himself—namely, the right to sell or use the thing patented. . . . If there is a liability at all, where a party owning less than the whole of a thing patented makes a grant or license, he shall be answerable to the others, rather than that the other patentee shall look to the grantee or licensee.”—*Ib.*

23. “Where one of the joint patentees uses or sells the thing patented, or any portion of it, the others cannot sue as for an infringement of the patent. The most that can be claimed is, that if one uses or sells it to the detriment of the others, he may be held responsible. For example, if he obtains more than his share of the profits from the use of the article, or, in issuing licenses, he obtains more than his share of the license money, he possibly may be held responsible by the other joint patentees. . . . One tenant in common of letters-patent has the same rights as the others to make, use, and sell the thing patented, and a licensee under one tenant in common cannot be enjoined on a bill by another tenant in common.”—*Ib.*

24. “A license of one or more of several owners in common of letters-patent confers the right as against all ; and the remedy of the other tenants in common is to be covered by an accounting for whatever may have been received by both.” *De Witt v. Elmira Nobles M’fg Co.*, 66 N. Y. 459.—ALLEN, 1876.

25. One of several joint owners in a patent was using a device which was not the device of the patent in question, and which in the hands of an outside party would have been held an infringement of such patent. He was held to infringe. *Herring v. Gas Consumers’ Association*, 3 McCrary, 206.—TREAT, 1878.

26. So far as one of the joint owners of a patent “acts outside of his interest or rights or powers as a joint owner, there is no adequate reason for treating him, *quoad hoc*, otherwise than as an infringer.”—*Ib.*

27. Where a person’s right under a patent is wholly of the right to make and sell for use within a certain district, it is an infringement to use it outside of that district. *Burke v. Partridge*, 48 N. H. 349.—FOSTER, 1878.

28. A patent was taken out while the inventor

was the member of a partnership, which partnership paid for the patent, and the patent was used by the partnership as long as the partnership lasted. It was held that this state of facts did not give the other partner any interest in the patent after the dissolution of the partnership. *McMillan M’fg Co. v. Blundell*, 11 Fed. Rep. 419.—COLT, 1882.

29. “A sale of patented articles in the ordinary course of trade outside the territorial limits to which the right to sell is restricted by the patentee’s grant is unwarranted.” *Hatch v. Adams*, 29 O. G. 776.—MCKENNAN, 1884.

30. Where A owns certain territory under a patent, and B owns certain other territory under the same patent, and A manufactures his goods within his own territory, and sells and delivers them within B’s territory, A is an infringer of B’s rights. *Hobbie et al. v. Smith et al.*, 27 Fed. Rep. 656.—COXE, 1886.

31. Where A owns certain territory under a patent, and B owns certain other territory under the same patent, and A sells the patented goods in his own territory to parties whom he knows will take them into the territory of B, he is not an infringer of B’s rights.—*Ib.*

32. “The grantee of a particular territory is . . . at liberty to sell within that territory, and having the right, it cannot be curtailed, though the purchaser takes the goods beyond the prescribed limits. This is so, even though the vendor knows that the purchaser intends so to act.”—*Ib.*

33. *Adams v. Burke*, 17 Wall. 453, falls short of holding that “the purchaser from the owner of a territorial right within the territory could not sell outside without infringing on the rights of the owner of that territory.” *Hatch et al. v. Hall et al.*, 30 Fed. Rep. 613.—WHEELER, 1887.

34. The owner of a territorial right under a patent for making beds furnished “beds of the patent to dealers, to be sold outside, and . . . sought their custom for that purpose. They were infringers in making the sales, and he participated in the infringement by furnishing the means for it and aiding and abetting it. Such a participant in the tort of infringement is liable for the whole.”—*Ib.*

35. Ordinarily joint owners of patents are tenants in common. *Rogers v. Reissner et al.*, 30 Fed. Rep. 525.—WHEELER, 1887.

36. Where A sells B a patent, together with all improvements he may thereafter make, the question as to what constitutes such improvements is to be settled upon a basis of common sense, and not upon a basis of technical distinc-



tions. *Aspinwall M'fg Co. v. Gill et al.*, 40 O. G. 1133.—BRADLEY, 1887.

37. "The owner of one eleventh of a patent cannot sue the owner of eight elevenths of it for an infringement, even though the ownership of the latter be only an equitable interest. It is the duty of the legal owner to transfer to the equitable owner his rightful share of the property."—*Id.*

38. "The exact mutual rights of part owners of a patent have never been authoritatively settled. If one part owner derives a profit from the patent, either by using the invention or getting royalties for its use or purchase-money for sale of rights, it would seem that he should be accountable to the other part owners for their portion of such profit, and probably a bill for an account would be sustained therefor; but this is matter of mere speculation."—*Id.*

### JURISDICTION.

#### "JURISDICTION" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 5. Gives the district courts jurisdiction of actions to repeal patents. [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 5. Gives the circuit courts jurisdiction of actions on the case for recovery of damages for infringement of patents.

SEC. 10. Gives district courts jurisdiction of actions to repeal patents. [Repealed July 4th, 1836.]

Act approved February 19th, 1819.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the circuit courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violations of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the courts may deem fit and reasonable: *Provided, however*, That from all judgments and decrees of any circuit courts rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the Supreme Court of the United

States, in the same manner, and under the same circumstances, as is now provided by law in other judgments and decrees of such circuit courts. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 17. *And be it further enacted*, That all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the power and jurisdiction of a circuit court; which courts shall have the power, upon a bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States, on such terms and conditions as said court may deem reasonable. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 57. *And be it further enacted*, That all actions, suits, controversies, and cases arising under the patent laws of the United States shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court, or by the Supreme Court of the District of Columbia, or of any territory; and the court shall have power, upon a bill in equity filed by any party aggrieved, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for infringement, the claimant [complainant] shall be entitled to recover, in addition to the profits to be accounted for by defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts upon the case.

SEC. 59. *And be it further enacted*, That damages for the infringement of any patent may be recovered by action on the case in any circuit court of the United States, or district court exercising the jurisdiction of a circuit court, or in the Supreme Court of the District of Columbia, or of any territory, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict shall

be rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 629. The circuit courts shall have original jurisdiction as follows : . . .

Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States.

SEC. 4919. Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.

SEC. 4921. The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any rights secured by patent, on such terms as the court may deem reasonable ; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby ; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts, in actions in nature of actions of trespass upon the case.

#### CASES.

1. A state court has no jurisdiction of a suit brought for infringement of a patent. *Parsons v. Barnard*, 7 Johns. 144, *per curiam*, 1810.

2. Under the patent acts as they were in A. D. 1811, a United States circuit court has not jurisdiction of an equity infringement cause between citizens of the same State. *Livingston v. Van Ingen*, 1 Paine, 45.—LIVINGSTON, 1811.

3. The Circuit Court has appellate jurisdiction in proceedings for repeal of patent—under Section 10, act of 1793—where the matter in dispute exceeds \$300. [Jud. Act, 1789 ; ch. 20, Sec. 22.] *Stearns v. Barrett*, 1 Mason, 153.—STORY, 1816.

4. Whether the complainant's patent is good and valid is not a question for the equity side of the court, but belongs to a court of law, with right of trial by jury. *Sullivan v. Redfield et al.*, 1 Paine, 441.—THOMPSON, 1825.

5. A patent is granted upon evidence and proofs laid before a public officer upon which he decides, and the grant of the patent is *prima facie* evidence that the proofs have been made and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs. It is not necessary for the patent to contain any recitals that the prerequisites to the grant have been duly complied with. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Peters, 448.—SUP. CT. 1840.

6. The mere fact that a contract pertains to a patent does not give a federal court jurisdiction. *Burr v. Gregory*, 2 Paine, 426.—THOMPSON, 1828.

7. "The act of February 15th, 1819, extended the jurisdiction of the circuit courts of the United States to suits both at law and in equity arising under the patent laws ; but there is nothing in that act which either in term or by necessary implication renders that jurisdiction exclusive." *Burrall v. Jewett*, 2 Paige, 134.—WALWORTH, 1830.

8. A state court has no jurisdiction of interfering patents. *Gibson v. Woodworth*, 8 Paige, 132.—WALWORTH, C., 1840.

9. Although the infringing act may be outside the jurisdiction of the court, yet if the court has jurisdiction of the person, the latter may be restrained from infringing. *Boyd v. McAlpin*, 3 McLean, 427.—MCLEAN, 1844.

10. The validity of a patent may be determined in a state court when that question comes in collaterally. *Rice v. Hotchkiss*, 16 Conn. 409.—WILLIAMS, 1844.

11. "Where a controversy arises wholly under a contract of license, and the parties are citizens of the same state, the federal court cannot take jurisdiction. But where the complainants set up their right under a patent and allege infringement, the court takes jurisdiction." *Brooks et al. v. Stolley*, 3 McLean, 523.—MCLEAN, 1845.

12. Where A has contracted with B to assign to B the former's patent, a federal court does not acquire jurisdiction of a suit to enforce such contract. *Nesmith et al. v. Calvert et al.*, 1 W. & M. 34.—WOODBURY, 1845.

13. Where there are different defendants, and the subject-matter in controversy does not give a federal court jurisdiction, it will retain jurisdiction as to such defendants as reside in a different state from complainants.—*Id.*

14. Objection to the jurisdiction of a federal court, on account of the subject-matter of the issue, comes too late after pleadings are filed and evidence is published.—*Ib.*

15. Though complainants' right to a patent in question may rest in contract, yet if an injunction is sought against defendants from an infringement of such a patent, a federal court can take jurisdiction.—*Ib.*

16. "The question of the regularity of the proceedings in petitioning for and obtaining the patent, and that of the correctness of the judgment of the office in awarding it, are not material, and cannot be inquired into." *Wilder v. McCormick*, 2 Blatch. 31.—BETTS, 1846.

17. Where there were joint owners under a patent, with an agreement binding one owner not to manufacture under the patent, and he did manufacture, a state court was held to have no jurisdiction to grant an injunction, for the real question was not infringement. *Parkhurst v. Kinsman*, 2 Halstead's Chancery, 600.—HALSTEAD, 1847.

18. "In most questions pending in courts of Chancery, or on the equity side of courts of law, a trial by jury has never been usual in this country or abroad. The seventh amendment to the Constitution secures that trial only in cases 'at common law.'" *Woodworth et al. v. Rogers et al.*, 3 W. & M. 135.—WOODBURY, 1847.

19. "In equity where the case is clear and without reasonable doubt, where the bill states a clear right to the thing patented, which, together with the alleged infringement, is verified by affidavit, and where the plaintiff has been in possession of it, by having sold or used it in part or in whole, the court will grant an injunction and continue it till the hearing or further order, without sending the plaintiff to law to try his right." *Motte v. Bennett*, 2 Fish. P. C. 642.—WAYNE, 1849.

20. "Not even the direct assent of the parties can confer jurisdiction or render the judgment of a tribunal, in a matter over which it has by law no cognizance, effectual." *Dudley v. Mayhew*, 3 Comstock, 9.—STRONG, 1849.

21. State courts have no jurisdiction of causes wherein the validity and infringement of patents are directly in issue.—*Ib.*

22. By the court: "The preventative interposition of equity is very often the only effective resort of a meritorious patentee; and where the facts of the case are not controverted, I am by no means satisfied that it is not the safest for both parties." *Wilson v. Barnum*, 1 Wall. Jr. 147.—KANE, 1849.

23. An equity action for an infringement of a

patent may be maintained in any circuit court within and for any district where the defendant is found and served with process. *Allen v. Blunt*, 1 Blatch. 480.—NELSON, 1849.

24. A bill in equity to set aside a contract of license does not come within the jurisdiction of a federal court simply because the license refers to a patent right. *Wilson v. Sanford et al.*, 10 Howard, 99.—SUP. CT. 1850.

25. "The jurisdiction of the circuit courts embrace . . . all cases, both at law and in equity, arising under the patent laws for infringement of letters-patent, without regard to the citizenship of the parties or the amount in controversy." *Day v. Newark India Rubber Mfg Co.*, 1 Blatch. 628.—NELSON, 1850.

26. "In order to give jurisdiction to the circuit courts of the United States, the party defendant must be an inhabitant of the district in which the suit is brought, or he must be found within it at the time of the service of the original process; and this, whether suit be commenced by writ, summons, or attachment, or whatever may be the nature or character of the process used. No exception is found in the act of Congress providing for the commencement of suits in these courts, nor in the judicial expositions given to it."—*Ib.*

27. The defendant was a New Jersey corporation, having an office in New York City. Service was made upon the president, who happened to be in that city. Plaintiff was a resident of New Jersey. The suit was brought in the Southern District of New York. It was held that the court was without jurisdiction in the case, the court saying: "Neither the levying of the writ of attachment upon the goods of the defendant in this district, nor the service of the summons upon their president within it, or both together, have the effect to give jurisdiction to the court in this case against defendants; and further, . . . according to the true construction of Section 11 of the Judiciary Act of 1789, the court would have no jurisdiction in suits instituted against foreign corporations, even in cases where the state practice, if adopted by it, would authorize the institution of such suits by the attachment of their goods found within the jurisdiction."—*Ib.*

28. In a suit for an injunction, based upon a contract relating to a patent, a federal court may have jurisdiction by reason of the citizenship of the parties—in that case, the suit to be brought in the state of which one of the parties is a citizen—but it does not take jurisdiction, because the subject of the contract is a patent. *Good-year v. Day*, 1 Blatch. 565.—NELSON, 1850.

29. Where the court has jurisdiction of the persons of the defendants, it may restrain them from infringement of a patent, outside the territorial jurisdiction of the court. *Wilson v. Sherman et al.*, 1 Blatch. 536.—NELSON, 1850.

30. A state court cannot enjoin against an infringement suit in a federal court. *Kendall et al. v. Winsor*, 6 R. I. 453.—AMES, 1850.

31. A federal court sitting in equity has jurisdiction of a patent cause irrespective of the right of the patentee to an injunction, or of his demand for one. *Nevins v. Johnson et al.*, 3 Blatch. 80.—BETTS, 1853.

32. A provisional injunction had issued against the respondent, complainant and his sureties giving bond conditioned to pay respondent any damages he might suffer by reason of that injunction if finally determined not to be rightful. The bill was subsequently dismissed and injunction dissolved; defendant moved the court to refer to a master the question how much damages the respondent had suffered. The court held that, "aside from positive legislation, a court of equity does not afford a remedy on such bonds." *Merryfield v. Jones*, 2 Curtis's C. C. 306.—CURTIS, 1855.

33. Where respondents are residents of another jurisdiction and carry on there the alleged infringing business, "they are consequently beyond the process of injunction, and the issuing of it would be inoperative and useless." *Good-year et al. v. Chaffee et al.*, 3 Blatch. 268.—NELSON, 1855.

34. The question of the validity of the patent cannot be tried even collaterally in a state court. *Oliver v. Pennel*, 4 Maine, 430.—RICE, 1855.

35. "The bill needs only to pray discovery for the purpose of account, and it will be sustained for the account only." *Sickles et al. v. Gloucester M'fg Co.*, 1 Fish. P. C. 222.—GRIER, 1856.

36. "The courts of the United States have their jurisdiction over" patent cases "by statute, and do not exercise it merely as ancillary to a court of law."—*Id.*

37. Where a bill in equity is brought for infringement of a patent, and pending the trial the patent expires, the case may and will be proceeded with.—*Id.*

38. In a patent case, "the bill need only pray for the discovery for the purpose of account, and it will be sustained for the account only." *Blank (or Sickles et al.) v. M'fg Co.*, 3 Wall. Jr. 196.—GRIER, 1856.

39. The courts of the United States have their jurisdiction over patent causes by statute, and

do not exercise it merely as ancillary to a court of law.—*Id.*

40. "The power of a court of law to compel a defendant to permit the agents of the plaintiff to enter on his property for the purpose of furnishing evidence of a trespass or other tort, though sometimes assumed by courts, when no objection is made, cannot be admitted." *Parker v. Bigler et al.*, 1 Fish. P. C. 285.—GRIER, 1857.

41. B brought suit against K in an action of assumpsit to recover for the use of B's patent by K. It was held that this was in effect such a suit as must be brought in a federal court. *Battin v. Kear*, 2 Phil. 301.—SHARSWOOD, 1857.

42. Where the production and establishment of the patent is necessary to lay foundation for the plaintiff's case, a state court has no jurisdiction. *Tomlinson v. Battel*, 4 Abbott's Practice, 266.—DUEK, 1857.

43. Section 17 of the act of 1836, authorizing courts of equity "to prevent the violation of the rights of any inventor," includes assignees as well as inventors. *Jenkins v. Greenwald*, 1 Bond, 126.—LEAVITT, 1857.

44. "If a patentee parts with the whole right secured by his patent, either for cash, or upon the purchaser's entering into a covenant to pay him a certain sum of money, or to do certain other things, the patentee has, after such a sale, no right vested in him secured by any act of Congress. A suit to enforce the covenants would not be a case arising under a law of the United States. The use of the whole thing sold cannot be a violation of any rights of the patentee secured by the laws of the United States, so long as the deed of sale remains in full force, for he has parted with all such rights. And when a portion of the right is parted with, the rule must be the same as respects such portion." *Good-year et al. v. Union India Rubber Co.*, 4 Blatch. 63.—INGERSOLL, 1857.

45. "Jurisdiction is not given to the Circuit Court, by any patent act, of all suits where patent rights are the subject of inquiry."—*Id.*

46. A bill to enforce a specific execution of a contract relating to a patent is not one of which a federal court can take jurisdiction simply because the contract relates to a patent. *Dean v. Mason et al.*, 20 Howard, 198.—SUP. CT. 1857.

47. In the case last referred to it is not material as regards jurisdiction that a court granting an injunction orders a bond in excess of \$2000.—*Id.*

48. Where, between the time of filing the bill and the hearing, the patent in suit expires, an account can be ordered and other relief granted, though, on account of the expiration of the pat-

ent, an injunction, to restrain further use, cannot issue. *Imlay v. Norwich & Worcester R. R.*, 4 Blatch. 227.—INGERSOLL, 1858.

49. Where the validity of a patent comes in question collaterally, a state court may entertain the action. *Lindsay et al. v. Roraback et al.*, 4 Jones' Eq. 124.—PIERSON, 1858.

50. State courts have jurisdiction to inquire into the validity of patents when such question comes in collaterally, and they have jurisdiction to enforce contracts the subject-matter whereof is patents. *Slemmer's Appeal*, 58 Penn. St. 155.—SHORSWOOD, 1868.

51. A state court has jurisdiction to try the validity of a patent when that question comes in incidentally. *Sherman v. Champlain Transportation Co.*, 31 Vt. 162.—REDFIELD, 1858.

52. "It is clearly no ground of jurisdiction, under the patent law, that the contract between the parties relates to a patent right. But if an infringement is proved, jurisdiction is conferred; and, having power to protect the rights of a party under a patent, the court will take cognizance of other matters, as incidental to the infringement." *Bloomer v. Gilpin et al.*, 4 Fish. P. C. 50.—LEAVITT, 1859.

53. Although parties have a constitutional right of trial by jury in actions at common law, such a trial in a suit in equity depends upon the discretion of the court. *Ely v. Monson & Brimfield M'fg Co.*, 4 Fish. P. C. 64.—SPRAGUE, 1860.

54. "It is plain that a patentee, whose invention is only valuable because used by all who pay a license fee, and who suffers no other wrong than the detention of such fee, has fixed his own measure of compensation, and needs none of the remedies which it is the duty of the chancellor to give for his protection. An injunction would do him no good; an account is not wanted; and the only remedy to which he is entitled being a judgment for a given sum of money, with interest, a court of law is his proper resort, where also he may recover a penalty to the extent of treble damages, if the judge sees fit to inflict it." *Livingston et al. v. Jones et al.*, 3 Wall. Jr. 330.—GRIER, 1861.

55. "An account cannot be required unless where a knowledge of the profits made by the infringer is necessary to a just determination of the controversy."—*Ib.*

56. "Although the statute gives original cognizance of patent controversies equally to courts of equity as to courts of law, and consequently the chancellor may decide a controversy as to infringement without requiring a previous verdict in a court of law, yet it does not follow that

all distinction, as to remedies granted by each tribunal, is to be abolished; a court of law cannot issue an injunction, nor a court of equity take jurisdiction to enforce a penalty, or merely punitive damages. Each court will give the remedy peculiar to its own functions. The remedies of a court of Chancery are by injunction and account; penalties and vindictive damages may be recovered only in courts of law."—*Ib.*

57. "Where the measure of damages is a certain sum, and does not require an account of profits, the peculiar jurisdiction of a chancellor is not needed for that purpose. The remedy by injunction is neither necessary nor proper to enforce the payment of money." *Sanders v. Logan et al.*, 9 Am. Law Reg. 475.—GRIER, 1861.

58. "The circuit courts of the United States have jurisdiction of controversies arising under the patent laws by direct grant from Congress. They do not merely act as ancillary to a court of law, and therefore do not require the patentee to establish his legal right in a court of law and by the verdict of a jury."—*Ib.*

59. Threatening to bring suit for infringement, with no basis for the same, gives right of action; a state court has jurisdiction thereof. *Snow et al. v. Judson*, 38 Barbour, 210.—JOHNSON, 1862.

60. "The power conferred on the United States Circuit Court to entertain bills in equity in controversies arising under the patent act is a general equity power, and carries with it all the incidents belonging to that species of jurisdiction. The power conferred not only enables the court to decree a final remedy, but to take care that the subject of the controversy shall not be rendered valueless pending the litigation." *Potter et al. v. Dixon et al.*, 5 Blatch. 160.—NELSON, 1863.

61. The jurisdiction of the Court of Claims does not embrace a case where a Government subordinate infringes upon a patent upon his own motion and authority. *Pitcher v. United States*, 1 Nott & Hunt, 7.—CASEY, 1863.

62. "Where the United States are plaintiffs, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state, the circuit courts of the United States have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500." *Heckers v. Fowler*, 2 Wall. 123.—SUP. CT. 1864.

63. "No state court can adjudicate on the question of the violation of a patent right. Questions touching these rights may, indeed, inci-

dentally arise in the state courts, and be decided by them." *Read et al. v. Miller et al.*, 2 Bissell, 12.—MCDONALD, 1867.

64. Under Section 17 of the act of Congress of July 4th, 1836, the federal courts have full jurisdiction of patent causes in equity, and full power to grant injunctions. *Goodyear et al. v. Hurlihen et al.*, 2 Hughes, 492.—JACKSON, 1867.

65. "An inventor may bring an action at law against parties infringing his patent, and the court has power to treble the damages awarded by the jury, or, if he prefer to do so, he may in the first instance seek redress in equity, without having established his right at law; and the court is authorized to inhibit and restrain the further infringement of the patent, by writ of injunction, and to grant a decree for the payment of such damages as the patentee may be found to have sustained."—*Id.*

66. "There at one time prevailed, in the circuit courts of the United States, the idea that the court, as a court of equity, would interfere in aid of a patentee only where his patent was sanctioned by general acquiescence for many years, or had been maintained at law by the verdict of a jury who had passed upon the novelty and utility of the invention when called in question. . . . The current of decisions of the last few years has been otherwise; and . . . courts of several of the circuits have held [and these decisions, too, have been made by the presiding judges of these circuits, who are members of the Supreme Court] that the grant of jurisdiction is as full in equity as it is at law." *Hoffheins et al. v. Brandt*, 3 Fish. P. C. 218.—GILES, 1867.

67. "A party can sue at law for damages for an infringement, but in equity he can obtain no such damages. His right may be maintained and protected for the future, and an account may be required."—*Id.*

68. A suit in equity was brought in the United States Circuit Court for the Southern District of New York, against the New York & Hudson River Railroad Company, where some of the acts complained of as infringements occurred in another district. It was held that under the provisions of Section 6 of the act of April 3d, 1818, the court did not have jurisdiction. *Hodge et al. v. Hudson River R. R. Co.*, 3 Fish. P. C. 410.—BLATCHFORD, 1868.

69. Where a Government agent uses a patented improvement on an arrangement with the patentee that he will await the action of Congress to get his compensation, in the absence of such action, the Court of Claims has no jurisdiction to award such compensation. *Shavor et al. v. United States*, 4 Nott & Hunt, 440.—NORTT, 1868.

70. State courts have jurisdiction of actions for recovery of damages for fraudulent representations in the sale of patent right. *Hunt v. Hoover*, 24 Iowa, 231.—WRIGHT, 1868.

71. The Court of Claims has jurisdiction of an action by a patentee against the Government for the recovery of an agreed royalty. *Burns v. United States*, 4 Nott & Hunt, 113.—LORING, 1868.

72. "It may often happen that the profits of the infringing defendant are much greater than the damages the plaintiff could prove he had sustained; and, in such cases, it could hardly be said that the plaintiff had a full and adequate remedy at law. In such a case, as, in matters of account, courts of equity possess a concurrent jurisdiction, in most cases, with the courts of law." *Perry v. Corning et al.*, 6 Blatch. 134.—HALL, 1868.

73. A suit that is brought for an accounting of profits is properly brought in equity. *Dibble v. Augur*, 7 Blatch. 86.—BLATCHFORD, 1869.

74. A suit to recover royalties under a license, to determine the right of the licensee, to alienate his interest and the like, is not such a suit on a patent as gives a federal court jurisdiction. *Merserole et al. v. Union Paper Collar Co.*, 6 Blatch. 356.—BLATCHFORD, 1869.

75. "A state court has jurisdiction to decree" a "license and agreement to be void and inoperative for fraud or any other adequate reason, and the fact that, in the investigation, the state court will be obliged to inquire whether there was anything new in the patents which could operate as a consideration for the license and agreement, cannot deprive the state court of jurisdiction, or confer it on this [federal] court."—*Id.*

76. "A state court cannot take cognizance of a suit brought for the infringement of a patent; nor of a direct suit brought to decree a patent to be void."—*Id.*

77. "It cannot be contended that every citizen has a right to bring a suit in the Circuit Court of the district where the proper defendant may be found to repeal a patent, for the reason that such suit is a suit arising under a law of the United States. If such right existed under Section 17 of the act of 1836, the provisions of Section 16 would be useless. The two sections must be construed together, and the confiding of authority, by Section 16, to declare a patent void, in certain specified cases, must be regarded as intended not to confer such authority in any other cases."—*Id.*

78. Questions of the existence, validity, or construction of letters patent for inventions when

arising collaterally in a suit in a state court must be there tried and determined. *David v. Park*, 103 Mass. 501.—GRAY, 1870.

79. Three sewing-machine companies jointly granted a license to a fourth sewing-machine company, with the provision that if licenses were granted to another party upon less royalty than the royalty of said fourth party, the royalty of said fourth party should be similarly reduced. Complainant sought decision in a federal court that a certain license to another party was upon a less royalty. The court held that there was no case presented for the jurisdiction of a federal court. *Florence Sewing Mach. Co. v. Singer M'fg Co.*, 8 Blatch. 113.—WOODRUFF, 1870.

80. "Suits in equity to recover gains and profits, or actions at law to recover damages for the infringement for letters-patent, may be maintained in a proper case, even after the patent has expired, if the alleged infringement took place during the term for which the patent was granted, and the suit was commenced before the claim was barred by the statute of limitations. Claims of the kind may be barred by the statute of limitations." *Hovess v. Nute*, 4 Fish. P. C. 263.—CLIFFORD, 1870.

81. "Inventors whose improvements are secured by letters-patent duly issued may prosecute infringers of their exclusive rights as well in equity as at law, and all such actions, suits, and controversies are exclusively cognizable in the circuit courts." *Hudson v. Draper et al.*, 4 Fish. P. C. 256.—CLIFFORD, 1870.

82. "Under Section 17 of the act of July 4th, 1836, . . . a party is at liberty to select his forum, although he seeks a recovery of money only, and neither seeks nor requires a discovery or other ancillary or further relief. No language could be employed to declare the jurisdiction of the courts at law and in equity more completely concurrent than is there found, or which would more clearly indicate that the party aggrieved may resort to either." *Perry v. Corning et al.*, 7 Blatch. 195.—WOODRUFF, 1870.

83. A suit for a foreclosure of a mortgage upon a patent may be sustained in a state court. *Boston & Fairhaven Iron Works v. Montague*, 108 Mass. 248.—MORTON, 1871.

84. State courts have jurisdiction of causes which involve the question of novelty or utility of a patent as a consideration for a promise to pay money. *Page v. Dickerson*, 28 Wisconsin, 694.—COLE, 1871.

85. Section 6 of the act of Congress of April 3d, 1818, referring to the Northern and Southern Districts of New York, applies solely to those districts, to the end that the Southern District

shall maintain jurisdiction only over causes arising in the Southern District. *Wheeler v. McCormick*, 8 Blatch. 267.—WOODRUFF, 1871.

86. The federal courts have jurisdiction to enjoin the use of a patented invention, and for an account of profits by the infringer, notwithstanding an action at law may be maintained to recover damages for infringement. *McMillin et al. v. Barclay et al.*, 3 Pittsb. 377.—MCKENNAN, 1871.

87. "The Circuit Court may rightfully take cognizance of every controversy arising under the patent laws, and . . . where prevention of a violation of the inventor's rights is sought, the equity jurisdiction of the court must be invoked, as alone competent to furnish adequate relief. A court of law possesses no such power; its remedies afford redress only for past infringement, but no effectual security against future aggressions."—*Ib.*

88. "Nor is a trial at law a perquisite to the exercise of this jurisdiction. Such trial may be ordered; but if its allowance were demandable of right, still the jurisdiction of the court would remain untouched, because, in the end, its result might be adopted or rejected, as the exigencies of equity might require. But it is altogether within the sound discretion of the court to allow or refuse such trial."—*Ib.*

89. "There is a broad distinction between the jurisdictional right to take cognizance of a complaint, and a denial of the relief which the complainant asks. Although the relief invoked may be refused, it does not follow that it is because the court cannot inquire into the merits of the cause, and adjudge it accordingly. Want of equity does not imply a defect of jurisdiction. But it is only when the court is without power to pass upon the subject-matter of the complaint, or to grant the relief sought, that its jurisdiction may be challenged."—*Ib.*

90. Where the defendant resides in another circuit than that in which the suit is brought, and service of process is made upon him while passing through the latter circuit, the court acquires jurisdiction of the person of the defendant, and may enjoin him against infringement elsewhere. *Thompson et al. v. Mendelsohn*, 5 Fish. P. C. 187.—MCKENNAN, 1871.

91. A state court has jurisdiction of a case where the question at issue is whether one party agreed to take a patent of another party. *Lockwood v. Lockwood*, 33 Iowa, 509.—COLE, 1871.

92. "Where the validity of the plaintiff's patent is put in question by the pleadings in the state court, and the defendant presents such proofs upon a trial as to render it necessary for

the court to examine and pass upon conflicting specifications and claims to priority in invention, in order to determine whether the plaintiff has such a property in the subject-matter of the grant as to entitle him to the exclusive and unmolested use of it, and an objection is taken to the jurisdiction of the court, for that reason the bill must be dismissed, for in such cases the jurisdiction is in the court of the United States exclusively." (This was said in a case where it was sought to restrain the defendant from publishing circulars containing threat of infringement suit.) *Hovey et al. v. Rubber Tip Pencil Co.*, 33 N. Y. 522.—BARBOUR, 1871.

93. A state court has jurisdiction of an action for the enforcement of a contract to assign a patent, and of the question of profits in connection therewith. *Binney v. Annam*, 107 Mass. 94.—MORTON, 1871.

94. "The nature of the Chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the Government." *Mowry v. Whitney*, 14 Wall. 434.—SUP. CT. 1872.

95. The validity of a patent may be tried by a state court when that issue comes in collaterally. *Middlebrook v. Broadbent et al.*, 47 N. Y. 443.—PECKHAM, 1872.

96. The jurisdiction of the Northern and Southern Districts of New York are kept separate by Section 6 of the act of April 3d, 1818. Complainant brought a suit against the Erie Railway Company in the Southern District. The infringing device being upon engines made and largely used in the Northern District, the Court held that it had authority to enjoin and give damages for the use within the Southern District. *Locomotive Engine Safety Truck Co. v. Erie Railway Co.*, 10 Blatch. 292.—BLATCHFORD, 1872.

97. In an action for infringement of patent brought in the Circuit Court for the Southern District of New York, the objection that the cause of action arose in the Northern District of New York is one which may be voluntarily waived, and where defendants did not raise it by their answer, they were taken to have waived it. *Black et al. v. Thorn et al.*, 10 Blatch. 66.—BLATCHFORD, 1872.

98. The courts of the United States have no general or common law of jurisdiction. Their power is limited by the terms of the statute which confers it. These limits are held to strictly, and the jurisdiction must in all cases be made to appear explicitly. *Florence Sewing Mach. Co. v. G. & B. S. M. Co.*, 110 Mass. 70.—SHEPLEY, 1872.

99. An assignee can proceed in a state court for an injunction against an infringement of his rights by his assignor. *Stone v. Edwards*, 35 Texas, 556.—WALKER, 1872.

100. "Contracts may be made respecting patent rights that may be enforced in a state court. When the controversy turns upon the effect of the contract and not upon the letters-patent, the case is within the jurisdiction of a state court." *Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co. et al.*, 110 Mass. 1.—CHAPMAN, 1872.

101. A corporation does not waive an objection to the jurisdiction of the court over it by appearing and pleading, by an attorney, to the jurisdiction of the court. *Decker v. N. Y. Belting & Packing Co.*, 6 Fish. P. C. 374.—BLATCHFORD, 1873.

102. A defendant died pending suit; thereof the court said: "No injunction can issue against the defendant, and as there is no proof of infringement by the executor, none can issue against him. No discovery is prayed for against the executor, and there is no presumption of any knowledge by him of his testator's acts. When the title to the principal relief, which is the proper subject of a suit in equity—the injunction and discovery—fails, the incidental right to an account fails also." *Draper v. Hudson*, 1 Holmes, 208.—SHEPLEY, 1873.

103. "Although the jurisdiction of the Circuit Court in equity in patent causes rests upon statute provisions, it is to be exercised according to the course and principles of courts of equity. . . . 'The right to an account of profits is incidental to the right to an injunction in copyright and patent cases.' . . . Where the title to equitable relief fails, the general rule of equity applies that the incidental relief fails also."—*Id.*

104. "Exclusive jurisdiction, in all actions at law, and suits in equity arising under any act of Congress granting or conferring to inventors the right to their inventions or discoveries, is conferred upon the Circuit Court, subject to the condition that the final judgment or decree in such controversy may be removed here for re-examination." *Mitchell v. Tilghman*, 19 Wall. 287.—SUP. CT. 1873.

105. "When the patentee or his assignee of letters-patent for an invention sells to a person a machine embodying the patented invention, with a covenant that the vendee and licensee shall be the exclusive licensee, and have the sole right to use the patented invention within a described territory; and thereafter sells to another the patented invention in violation of his contract, to be used in the described territory, such



second vendee having notice of the first contract, can the licensee enforce his rights by bill in equity in the federal courts, without regard to the citizenship of the parties, under the jurisdiction conferred upon these courts by the patent act?" With regard to the case thus stated, the court said. "Is the case supposed a case or controversy arising under the patent laws of the United States? I feel compelled to come to the conclusion that it is not. It is a case arising under a contract in relation to a machine embodying in its organization three or more patented inventions. But it is a case arising out of a contract and the relations of the parties under that contract, and not under the patent laws of the United States." *Hill et al. v. Whitcomb et al.*, 1 Holmes, 37.—SHEPLEY, 1874.

106. A state court has jurisdiction of a case in which it is sought to set aside a patent on the ground of fraud. *Leonard v. Barnum*, 34 Wis. 105.—COLE, 1874.

107. A Rhode Island corporation brought suit for infringement in the Southern District of New York. In the suit defendants sought to have complainant enjoined in similar proceedings elsewhere. The court held that it had not jurisdiction for that purpose. *Rumford Chemical Works v. Hecker et al.*, 11 Blatch. 552.—BLATCHFORD, 1874.

108. "The decision of the Patent Office is never final upon the question of the novelty or priority of an invention." *Union Paper Bag Machine Co. v. Crane et al.*, 1 Holmes, 429.—LOWELL, 1874.

109. In an action for the recovery of money promised to be paid for an interest in a patent, it is open for a state court to go into the question of the validity of the patent. *Rice v. Garnhart*, 34 Wis. 453.—LYON, 1874.

110. "If the licensee 'uses the patented invention beyond the limits of the license or grant, or in a way not authorized by the license or grant, then there has been a violation of a right secured to the patentee under a law of the United States giving to him the exclusive right to use the thing patented, although such licensee performs, according to their terms, all the covenants entered into by him.'" *Magic Ruffle Co. v. Elm City Co.*, 13 Blatch. 151.—SHIPMAN, 1875.

111. "If the licensees have . . . expressly covenanted, in their agreement of license, that they will do or will not do a particular act, or will not use the invention for a particular purpose, a violation of such covenant is . . . a breach of contract, not arising under the laws of the United States, but for which remedy may

be sought in the circuit courts of the United States, provided the citizenship of the parties gives jurisdiction to such court."—*Id.*

112. A bill in equity was brought for breach of contract. Defendant contended that it could not be maintained because there was a complete and adequate remedy at law. The bill asked for an account and discovery, and by reason thereof the equity jurisdiction was maintained.—*Id.*

113. "It is undoubtedly true that the state courts have no cognizance of actions in which the validity of letters-patent is involved. The jurisdiction of the courts of the United States is exclusive over such questions. Where, however, the controversy does not turn upon the letters-patent, but upon the force and effect of some contract under them or in reference to them, in which the question of their validity is not raised, it has long been held that the state courts are appropriate tribunals for the adjudication, and that the federal courts cannot properly assert jurisdiction, unless the residence or citizenship of the parties confer to it." *Consolidated Fruit Jar Co. v. Whitney et al.*, 2 Bann. & Ard. 30.—NIXON, 1875.

114. In a case where the questions at issue are as to the validity and *bona fide* of certain transfers and assignments of interests in and under them, a state court may take jurisdiction.—*Id.*

115. For an example of a state court determining the question of infringement when that issue came in collaterally, see —. *Stevens v. Pierpont*, 42 Conn. 360.—CARPENTER, 1875.

116. State courts have no jurisdiction of the question of infringement of patents when that question comes in direct issue. *Smith v. McClelland*, 11 Bush, 523.—PETERS, 1875.

117. "Controversies arising upon conflicting claims to or under patents issued under the laws of the United States are cases arising under the laws of the United States. It is upon this theory that the circuit courts have, from the foundation of the Government, entertained jurisdiction of patent cases." *Celluloid M'fg Co. v. Goodyear Dental Vulcanite Co.*, 13 Blatch. 375.—HUNT, 1876.

118. "If a contract has been made, investing the defendant with a right to use the complainant's patented property, an injunction and an account could only be decreed as the consequence of an adjudication that the defendant had forfeited this right by reason of non-compliance with the terms upon which it was granted. But whether such an adjudication ought to be made would depend altogether upon the rules and

principles of equity, and in no degree whatever upon any act of Congress concerning patent rights." *Tilghman v. Hartell et al.*, 2 Bann. & Ard. 260.—MCKENNAN, 1876.

119. The decision of the Commissioner of Patents on the question of invention, its utility and importance, is open to inquiry in the courts. *Reckendorfer v. Faber*, 92 U. S. 347.—SUP. CT. 1876.

120. Causes of action that relate to patents, but involving the validity thereof, are triable in state courts. *Blakeney v. Goode et al.*, 30 Ohio St. 350.—WRIGHT, 1876.

121. A patent owner cannot recover in a state court upon a *quantum meruit* for an unauthorized sale of his patent. *De Witt v. Elmira Nobles M'fg Co.*, 66 New York, 459.—ALLEN, 1876.

122. "The powers of the Supreme Court of the District of Columbia, in patent cases, are the same as those of the circuit courts of the United States." *Cochrane et al. v. Deener et al.*, 94 U. S. 780.—SUP. CT. 1876.

123. "The circuit courts were first invested with equity jurisdiction in patent cases by the act of February 15th, 1819, which declared that these courts should have 'original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity, filed by any party aggrieved in any such case, should have authority to grant injunctions, according to the course and principles of courts of equity,' etc.

"This law was substantially re-enacted in Section 17 of the patent law of July 4th, 1836, and Section 55 of that of July 8th, 1870, special power to assess damages in equity cases being also conferred by the latter act. Before the act of 1819 was passed, the Circuit Court had cognizance of actions at law brought to recover damages for the infringements of patents, but not of suits in equity in relation thereto unless the parties happened to be citizens of different states."—*Id.*

124. A state court has jurisdiction of proceedings to punish interference with the title and possession of a patent vested in a receiver. *Woven Tape Skirt Co., In re*, 12 Hun, 111.—DANIELS, 1877.

125. A suit in equity was brought for infringement of a patent after the expiration of the patent. The court held that there was no loss to the patentee beyond the mere value of a license; that there was no element in the case upon which

to base an action of profits; and as no case for an action was presented, there was no need of a discovery in aid of an account, consequently an action would not lie. *Vaughan v. Central Pacific R. R. Co.*, 4 Sawyer, 280.—SAWYER, 1877.

126. "There may be cases, such as where the infringer makes a profit by the sale or use of the invention, wherein the patentee may have an election of remedies for an infringement of his patent—viz., by an action at law to recover the damages sustained, in which the actual damages may be trebled, in the discretion of the court; or by a suit in equity for an account and recovery of the profits made by the infringer from the sale or use of the invention. It would seem from these authorities that the jurisdiction of equity in the latter case rests on the ground of a trust. The patentee being entitled to the profits resulting from the sale or use of his invention, the infringer is converted into a trustee for the patentee, as regards the profits thus made, and of which he would otherwise be deprived. But in order to maintain a suit in equity for an account of profits there must be actual profits resulting to the infringer, susceptible of computation or estimation, of which the patentee could be deprived, and with which the infringer may be charged as a trustee. If, from the character of the invention, there can be nothing in the nature of profits of which the patentee can be deprived, there is no basis for charging the infringer with receiving profits for his benefit, and nothing for which he can be called upon to account"—*Id.*

127. A bill in equity was filed after expiration of patent, and prayed for a discovery and an accounting, but not for an injunction. It was held that the bill might be sustained upon the prayer for a discovery and an account. *Vaughan v. East Tennessee, Virginia & Georgia R. R. Co.*, 1 Flippin, 621.—BROWN, 1877.

128. "When a bill is brought for a discovery and for other equitable relief within the appropriate jurisdiction of a court of equity, and the ultimate object of the plaintiff is to obtain damages, in such case the court, having granted a discovery, will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law." *Magic Ruffle Co. v. Elm City Co.*, 14 Blatch. 109.—SHIPMAN, 1877.

129. "It may be regarded as generally true that a court of equity ought not to sustain a bill which, although it may contain matter which can give the court jurisdiction, is merely for the assessment of damages for a breach of contract."—*Id.*

130. "Where a bill is brought for discovery in a case which is not the proper subject of an action or bill for an account, the fact that the plaintiff is entitled to a discovery does not necessarily entitle him also to an account."—*Ib.*

131. "There is a class of cases in which the relief to be ultimately rendered is the payment of damages alone, and where the party seeking such relief needs the aid of a court of equity for discovery, in a case which is not of trusteeship or agency, but where the ascertainment of damages is complicated and intricate, and the action at law cannot be adequately tried without great difficulty, resulting from the nature of the accounts or from other circumstances. In such cases a court of equity assumes jurisdiction of the whole case, and proceeds to a final degree upon the merits."—*Ib.*

132. "When the patentee has infringed his license, and, while holding the legal title to the patent in trust for his license, has been faithless to his trust, 'courts of equity are always open to the redress of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the Circuit Court has jurisdiction.'" *Stanley Rule & Level Co. v. Bailey*, 14 Blatch. 510.—SHIPMAN, 1878.

133. A suit for infringement of a patent was brought in the Northern District of Illinois. Motion for provisional injunction was made. It did not appear that the defendant had ever made or sold any infringing goods in said district; he was the agent of a St. Louis packing company for the sale of their goods in New York City, and did no business and had no place of business in said district. The court held that "a preliminary injunction ought not, therefore, to issue against him in this district, because such a process cannot run beyond the territorial limits of the district—certainly not in an ordinary case." *Wilson Packing Co. et al. v. Clapp*, 8 Bissell, 154.—BLODGETT, 1878.

134. Where a bill of complaint seeks a discovery and accounting for profits, it can be maintained after the expiration of the original and extended terms of the patent. *Sayles v. Dubuque & Sioux City R. R. Co.*, 5 Dillon, 561.—DILLON and LOVE, 1878.

135. "A bill in equity when otherwise maintainable will lie in behalf of the patentee, although the patentee has expired, and the case is such that no injunction has issued or can issue. The infringer is converted into a trustee for the patentee as to profits made by the former from the use of the patented invention; and this is sufficient ground of equity jurisdiction of the

bill to ascertain the amount of such profit and to compel the infringer to account for the same." *Stevens v. Kansas Pacific R. R. Co.*, 5 Dillon, 486.—MILLER, 1879.

136. Where a dispute between complainant and respondent is really about a license, and the parties are citizens of the same state, a federal court has no jurisdiction. *Hartell v. Tilghman*, 99 U. S. 547.—SUP. CT. 1879.

137. "The power to prevent, by injunction, the violation of a right secured by a patent, is conferred, by Section 4921 of the revised statutes, irrespective of any right, in the given suit, to recover profits or damages." *Colgate v. International Ocean Telegraph Co.*, 17 Blatch. 308.—BLATCH. 1879.

138. In a suit between two parties, where one seeks to compel the other to transfer the title to a patent, and both parties are citizens of the same state, a federal court has no jurisdiction. *Perry v. Littlefield et al.*, 17 Blatchford, 272.—BLATCHFORD, 1879.

139. A claim for relief against setting up a false title to a patent does not give jurisdiction to a federal court. *Prime et al. v. Brandon Mfg Co.*, 16 Blatch. 453.—WHEELER, 1879.

140. The acts of 1789 and 1875 declare that "no suit shall be brought against any person in any other district than that in which he is an inhabitant, or where he is found." The present suit was brought in the Southern District of Illinois. The laws of Illinois provided "that foreign corporations, and their agents doing business in this state, shall be subject to all liabilities, restrictions, and duties which are or may be imposed upon corporations of like character in this state, and that they shall have no other or greater power is expressly stated in the statute." The allegation in the bill of complaint was that the Saint Louis Beef Canning Company—a corporation under the laws of Missouri—owns and possessed a slaughter-house and stock-yard in East St. Louis, Ill., where beef to be canned by the company was slaughtered and pressed preparatory for and in the name of such company. Jurisdiction of the court was sustained, the court saying that "it is necessary that the foreign corporation should do business in the state in order to be found there, and in order to warrant a service on the president when within the limits of the state." *Wilson Packing Co. v. Hunter*, 4 Bann. & Ard. 184.—DRUMMOND, 1879.

141. *Doubted*, "Whether, under Section 55 of the act of 1870, or Section 4921 of the revised statutes, the United States circuit courts have jurisdiction in patent cases, except by injunc-

tion, where the parties are citizens of the same state." *Sayles v. Richmond, Fredericksburg & Potomac R. R. Co.*, 3 Hughes, 172.—HUGHES, 1879.

142. "It is a well-settled canon of construction that jurisdictional legislation must be strictly construed."—*Id.*

143. After a patent has expired so that no injunction can be granted, and although the bill of complaint is not a bill of discovery, the court has jurisdiction to award an account, and can therefore take cognizance of the suit as a suit in equity. *Gordon v. Anthony et al.*, 16 Blatch. 234.—BLATCHFORD, 1879.

144. "No law of the United States makes provision for the service of any process outside of the district." No such service can be made in the interference proceeding provided for by Section 4918 of the revised statutes. *Liggett & Myers Tob. Co. v. Miller et al.*, 1 McCrary, 31.—MCCRARY, 1880.

145. Where the original specification in the application on which the patent issued had been amended by filing substantially a new one, written by an attorney who had not received a power from the proper party, it was held that such informalities are cured by the issue of the patent, and that the action of the Commissioner therein cannot be inquired into in an action for infringement. *Hoe et al. v. Cottrell et al.*, 17 Blatch. 546.—SHIPMAN, 1880.

146. Where a United States court has entered a final decree of infringement and for injunction upon agreement of parties, a state court has jurisdiction—the parties being citizens of the same state—to entertain a suit, at defendants' instance, praying that the agreement may be set aside and complainant enjoined from availing himself thereof, on the ground of a heretofore undiscovered bar to the validity of complainant's patent in the existence of a prior patent for the same invention, for the state court might decide that ignorance of the existence of said prior patent affords no ground upon which to set aside the agreement. [It seems that if the inquiry in the state court should lead to determining the identity of the two patents, that court would have the power to pass on that question.] The United States court thereupon stays contempt proceedings until the determination of the issue in the state court. *Pentlarge v. Beeston et al.*, 18 Blatch. 38.—BENEDICT, 1880.

147. The above decision is without prejudice to said complainant's right to proceed regularly in the United States court by bill of complaint.—*Id.*

148. The Court of Claims has jurisdiction whenever a patentee seeks to recover compensa-

tion under a contract with the Government for the use of his patent. *Morse M'fg Co. v. U. S.*, 16 Nott & Hop. C. C. 296.—DAVIS, 1880.

149. Questions of title to a patent are questions "which arise under the patent laws," and give an United States court jurisdiction. *Campbell v. James et al.*, 18 Blatch. 92.—WHEELER, 1880.

150. Section 719 of the revised statutes provides: "An injunction shall not be issued by a district judge, as one of the judges of a circuit court, in any case where a party has had a reasonable time to apply to the Circuit Court for the writ; nor shall an injunction so issued by district judge continue longer than to the Circuit Court next ensuing, unless so ordered by the Circuit Court." *Held*, "It must be taken to be the law still, that the district judge not acting through the court, but signing the writ himself in vacation, should not do so when the Circuit Court is sitting or can be applied to, and should limit its operation to the next ensuing term. But the district judge has full power to hold the Circuit Court for all purposes, including this." *Goodyear D. V. Co. v. Folsom*, 3 Fed. Rep. 509.—LOWELL, 1880.

151. A suit in equity for an accounting as to an indefinite amount of damages and profits may be brought and maintained after the patent expires. *Atwood v. Portland Co.*, 10 Fed. Rep. 283.—LOWELL, 1880.

152. The Federal Court for the Southern District of Ohio is by law in two divisions, the Eastern and the Western. A resident of the Eastern Division was sued in an action made returnable in the Western Division. The respondent filed a general appearance, and on motion had time for answer extended. *Held*, that it was then too late for the respondent to object to the jurisdiction, and that these proceedings named were a waiver of such right to object. *Page et al. v. Chillicothe*, 6 Fed. Rep. 599.—SWING, 1881.

153. A patent having expired, a suit in equity was brought thereon merely to recover profits and damages. It was held that an equity suit could not be maintained. *Root v. L. S. & M. S. Railroad Co.*, 105 U. S. 189.—SUP. CT. 1882.

154. For a *résumé* of legislation upon equity jurisdiction in patent cases, see —. *Id.*

155. By the court: "Our conclusion is that a bill in equity for a naked account of profits and damages against an infringer cannot be sustained; that such relief ordinarily is incidental to some other equity the right to enforce which secures to the patentee his standing in court;" that the most general ground for equitable interposition is to insure to the patentee the enjoy-

ment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own peculiar circumstances as furnishing a clear and satisfactory ground of exception from the general rule.—*Ib.*

156. By the court: "It is the settled doctrine of this court that this distinction of jurisdiction between law and equity is constitutional to the extent to which the seventh amendment forbids any infringement of the right of trial by jury, as fixed by the common law, and the doctrine applied to patent cases as well as others."—*Ib.*

157. Complainant sought by bill in equity to have defendant's patent applied to the payment of a debt of \$52 due from defendant to complainant. Both were citizens of the same state, and bill was dismissed for want of jurisdiction. *Ryan v. Lee*, 10 Fed. Rep. 917.—TREAT, 1882.

158. Where the defendants do not rest their case upon the question whether a royalty contract between them and complainant is terminated, but in substance deny infringement, United States courts have jurisdiction of the case. *Smith v. Standard Laundry Mach. Co. et al.*, 20 Blatch. 360.—WHEELER, 1882.

159. A bill in equity for infringement of patent cannot be brought and sustained after the expiration of the patent simply for an account of profits and damages. *Campbell v. Ward*, 12 Fed. Rep. 150.—NIXON, 1882.

160. Where, after the expiration of a patent, an owner of a patent had a full remedy for infringement by action at law, it was held that an action in equity would not lie. *Hayward et al. v. Andrews et al.*, 12 Fed. Rep. 786.—HARLAN, 1882.

161. By the court: "Not being entitled to an injunction, some other ground for equitable relief must be disclosed in the bill besides a naked account for profits and damages in order to give the court jurisdiction in equity." *Spring et al. v. Domestic Sewing Mach. Co.*, 13 Fed. Rep. 446.—NIXON, 1882.

162. By the court: "It is never too late at

any time during the pendency of the proceedings for the court to examine into its right and power to make a decree or enter a judgment in a case." Nor need the objection be raised in the pleadings.—*Ib.*

163. By the court: "An injunction is a preventive remedy, having reference to the future rather than the past. The complainant not being entitled to one in the case, and the provisions of the patent law giving to one to whom has been assigned an interest in the damages for past infringement, as incidental to the transfer of the legal title, the remedy of an action on the case, I am of opinion that this court in equity has no jurisdiction."—*Ib.*

164. Complainant had assigned his patent to defendants upon their agreement to pay him certain royalties. He claimed that proper royalties had not been paid, asked relief in that regard, and also sought to have the question determined whether certain articles were within his patent. It was held that this furnished a case for a state court and not for a federal court. *Teas v. Albright et al.*, 22 O. G. 2069.—NIXON, 1882.

165. Where an equity suit has been brought on a patent, and the patent expires while the action is pending, the action will not be dismissed because of such expiration. *Gottfried v. Moerliën*, 14 Fed. Rep. 170.—BAXTER, 1882.

166. By the court: "As the defendants admit the validity and use of the complainants' patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention, the case is not one arising under the patent laws of the United States; and the requisite diversity of citizenship between the parties not existing, this court has no jurisdiction." *Nichols et al. v. Tice et al.*, 14 Fed. Rep. 352.—WALLACE, 1882.

167. Defendant held a revocable license from complainant. Complainant revoked it, and brought suit for infringement. Defendant not only answered that the license was not lawfully terminated, but denied making and selling the patented machines. The issue raised by this plea was held to give an United States court jurisdiction irrespective of citizenship. *Smith v. Standard Laundry Mach. Co.*, 19 Fed. Rep. 826.—WHEELER, 1882.

168. A bill in equity for infringement will not lie when the bill is filed only five days before the expiration of the patent, even though an injunction be asked for. *Burdell v. Comstock*, 15 Fed. Rep. 395.—BAXTER, 1883.

169. By the court: "Objections to the jurisdiction are usually taken in the first instance,

but a plain defect of jurisdiction may be insisted upon at the hearing."—*Id.*

170. By the court: "The only complaint made in the bill is that the appellants were fraudulently excluding the appellee from the inspection of their books of account, and refusing to pay him the sums due for royalties under his contract; and the prayer of the bill was for a disclosure and account of what was due the appellee under his contract, and a decree for the amount found to be due him. On the face of the bill, therefore, the case is not one arising under the patent laws of the United States. . . . The suit, notwithstanding the collateral inquiry, remains a suit on the contract to recover royalties, and not a suit upon the letters-patent. It arises solely upon the contract, and not upon the patent laws of the United States." *Albright et al. v. Teas*, 106 U. S. 613.—*SUP. CT.* 1883.

171. For a discussion of the question of service of process upon a non-resident corporation, see —. *Gray et al. v. Taper Sleeve Pulley Works*, 24 O. G. 602.—*ACHESON*, 1883.

172. Defendant entered into a contract with complainant in 1865 to manufacture a certain number of patented mowing machines each year during the life of a patent expiring in 1883. In 1881 a bill in equity was brought asking for specific performance and for damages. *Held*, that the bill in equity would not lie because specific performance at that date was impossible, and because the remaining thing claimed—the damages—was recoverable in an action at law. *Werden et al. v. Graham*, 24 O. G. 101.—*SUP. CT.* 1883.

173. Where the suit was simply on a license, on a certain contract between the parties, it was held that there was no question arising under the patent laws, and no jurisdiction in a United States court. *Kelly v. Porter et al.*, 8 Sawyer, 482.—*SAWYER*, 1883.

174. By the court: "Sitting here in equity I cannot, after the expiration of the patent, undertake to decide upon its validity or enjoin myself from trying the case at law, pending in New Hampshire, unless some purely equitable defence is made out which would not be equally available in that action." *Concord v. Norton*, 16 Fed. Rep. 477.—*LOWELL*, 1883.

175. Where an equity suit was brought in a federal court for infringement of patent and also for recovery of royalties, and the patents were adjudged invalid, it was held that the suit could be maintained as to the royalties when the citizenship of the parties give the court jurisdiction. *McKay v. Jackman*, 17 Fed. Rep. 641.—*WHEELER*, 1883.

176. Where the patentee seeks for the use of his patent a stipulated royalty or license, he can proceed in equity for an infringement, when he seeks an injunction. *McMillin et al. v. St. Louis & Miss. Valley Transp. Co.*, 5 McCrary, 561.—*TREAT*, 1883.

177. A suit in equity cannot ordinarily be maintained for infringement of a patent if brought after the expiration of the patent. *Gramme E. C. v. Arnoux & Hochhausen E. Co. et al.*, 21 Blatch: 450.—*BLATCH*, 1883.

178. Although a patent expires pending a litigation upon it, an equity suit previously commenced will be retained to complete the accounting. *Adams et al. v. Howard et al.*, 22 Blatch. 47.—*WALLACE*, 1884.

179. Complainants brought their bill of complaint June 12th, 1880, setting up their original patent only. It had been reissued and would expire August 25th, 1880. September 22d, 1880, the bill was amended so as to set up the reissue. It was held that the suit might continue. *Reay et al. v. Raynor et al.*, 22 Blatch. 13.—*WHEELER*, 1884.

180. The complainant's bill of complaint was filed one day before the patent expired, seeking the ordinary remedies. Defendant demurred for want of equity, and his demurrer was sustained. *Davis v. Smith*, 19 Fed. Rep. 823.—*LOWELL*, 1884.

181. Defendants held a revocable license from complainant. Complainant revoked it and brought suit for infringement. Defendants not only answered that the license was not lawfully terminated, but denied making and selling the patented machines. The issue raised by this plea was held to give an United States court jurisdiction irrespective of citizenship. *Smith v. Standard Laundry Mach. Co. et al.*, 20 Blatch. 360.—*WHEELER*, 1882.

182. Where a suit is brought against the Commissioner of Patents in one of the circuit courts of the United States, and the Commissioner accepts service, the court acquires jurisdiction so far as the presence of the Commissioner is concerned. *Vt. Farm Mach. Co. et al. v. Marble*, 22 Blatch. 128.—*WHEELER*, 1884.

183. Where a trust is created and its objects are to be carried out within a certain state, the validity of a transfer of a patent involved in the creation of such trust is to be tested by the law of the state, though the matter may be in question in a suit in a federal court. *Ladd, Trustee, v. Mills et al.*, 22 Blatch. 242.—*WALLACE*, 1884.

184. Where three patents are set up in a bill of complaint, and it is alleged that "these several letters-patent are applicable to the same

process, and are so used by the defendants," it seems that in awarding damages a consideration of all three may be necessary, equity jurisdiction may be maintained, although some of the patents are near their expiration. *N. Y. Grape Sugar Co. v. Peoria Grape Sugar Co.*, 21 Fed. Rep. 878.—BLODGETT, 1884.

185. Where a bill of complaint for an infringement of a patent is filed more than three months before the expiration of the patent, it cannot be said that it is impossible to give complainant an injunction, or even to reach a final decree on the merits before the expiration of the patent, and, therefore, equitable jurisdiction may be maintained.—*Id.*

186. An infringer may be enjoined in a district where he lives from committing infringement elsewhere. *Hatch et al. v. Hall*, 22 Fed. Rep. 438.—WHEELER, 1884.

187. A licensor brought an equity suit against the licensees praying disclosure of license fees, "and for such other and further relief as the case may require." Thereupon the court said: "So far as the bill is one for relief, it is clear that this court has no jurisdiction to grant it. The action is brought to enforce a contract, and there exists a plain, adequate, and complete remedy at law. So far as the bill seeks a discovery it is open to the objection that there is no allegation that a suit at law has been brought. In order to support a bill of discovery it must appear that the discovery is asked for the purposes of some suit brought, or intended to be brought, otherwise it will not be entertained, as courts of equity grant discovery to aid mere legal proceedings. . . . The defendant can demur to the whole bill, if it does not aver that a suit at law is pending in which a discovery may be material." *Perkins v. Hendryx et al.*, 23 Fed. Rep. 418.—COLT, 1885.

188. Although the sum in dispute is small, yet, if the evidence tends to show a technical right to an injunction and a claim for profits, an equity suit will lie, and complainant will not be remitted to his action at law. *Greene v. Barney*, 19 Fed. Rep. 420.—LOWELL, 1884.

189. Where a corporation has infringed a patent and then made an assignment in insolvency to an assignee, a bill for infringement by the corporation can be maintained against the assignee, although the patent owner might, if he choose, present his claim to the assignee and prosecute it under the laws of the state. *Gordon et al. v. St. Paul Harvester Works et al.*, 23 Fed. Rep. 147.—NELSON, 1885.

190. "A court of equity should not refuse to entertain a bill of discovery, although by the

enlargement of the jurisdiction and remedies exercised by courts of law, similar relief could be obtained by the complainant in his action at law." *Colgate v. Campagne Française Du Telegraphe & Co.*, 23 Fed. Rep. 82.—WALLACE, 1885.

191. If the right of the patentee was acknowledged, and without his consent an officer of the Government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie within the jurisdiction of the Court of Claims. . . . And it may be that, even if the exclusive right of the patentee were contested, such an action might be brought in that court involving all questions relating to the validity of the patent." *Hollister v. Benedict & Burnham M'f'g Co.*, 113 U. S. 59.—SUP. CT. 1884.

192. Though a state court may enjoin a party from disposing of patents which stand in his name, when the title thereto is in doubt it may not enjoin him from the use of the patented mechanism, for the courts of the United States are vested with exclusive jurisdiction of the prevention of the infringement of patentable inventions. *Continental Store Co. v. N. Y. Store Service Co. et al.*, 31 O. G. 1561.—SHIPMAN, 1885.

193. "Courts of equity can exercise jurisdiction in patent causes only where the circumstances call for the peculiar forms or character of relief which these courts administer. Ordinarily the relief required is that afforded by the writ of injunction. Where, therefore, the circumstances do not call for the service of this writ, the jurisdiction of equity does not ordinarily apply. . . . To sustain such a suit, the entire right in the patent must be presented." *Hewitt et al. v. Pa. Steel Co.*, 31 O. G. 1687.—BUTLER, 1885.

194. Where, before the expiration of a patent, a suit in equity is commenced for its infringement, the complainants being less in number than all the owners, and the proper owners are not brought in by amendment until after the patent expires, the further jurisdiction in equity must be maintained.—*Id.*

195. A corporation of one state doing business in another state is suable in the courts of the United States established in the latter state if the laws of that latter state so provide, and in the manner provided by those laws, but not otherwise. *Boston Electric Co. v. Electric Gas Lighting Co.*, 23 Fed. Rep. 838.—COLT, 1885.

196. Where the defendants had manufactured

but one infringing machine, and that more than three years before the bill of complaint was filed, and there was no claim that they threatened to repeat the wrongful act by making another, it was held that an adequate remedy at law existed, and that an equity suit could not be maintained. *Smith et al. v. Sands et al.*, 24 Fed. Rep. 470.—WITHEY, 1885.

197. Where the defendants had used a single machine, and the complainants were in the habit of granting licenses, it was held that an adequate remedy at law existed, and that an equity suit could not be maintained.—*Ib.*

198. For a state of facts in which laches were held to bar the maintenance of a suit in equity for infringement of a patent, see —. *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 23 Blatch. 167.—SHIPMAN, 1885.

199. While two persons were both directors, and one was vice-president and the other treasurer of a company, the alleged infringement thereby begun. Subsequently these persons sold their stock in the company, bought the patents in suit, and, through their assignee, brought suit against said company for infringement. Thereof the court said: "An enforcement of such claim does not seem to me to be the province of a court of equity."—*Ib.*

200. The losing party to an interference in the Patent Office, being a prior patentee, may bring on the interference anew in a United States circuit court under Section 4918 of the revised statutes. *Hubel v. Tucker et al.*, 23 Blatch. 297.—WALLACE, 1885.

201. Where a bill of complaint for alleged infringement of patent was filed twenty-six days before the patent expired, thereby giving time enough for notice of a motion for provisional injunction and to obtain it, and the bill set forth special circumstances for equitable relief in that the plaintiff had retained the exclusive right to make and sell, and is exercising it, and is able to supply the market, and the defendants are making the machines containing the invention, and threaten to make them in large quantities, and intend to put upon the market the coming season infringing machines made before the patent expires, and the bill prays for an injunction restraining the sale after as well as before the patent expires of such machines, equity will take jurisdiction. *Toledo Mower & Reaper Co. v. Johnston Harvester Co. et al.*, 23 Blatch. 332.—BLATCHFORD, 1885.

202. Where the patent in suit would expire May 5th, and the bill of complaint is sworn to April 29th, filed May 1st, and the subpoena to appear and answer was served May 2d, and the

sole object of the bill plainly appears to be to obtain profits and damages, equity jurisdiction will not be sustained. *Mershon v. J. F. Pease Furnace Co.*, 23 Blatch. 329.—BLATCHFORD, 1885.

203. "If there is" a plain, adequate, and complete "remedy at law when the defendant is brought into the court of equity; if there is not, in good faith, at that time a case in which the court of equity could, by the exercise of its jurisdiction in the ordinary course of procedure, give to the plaintiff the most moderate measure of equitable relief which he prays or would be entitled to on his allegations; if the coming into the court of equity appears to be a pretence to avoid the court of law, the court of equity should not entertain the case."—*Ib.*

204. The language of Section 4921 of the revised statutes seems to make the power to award profits dependent upon the power to grant an injunction, but the general course and principle of courts of equity make the right to an account dependent on the right to an injunction. In thus mentioning power and right the court refers to entertaining the suit at all, and not to the power to give proper relief in an equity suit properly brought where the patent expires during the pendency of the suit.—*Ib.*

205. Where the only question to be established in a suit is the number of machines made by the defendants under a license which he has not accounted and paid for, this can be established as readily and completely in a suit at law as in equity, and equity will not take jurisdiction. *Crandall et al. v. Plano Mfg Co.*, 32 O. G. 1123.—BLODGETT, 1885.

206. "All patentees have an adequate remedy at law in suits against infringers, except in cases where there is a right to an injunction as a part of the relief sought; but . . . in all cases where the only question is as to the amount of profits and damages, and the plaintiff is not entitled to an injunction, the remedy is at law."—*Ib.*

207. In a bill of complaint for alleged infringement of a patent filed after the expiration of the patent, there were set out therein special allegations relating to the discovery sought; such as that the infringing machines were made by the defendants in different rooms of the factory and put together either in the factory or at the place of business of the purchasers in distant parts of the country; that some had been shipped to foreign countries; that sometimes the outer door of defendants' factory had been locked, etc., etc., whereby complainant was rendered ignorant of and not able to ascertain the number and size of the machines sold. It was held that these were



not such special circumstances as would entitle the court to entertain jurisdiction in equity. *Lord v. Whitehead & Etherton Mach. Co. et al.*, 24 Fed. Rep. 801.—COLT, 1885.

208. By the court : " Since the law authorizing the examination of parties as witnesses, we understand the more general and better rule to be that equitable jurisdiction will not attach for discovery simply, except in aid of a suit at law ; but the party must invoke some other distinct equitable ground. And where the broader rule may be said to prevail based upon the proposition that the court, having acquired jurisdiction for the purpose of discovery, will proceed and determine the whole matter in controversy, the plaintiff must allege that the facts concerning which he seeks a disclosure are material to his cause of action ; that he has no means of proving these facts by the testimony of witnesses, or by any other kind of evidence used in courts of law ; that the only mode of establishing them is by compelling the defendant to make a disclosure ; and that therefore a discovery by suit in equity is indispensable ; and, further, if the defendant by his answer fully denies all the allegations with respect to which a discovery is demanded, the suit must fail."—*Ib.*

209. An equity suit was brought May 5th, 1885, upon letters-patent which expired upon June 16th, 1885. Process was served on the defendants May 7th, and no steps taken to secure a provisional injunction. After the patent expired it was contended that the court could not retain jurisdiction. The court decided that it had jurisdiction. *Dick et al. v. Struthers et al.*, 25 Fed. Rep. 103.—ACHESON, 1885.

210. " If a case is cognizable in equity at the time the bill is filed, the mere fact that the patent is expired does not oust the jurisdiction of the court."—*Ib.*

211. " A bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained." *Adams et al. v. Bridgewater Iron Co. et al.*, 34 O. G. 1045.—COLT, 1886.

212. " Mere intricacy of the account does not furnish a ground for equitable interference."—*Ib.*

213. Suit in equity was begun July 10th, 1880. The patent was to expire August 2d, 1880. The bill prayed for a perpetual injunction. It was held that equity jurisdiction was maintainable.—*Ib.*

214. " It is undoubtedly the rule that where there appears to be a subsisting license between the complainant and the respondent, the jurisdiction of the court under the patent law will

not be extended to cover a suit to enforce the terms of the license, or to forfeit the license on the ground that the terms thereof have been violated. . . . Where a suit is brought for infringement, and the existence of a license is alleged by the respondent and denied by the complainant, it is competent for the court to determine whether, at the time of the filing of the bill, there was a subsisting license between the parties." *Hammacher et al. v. Wilson*, 26 Fed. Rep. 239.—CARPENTER, 1886.

215. Over a year after a patent expired, a bill in equity was sought to be maintained on the ground that it was desired to enjoin against the use of infringing articles made during the existence of the patent. It was held that the equity suit could not be maintained. *Consolidated Safety Valve Co. v. Ashton Valve Co. et al.*, 26 Fed. Rep. 319.—COLT, 1886.

216. A suit in equity was brought to subject a patent right to the payment of the complainant's judgment debt. The parties were citizens of different states. It was held that the federal court had jurisdiction. *Gorrell v. Dickson*, 26 Fed. Rep. 454.—ACHESON, 1886.

217. An agreement by which the defendant was to report monthly the number of machines made under licenses, with covenant not to make machines except of a certain description and not to dispute the validity of the patents mentioned in the licenses, accompanied by the allegation that defendant had violated his agreements in all these particulars, makes a clear case for the interpretation of a court of equity. *Pope Mfg Co. v. Owsley*, 27 Fed. Rep. 100.—BLODGETT, 1886.

218. For the mere recovery of a royalty, action at law is ample. *Bragg v. City of Stockton*, 27 Fed. Rep. 509.—SAWYER, 1886.

219. Where a patented thing is a machine which defendant has used but not made, and complainant has an established royalty, complainant, on bringing suit in equity, is entitled to an injunction without damages, or, if he prefers, an account of profits and an injunction against further use.—*Ib.*

220. Where, in a suit for alleged infringement, the parties are citizens of the same state, and there happens to be a license between them, the bill of complaint must be dismissed. *Jencks v. Langdon Mills et al.*, 27 Fed. Rep. 622.—COLT, 1886.

221. " As a general rule, the right to an account to profits in patent cases is incident to the right to an injunction ; and ' where the title to the principal relief, which is the proper subject of a suit in equity, and injunction and discov-

ery, fails, the incident right to an account fails also. . . . But it does not follow that, where the jurisdiction of the court in an injunction bill has attached, it is entirely ousted by the subsequent happening of an event which precludes the exercise of the power to grant an injunction. On the contrary, patent bills are frequently retained by the circuit courts after the expiration of the term of the patents, when an injunction against infringement could not be granted, and equity, touching accountability for profits and damages and the patentee's rights, has been administered according to such methods as might be appropriate to the circumstances. Much stronger is the reason for preserving the jurisdiction of the court where its alleged loss results from a mere change of the relation of the respondent to the suit, as by his death." *Kirk v. DuBois*, 28 Fed. Rep. 460.—MCKENNAN, 1886.

222. More than a year after a bill of complaint was filed the patent in suit expired. It was held that an equity court continued to have jurisdiction. *Brooks v. Miller*, 28 Fed. Rep. 615.—STREVELS, 1886.

223. "[1] The patentee, in resorting to his remedy, whether in a court of law or equity, is bound by the same principles affecting the jurisdiction of the two tribunals as prevail in other branches of law. If the remedy at law is ample, he is bound to pursue it; otherwise he may resort to a court of equity. [2] In a case of infringement then continuing by the unauthorized use of a machine which embodies his invention, the patentee is not restricted to the remedy at law, but may apply for an injunction, and, upon his bill, obtain an award for damages for past infringement. . . . [3] If the case is not one appropriate for an injunction, but is for damages only—as, for example, when the bill is filed after the expiration of the patent—the remedy is at law only. [4] Where . . . there is, at the time of filing the bill, a right to an injunction, and one is prayed for, but no preliminary injunction is sued out, the fact that the right to a permanent injunction is lost pending the suit, as by the expiration of the patent, will not oust the court of jurisdiction. Its control of the case, having once attached, will continue, notwithstanding supervening events. Of course if the bill is filed so nearly before the expiration of the patent that, according to the usual practice of the court, no injunction could be obtained in time to be of any service, it is obvious that the bill should not be sustained. The substantial hold which the court has being for the purpose of awarding an

injunction, it will not entertain the case at all if the expectation of affording that remedy is manifestly illusory. But if, at the commencement of the suit, the facts exist, and there is time to afford the remedy while it may yet be efficient, it would be contrary to the general principles of the court to dismiss the bill, because, on account of the delays of litigation, it had lost the power to grant that relief, provided other subjects of legal inquiry remained in the case."—*Id.*

224. "A suit for royalty on a license is a suit at common law, or if in equity, it is a suit on general equity, not dependent at all upon the patent law, and not within the jurisdiction of the Circuit Court of the United States unless the parties are citizens of different states." *Consolidated Middlings Purifier Co. v. Wolf et al.*, 37 O. G. 567.—BRADLEY, 1886.

225. "A suit merely for an account of profits and damages on a license cannot be maintained in equity. There must be something more. There must be some equitable ground of relief in addition to the demand for an account of that kind."—*Id.*

226. A provisional injunction against infringement may be granted before the patent issues and while the application is pending. *Butler v. Ball*, 28 Fed. Rep. 754.—WELKER, 1886.

227. "Except where the law of the state where it carries on business and is sued imposes, expressly or by implication, a liability to suit there as a condition of its doing business in the state, a foreign corporation cannot be found, for the purpose of a suit, *in personam*, outside of the jurisdiction or sovereignty creating it." *United States v. Am. Bell Telephone Co. et al.*, 29 Fed. Rep. 17.—JACKSON, 1886.

228. "In the absence of a voluntary appearance, three conditions must concur or coexist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held—viz. . [1] It must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; [2] that such business is transacted or managed by some officer appointed by and representing the corporation in such state; and [3] the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the state. When the local law, expressly or by comity, permits foreign corporations to do business in the state; when it also provides for suit against them in a reasonable and proper manner, and within the just limits of the state's power and authority; and when

a foreign corporation thereafter enters the state, and transacts its corporate business by means of resident agents coming within the terms of the local statute, it may be *found*, and is liable to suit there in either the state or federal courts, by service of process on such agent."—*Ib.*

229. "The judiciary acts [rev. st., Sec. 739] and act of March 3d, 1875, providing that no civil suit or action shall be brought against any person outside of the district in which he resides or may be found at the time of the service of the process do not affect the general jurisdiction of "a circuit "court, but merely confer a personal privilege or exemption upon the defendant which can be waived by a foreign corporation, not only by a voluntary appearance to the suit, but by doing business in a state imposing the condition or liability to a suit there by service of process on its agent. It cannot be held sufficient, to give" a circuit "court jurisdiction *in personam* over a foreign corporation, that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on business in its own right, and on its own responsibility, and for its own account, and through or by means of its own agents, officers, or representatives, in order to bring it within the operation of the laws of a state other than that in which it is incorporated, making it amenable to suit there as a condition of its doing business in such state."—*Ib.*

230. The American Bell Telephone Company had its home and location in Boston, Mass. It was connected business-wise with certain local corporations in Ohio. It was held that "furnishing the means necessary to enable the licensee companies to transact the business of telephony in Ohio, either upon a fixed rental and royalty on the telephone instruments used, or a percentage of the gross receipts of the business, does not constitute the carrying on of that business by the American Bell Telephone Company, or make the licensee companies its 'managing agents,' so as to render it amenable to suit here."—*Ib.*

231. "In exercising" the "common-law right of licensing others to use its patent," a "corporation owner is no more nationalized than a private owner would be under the same circumstances. The fact that a patent-holding corporation licenses others to use its patent in a particular state has no more effect and operation in domesticating it within such state than the same act on the part of a private owner would render him a citizen and resident of every state in which

his patent might be used. The franchise right of the patent-holding corporation in no way serves to establish the fact that such corporation is carrying on its business, and is to be found wherever its patent is used."—*Ib.*

232. "Neither the patent law, nor the privileges secured to patentees thereunder, in any way enlarge, modify, or change the judiciary acts in respect to either the territorial jurisdiction of the federal courts, or the proper service of process upon defendants."—*Ib.*

233. The home and location of the American Bell Telephone Company was in Boston, Mass. It was connected business-wise with certain local telephone companies in Ohio. It was sought to get service upon the parent company by service upon the local Ohio corporations. The court held that "the various matters relied on to show that the American Bell Telephone Company is to be found in Ohio, and subject to the jurisdiction of this court—such as its ownership of the telephone instruments used by the licensee corporations; the ownership of stock in one or more of the local companies; the rights and powers reserved to it of resuming possession of its telephone instruments, and taking control of the telephone business, in the event of default on the part of the licensee corporations in complying with the provisions of the license contracts; the sharing in the gross receipts of certain portions of the business done; the reservation of rents and royalties; the right to make changes; and the restrictions and limitations imposed upon the licensee companies—neither singly nor in the aggregate establish the two *essential facts* necessary to bring the American Bell Telephone Company within the power and jurisdiction of this court—viz., that said corporation is now, or was at the commencement of this suit, carrying on its business in the state of Ohio, and that it had a 'managing agent' or agents representing it here. The truth of the plea being assumed, the only relation existing between the American Bell Telephone Company and the local corporations is really and technically that of lessor and lessee, licensor and licensee; the Bell Telephone Company being merely the lessor of the telephone instruments, and the licensor of the right to use the patent embodied therein, on certain terms as to rents and royalties and otherwise, agreed upon between the parties, the contract being entered into not in Ohio, but at Boston, Mass."—*Ib.*

234. A bill in equity for infringement of a patent was filed fifteen days before the expiration of the patent. As under the rules of the court only four days of notice of motion for injunc-

tion were necessary, it was held that the court had jurisdiction. *Clark et al. v. Wooster*, 119 U. S. 322.—SUP. CT. 1886.

235. Where, in an equity cause, the bill prays an injunction, and there is time enough before the expiration of the patent to obtain one, yet it is never asked for, equitable jurisdiction has attached and may be maintained after the expiration of the patent.—*Ib.*

236. "If the cause was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent would not take away the jurisdiction and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort."—*Ib.*

237. "Where a party alleges equitable ground for relief and the allegations are not sustained, as where a bill is founded on an allegation of fraud, which is not maintained by the proofs, the bill would be dismissed *in toto*, both as to the relief sought against the alleged fraud and that which is sought as incidental thereto."—*Ib.*

238. Respondents had taken a royalty license from complainant, and had failed to pay the agreed royalty. Complainant brought bill in equity asking for a discovery and account, also that defendants might be decreed to pay the license fee then due, and that they might be enjoined from using the patented machines until such payments were made. Respondents contended that an equity suit could not lie, but the court held otherwise. *McKay v. Smith et al.*, 29 Fed. Rep. 295.—COLT, 1886.

239. Federal courts do not have jurisdiction over controversies arising out of license contracts. *Willis et al. v. McCollin*, 38 O. G. 1017.—BUTLER, 1886.

240. Where the question at issue is whether an assignment covered a certain division of the application, the question is one of patent law of which a federal court has jurisdiction. *Puets v. Bransford*, 32 Fed. Rep. 318.—MILLER, 1887.

241. A bill of complaint was demurred to on the ground that equity had no jurisdiction, for the reason that the action was begun twenty-one days prior to the expiration of the patent, and the complainant had ample remedy at law. By rule of the court, notices of the motion were to be served at least four days before the hearing, and as this might have resulted in seventeen days of injunction, the equity jurisdiction was maintained. *Kittle v. De Graaf et al.*, 30 Fed. Rep. 689.—COXE, 1887.

242. An equity suit had proceeded to the point where the case was sent to a master for an accounting in damages. Motion was made to open

the decree and to strike out so much thereof as directed the taking of an account of profits and damages, for the reason that the patent had expired more than two years before the bill was filed. The motion was granted, the court saying: "If jurisdiction never attached, neither waiver, delay, nor consent can now confer it." *Creamer v. Bowers et al.*, 30 Fed. Rep. 185.—WALES, 1887.

243. Where a patent has nearly sixteen years to run, it is not necessary to show a recovery at law to warrant an injunction and an accounting. *McCoy et al. v. Nelson*, 39 O. G. 831.—BLATCHFORD, 1887.

244. By the court: "As the patent was in force at the time the bill was filed, and the complainants were entitled to preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time before final decree." *Beedle v. Bennett et al.*, 39 O. G. 1326.—SUP. CT. 1887.

245. Where a bill of complaint alleges the infringement of a patent, and also alleges that the defendants seek to justify their infringement by reason of purchasing the patented articles from a party claiming the right to make the same, which right the complainant denies, a federal court sitting in equity has jurisdiction of the action. *Seiber Cylinder Oil Cup Co. v. Manning et al.*, 32 Fed. Rep. 625.—WALLACE, 1887.

246. "The laws of New York [Sec. 1104, c. 410, Laws, 1882] respecting the presentation of claims against the city of New York to the comptroller for adjustment before bringing suit only apply to such claims as can be prosecuted in the state courts by the actions or proceedings mentioned in Section 1103; and (2) if this enactment were intended to apply to actions at law brought in the federal courts, it would not apply to suits in equity. The equity jurisdiction of the courts of the United States is subject to neither limitation nor restriction by the state authorities, and is uniform throughout the different states of the Union." *Garnswell Fire Alarm Tel. Co. v. New York*, 31 Fed. Rep. 312.—WALLACE, 1887.

247. "Where the statute restricts suits to the district in which the acts are committed, a consistent and reasonable interpretation of the statute requires it to be held that a corporation, for the purposes of such suits, has a 'managing agent,' and is sufficiently 'found' within the district in the person of an individual who has the direction, management, and control of its business therein, out of which the acts complained of have arisen, and who so far represents the corporation as to make his acts incurring penalties in that business the acts of the corporation."

*Hat Sweat M'fg Co. v. Davis Sewing Mach. Co.*, 31 Fed. Rep. 294.—BROWN, 1887.

## LACHES.

## CASES.

1. Defendants contended against a provisional injunction, on the ground of laches on the part of complainant in not bringing suit. Complainant, meanwhile, had been busy with another suit, and was held not guilty of laches. *Van Hook v. Pendleton et al.*, 1 Blatch. 187.—BETTS, 1846.

2. Defendants objected that the complainant had been guilty of laches in not speeding the cause as a plea in bar, and an answer supporting the plea, had been filed nearly two years before. It was not shown that any proofs had been taken by either party, or that defendants had availed themselves of their privilege of speeding the cause, and the objection was overruled. *Parkhurst v. Kinsman et al.*, 2 Blatch. 72.—BETTS, 1848.

3. "Where the jury are satisfied that the plaintiffs have not abandoned their invention and privileges granted by letters-patent, their neglect to prosecute parties infringing such patent will not bar their right to recover such damages as they have actually sustained by the defendant's infringement." *Ransom et al. v. New York*, 1 Fish. P. C. 252.—HALL, 1856.

4. "When the patentee has stood by for a series of years and permitted, or not objected in the way in which the law authorizes him to object, to the use of the article claimed under the letters-patent, . . . such conduct ought to be visited, to some extent, upon the patentee." *Goodyear et al. v. Honsinger*, 2 Bissell, 1.—DRUMMOND, 1867.

5. "Courts of equity ought to demand of patentees reasonable diligence in asserting their rights. Of course, the rule is flexible, subject to be changed by the peculiar circumstances of each case. A court of equity should always act fairly and justly, so as to protect the rights of the patentees, although they may not, owing to various circumstances, prosecute their rights so soon or so early as, under other circumstances, they ought to prosecute them."—*Id.*

6. Defendants were advised of a decree as early as May, 1868, but took no steps to move to open it until April, 1869. It was held that they had been guilty of such laches as not to be entitled to the favor asked, as no excuse was shown for the delay. *Doubleday v. Sherman et al.*, 6 Blatch. 513.—BLATCHFORD, 1869.

7. Complainant had given to another party a license to *make and sell* the patented thing to others, who should procure a license to *use* it. Defendants set up this fact as acquiescing in infringement. The court held otherwise. *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

8. If defendants appropriate complainant's invention "without consulting him, and he was passive when he knew it, because he was powerless to prevent them, he is not estopped from asserting his right when he is in a condition to enforce it." *McMillin et al. v. Barclay et al.*, 3 Pittsb. 377.—MCKENNAN, 1871.

9. "Nor is this supposed estoppel invigorated by the fact that invasion of the patentee's rights has been widespread, and that all who may be found in that category may be held liable accordingly. Whoever reaps where he did not sow wrongfully appropriates what belongs to another, and equity will not stay the hand of the rightful owner of the harvest against him."—*Id.*

10. "A delay of three months in filing the bill, the defendant not having been induced to change his position or, so far as appears, having had any communication with the plaintiffs in the interval, is no ground for refusing the injunction" (provisional). *Union Paper Bag Mach. Co. et al. v. Binney*, 5 Fish. P. C. 166.—LOWELL, 1871.

11. Eighteen months' knowledge of defendants' infringement without proceeding against him creates laches which prevent provisional injunction. *Hockholjer et al. v. Elger et al.*, 2 Sawyer, 361.—HILLYER, 1873.

12. Delay in bringing suit for a term of years against a known infringer will prevent the issue of a provisional injunction. *Whitney et al. v. Rollstone Mach. Works et al.*, 2 Bann. & Ard. 170.—SHEPLEY, 1875.

13. If the owner of a patent should, without protest, see infringement go on for a long time and until after the expiration of the patent, a court of equity would not then interfere in behalf of the patent owner. *Magic Ruffle Co. v. Elm City Co.*, 13 Blatch. 151.—SHIPMAN, 1875.

14. "Courts of equity do not look with favor upon those who slumber over their rights." *Wortendyke v. White*, 2 Bann. & Ard. 25.—NIXON, 1875.

15. "There must be satisfactory proof of knowledge, or means of knowledge, before laches can be imputed."—*Id.*

16. "If it be true that the suspicions of the complainant, in regard to the defendant's infringement, were allayed by the direct misrepresentations of the defendant, the court cannot give

to him any advantage resulting from the lapse of time. . . . In such an issue the burden is on the defendant."—*Id.*

17. Where a patent owner has known of an infringement for some years and declined to bring suit, his laches will prevent provisional injunction. *Jones et al. v. Merrill et al.*, 8 O. G. 401.—WALLACE, 1875.

18. "It is a general principle of equity jurisprudence that the court will not lend its extraordinary aid to any claimant who has encouraged or acquiesced in an infringement of his right or unreasonably delayed in prosecuting for its violation. Compensation for damages accrued and protection from future damages is all such a complainant is entitled to."—*Id.*

19. "If a man has a patent, . . . and he sees the world at large using it for eight or ten years, takes no steps to arrest it, sues nobody, sets up no claim, gives no warning, it is a very natural and strong reason why, under these circumstances, he should not be permitted to come subsequently and arrest everybody by process of injunction. In each and every case that question depends upon its own facts." *Am. Middlings Purifier Co. v. Christian et al.*, 4 Dillon's C. C. 448.—MILLER and DILLON, 1877.

20. Plaintiff's patent was procured in 1863, and no steps taken to force it against anybody till 1874 or 1875. It was apparent that in the original patent, issued in 1863, there were defects in the specification which rendered the patent unavailable, in the opinion of the plaintiff, for the purpose of a suit, and the proper reissue was procured meanwhile to cure that trouble. The court held that there had not been laches in enforcing the patent unless, during all this time, the patent, as it originally stood, was in general use, and in such use as to attract the notice and attention of the patent owner. The infringement commenced in 1871 or 1872. It was held that no laches had taken place.—*Id.*

21. "The fact that infringers have been able to keep the patent in litigation until within a few days of its expiration furnishes no reason why the patentee should not enjoy his grant during the small remnant of the term." *Rumford Chemical Works v. Vice*, 14 Blatch. 179.—BENEDICT, 1877.

22. The complainant's patentee learned in the spring of 1876 that the defendants were manufacturing, and claimed the right to manufacture, the articles complained of. Complainant then warned defendants to desist. They did not desist, but became, with complainant's knowledge, the largest producers of these wares in the market. Complainant quietly acquiesced for nearly

two years, and did not serve defendants with notice of his motions until March 6th and 7th, 1878. Provisional injunction was refused because of complainant's laches. *Sperry v. Ribbans et al.*, 3 Bann. & Ard. 260.—NIXON, 1878.

23. For a patent owner to know of an infringement and take no steps to stop it (in the present case for two years) constitutes laches, and the complainants who succeed to that patent, in his right, are chargeable with those laches. *Spring et al. v. Domestic Sewing Mach. Co.*, 4 Bann. & Ard. 427.—NIXON, 1879.

24. A reissued patent was granted May 9th, 1871; within a year suit for infringement was brought, resulting in a great deal of litigation and a decree sustaining the patent. In 1879 the present suit was brought; defendant sought to avail himself of complainant's laches. The court held that the proof did not show laches. *Green v. French*, 4 Bann. & Ard. 169.—NIXON, 1878.

25. "A delay in bringing action against infringers, when satisfactorily accounted for, is not to be treated as laches. It would be a great hardship to require patentees, who are generally poor, to institute legal proceedings as soon as an infringement was ascertained, or lose the right to the protection which an interlocutory injunction affords."—*Id.*

26. "Mere delay in seeking relief when there is no estoppel will not, in general, prevent an injunction, though it may preclude the plaintiff from right to an account for past profits." *N. Y. Grape Sugar Co. v. Buffalo G. Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1883.

27. Several cases against different parties were brought in a circuit court for the infringement of a patent. One case went to final hearing; the patent was held valid; the defendant was held to infringe; and an appeal was taken to the Supreme Court, but was abandoned at the instance of the plaintiffs for a consideration named. The other cases were dismissed. One of the other defendants continued to use his device for about seven years. Then complainants brought suit and asked for a provisional injunction. The court held that the facts did not warrant an injunction. *McMillan et al. v. Conrad*, 5 McCrary, 140.—TREAT, 1883.

28. Where a preliminary injunction was asked for and defendant had been doing the act complained of for seven years, while a suit at law had been brought in 1880 and not prosecuted, and complainant was one who made its patent profitable by licenses, and defendant was shown to be pecuniarily responsible, the injunction was denied. *United Nickel Co. v. New Home Sew-*

ing Mach. Co., 21 Blatch. 415.—BLATCHFORD, 1883.

29. The principle recognized that laches, in prosecution for infringement, may defeat an accounting; but such laches were not found to exist in the case in hand, because the circumstances fail to establish acquiescence in that instance, when the infringement was known to the owners of the patent. *Adams et al. v. Howard et al.*, 22 Blatch. 47.—WALLACE, 1884.

30. Where the complainant does not lead the defendant into any expenditure or course of conduct by his silence when he ought to have spoken, complainant has not, through laches, forfeited his right to an injunction. *Childs v. B. & F. H. Iron Works*, 19 Fed. Rep. 258.—LOWELL, 1884.

31. Complainant's suit on the driven-well patent was brought in 1879, and defendant sought to charge complainant with laches in bringing the suit. The patent was first sustained in 1876, and the court, remarking that a great deal of information doubtless had to be acquired about infringers between 1876 and 1879, found that complainant was not chargeable with laches. *Green v. Barney*, 19 Fed. Rep. 420.—LOWELL, 1884.

32. A bill of complaint alleged infringement of complainant's patent for thirteen years on the part of the defendants, without setting up any excuse for complainant's delay in prosecution, without setting up ignorance of defendants' conduct, and without setting up inability on complainant's part to assert his rights. It was held that after such laches complainant was not entitled to an injunction. *McLaughlin v. People's R. R. Co. et al.*, 21 Fed. Rep. 574.—BREWER, 1884.

33. Where more than twelve years have elapsed since the bill of complaint was filed, and an acknowledged error in the evidence as to a certain date is committed, and it does not clearly appear that the defendants could not with reasonable diligence have discovered the facts which are sought to be introduced, there is too great laches to permit of the reopening of the case. *Willimantic Linen Co. et al. v. Clark Thread Co. et al.*, 32 O. G. 1356.—NIXON, 1885.

34. A motion for provisional injunction was made in 1885. It was shown that the owners of the patent had, since 1878, known of the alleged infringement and taken no steps, except making threats, to restrain it. It was attempted to account for this delay by the statement that the owners of the patent were quarrelling among themselves from the date of the patent until 1832, and that since the latter date they had

been constantly engaged in establishing rights against other infringers. The explanation was held unsatisfactory, and provisional injunction was refused by reason of complainant's laches. *Ladd v. Cameron*, 25 Fed. Rep. 37.—NIXON, 1885.

35. A patent was granted August 28th. 1883. Action for infringement was commenced within six months thereafter. There was nothing in the bill of complaint to indicate that the complainant had granted, or intended to grant, licenses, or that he did not commence his suit the very day he learned of the infringement. It was held that there was nothing in these circumstances on which to predicate laches. *Brick v. S. I. Railroad Co.*, 23 Fed. Rep. 553.—COXE, 1885.

36. For a state of facts in which laches were held to bar the maintenance of a suit in equity for infringement of a patent, see —. *N. Y. Grape Sugar Co. v. Buffalo G. Sugar Co. et al.*, 23 Blatch. 167.—SHIPMAN, 1885.

37. Where it appears that complainant has known for some time of defendant's infringement without proceeding there against, there must be satisfactory explanation of this delay in order to secure a provisional injunction. *Mundy v. Kendall*, 23 Fed. Rep. 591.—NIXON, 1885.

38. Where there has been inexcusable laches on the part of complainants and entire good faith on the part of the defendants, complainants' claim to profits is destitute of equity. (In this case a license fee of one thousand dollars was taken as a measure of damages.) *Keller et al. v. Stolzenbach et al.*, 28 Fed. Rep. 81.—ACHELSON, 1886.

39. "That laches merely in applying for a patent, when there was no laches in otherwise protecting the invention, may compel an inventor to be deprived of his patent, another inventor meanwhile giving the same invention to the public, is probably true." *Hubel v. Dick*, 28 Fed. Rep. 132.—SHIPMAN, 1886.

40. "The accumulated wisdom of a multitude of precedents has established the principle that he who invokes the protection of a court of equity must be 'prompt, eager, and ready' in the enforcement of his rights. Equity will not encourage a sleepy suitor. As time passes, memory fails, witnesses die, proof is destroyed, and the rights of individuals and of the public intervene. Long acquiescence and laches can only be excused by proof showing excusable ignorance, or positive inability to proceed on the part of the complainant, or that he is the victim of fraud or concealment on the part of others. A mere imaginary impediment or technical dis-

ability is not enough. The court will not entertain a case where it appears that the complainant, or those to whose rights he has succeeded, have acquiesced for a long term of years in the infringement of the exclusive right conferred by the patent, or have delayed, without legal excuse, the prosecution of those who have openly violated it." *Kittle v. Hall et al.*, 29 Fed. Rep. 508.—COXE, 1887.

41. "A party who purchases a patent which has for years been freely plundered by a multitude of trespassers does not answer the charge of laches by showing that he commenced immediately, after he acquired title, to bring the wrong-doers to account."—*Ib.*

42. A delay of seven years in prosecuting an infringer, where the delay is partially accounted for and excused, does not amount to unreasonable laches.—*Ib.*

43. A suit for infringement of patent was brought in October, 1886, and in the bill of complaint it was alleged "that since the date of the letters-patent on June 14th, 1874, on divers times and occasions the defendants had used and sold the invention." The bill was demurred to as showing laches. The court said: "This language does not imply a continuous use of the invention for such period as to bar all relief. The second point of the demurrer is accordingly overruled." *Koalatype Engraving Co. et al. v. Hoke et al.*, 30 Fed. Rep. 444.—THAYER, 1887.

44. Where a bill of complaint alleges that since the date and issue of the patent it has been infringed, the bill is not to be interpreted as alleging that the infringement was open and continuous. *Kittle v. De Graaf et al.*, 30 Fed. Rep. 689.—COXE, 1887.

45. A decree was made in May, 1868. Defendants sought to open it in April, 1869. Motion denied for laches. *Doubleday v. Sherman et al.*, 6 Blatch. 513.—BLATCHFORD, 1869.

## LIBEL UPON TITLE.

### CASES.

1. A court of equity has no jurisdiction to prevent a party from impugning the title of another person to the patent. *Whitehead et al. v. Kilton*, 119 Mass. 484, *per curiam*, 1876.

2. A court of equity may enjoin against the threatening of a patent suit and against the libeling of the title to a patent. *Bell v. Singer M'fg Co.*, 65 Ga. 452.—HAWKINS, 1880.

3. Complainant brought an equity suit against the defendant, setting up as his cause of action "written representations to dealers in ham-

mocks that hammocks made by the orator infringe a patent of the defendant, and threats of suit for the infringement contained in letters from the defendant's attorneys addressed to such dealers." The bill did not allege that defendant threatens nor that the orator believes that he intends to continue such representations or threats, nor even that the orator feared that he would. And the proof did not go in this respect beyond the bill. The court said: "Courts of equity have no jurisdiction of libel or slander affecting title to property or property rights, or other slander or libel, unless threatened or apprehended repetition makes preventative relief appear necessary. The remedy for past injuries of that nature is understood to be wholly at law." Bill of complaint dismissed with costs. *Palmer v. Travers*, 20 Fed. Rep. 501.—WHEELER, 1884.

4. "There is no jurisdiction in a court of equity to enjoin libel on the rights or title" of a patentee, or to prevent a lawful patentee from publishing statements that he is about to bring suit for infringement. *Baltimore Car Wheel Co. et al. v. Bemis et al.*, 29 Fed. Rep. 95.—CARPENTER, 1886.

## LICENSE.

### "LICENSE" IN THE PATENT ACTS.

Act approved March 3d, 1839.

SECTION 7. *And be it further enacted*, That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid, by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent. [Repealed July 8th, 1870.]

Act approved May 27th, 1848.

SEC. 2. *And be it further enacted*, That hereafter the Commissioner of Patents shall require a fee of one dollar for recording any assignment, grant, or conveyance of the whole or any part of the interest in letters-patent, or power of attorney, or license to make or use the thing patented, when such instrument shall not exceed



one thousand words ; and the sum of three dollars when it shall exceed one thousand words ; which fees shall in all cases be paid in advance. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 37. *And be it further enacted*, That every person who may have purchased of the inventor, or with his knowledge and consent may have constructed any newly invented or discovered machine, or other patentable article, prior to the application of the inventor or discoverer for a patent, or sold or used one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4899. Every person who purchases of the inventor or discoverer, or with the knowledge and consent constructs any newly invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor.

#### CASES.

1. Where the law required the evidence of a right to use a patented invention to be in writing, a lease of a machine—embodying the invention—from defendants to plaintiff, wherein plaintiff agreed to deliver the machine to defendants at termination of the lease, was held to satisfy the requirement. *Reutgen v. Kanours et al.*, 1 Wash. 168.—WASH. 1804.

2. The purchase of a license under plaintiff's patent proves nothing relative to the issue of disputed novelty. Evidence rejected. *Evans v. Eaton*, 1 Peters' C. C. 322.—WASH. 1816.

3. Evidence that alleged prior users had taken licenses from the plaintiff is admissible in plaintiff's behalf. *Evans v. Eaton*, 3 Wheat. 454.—SUP. CT. 1818.

4. Notice to defendant of patentee's right is not necessary before bringing suit for infringement. *Ames v. Howard et al.*, 1 Sumner, 482.—STORY, 1833.

5. Where an inventor, while working for another, developed the invention at the expense of such other, and allowed such other freely to use it, this state of facts was held to constitute a license to use the invention during the life of the patent. *McClurg et al. v. Kingsland et al.*, 1 Howard, 202.—SUP. CT. 1843.

6. A written conveyance under a patent, called by the court a license, gave "the right and privi-

lege of manufacturing the said matches, and to employ in and about the same six persons and no more." Thereof the court said : "The license in this case was an entirety, and incapable of division, or of being broken up into fragments in the possession of different persons. The right granted is to the grantee and six persons to be employed by him in making matches ; and if it be assignable, the assignment must be of the entirety of the license to the assignee, and it cannot be apportioned among different persons in severalty." *Brooks v. Byam et al.*, 2 Story, 525.—STORY, 1843.

7. A license is not required to be recorded in the Patent Office in order to give it effect and validity.—*Ib.*

8. That section of the law which permits a person who uses a patented machine before application for patent is made to continue that use after patent granted does not apply to the case where the use prior to the application was without the inventor's knowledge and consent. *Piereson v. Eagle Screw Co.*, 3 Story, 402.—STORY, 1844.

9. A patent owner gave a license under his patent upon a stipulated royalty, with a clause of forfeiture for non-payment for a certain time. The licensee failed to pay the license fee for such a certain time, and the patent owner took judgment against him therefor. The patent owner revoked the license, and it was held that he had a right to do so, notwithstanding his judgment for the royalty. *Armstrong v. Hantenbeck et al.*, 3 N. Y. Legal Observer, 43.—BETTS, 1844.

10. The act of 1839, chapter 88, paragraph 7, "in broad terms allows any one to use and vend a machine which he has purchased or constructed before the inventor applied for a patent. This, however, . . . must be construed to mean a purchaser of the inventor or his grantee, or a construction by their consent, or by his own ingenuity." *Hovey v. Stevens*, 1 W. & M. 290.—WOODBURY, 1846.

11. Where a license upon royalty is under seal, the licensee cannot defend against an action for the royalty on the ground of the invalidity of the patent. *Wilder v. Adams et al.*, 2 W. & M. 329.—WOODBURY, 1846.

12. A license to run a single patented machine will not be construed as confined to a certain specific machine, unless the terms of the license expressly require that construction. *Brooks et al. v. Stolley*, 4 McLean, 275.—MCLEAN, 1846.

13. "A sale by the patentee of the machine does not give an implied right to it, as such right is exclusively vested in him and such person as

may have received it from him. But this inference does not necessarily follow where the sale of the machine is made by a person who has no exclusive right, but a license merely to use."—*Ib.*

14. A licensee gave his licensor promissory notes in consideration of the license, upon the agreement, "that, in case said notes were not paid when they, or either of them, fell due, then the said license and permission should be void, and the same should revert to said. . . ." The court held that "the license was forfeited the moment when any of the notes came due and was unpaid; and it was optional with the plaintiff to resort to his remedy at common law to enforce a collection of the notes, or to treat the rights of the defendant as forfeited." *Woodworth v. Weed*, 1 Blatch. 165.—NELSON, 1846.

15. The words of a license were: "I do license and empower the said Thomas Holland and his assigns to use one machine in Boston, aforesaid, constructed according to the specification under either of said patents," etc., "during the continuance of the term for which said letters-patent were respectively granted," etc. The question raised was whether this licensee had the right to make, or procure to be made, the machine thus permitted to be used. It was held that he had this right, and the court said: "In respect to some patents the right to make, vend, or use, may be distinguishable from each other, yet they all are united in this patentee." *Woodworth v. Curtiss*, 2 W. & M. 524.—WOODBURY, 1847.

16. In the case last referred to, the court held that a licensed machine might be repaired, and if destroyed or used up might be replaced.—*Ib.*

17. The above license was held to be assignable.—*Ib.*

18. In the case last referred to, it was held that the license being granted during an original term, the right to continue the use of the particular machine then in existence continued during an extended term.—*Ib.*

19. Where A had a license from B under which A was to pay certain moneys in stated instalments, and only paid a part of the instalments, the contract thus being partly executed, it was held that the license did not fail without some proper action of a court thereon. *Gibson v. Barnard et al.*, 1 Blatch. 388.—NELSON, 1848.

20. Where two weeks' non-use of a licensed machine is to work a forfeiture, the forfeiture accrues by the fact of such non-use. *Wilson v. Stolley*, 5 McLean, 1.—MCLEAN, 1849.

21. A written agreement between the parties allowed defendants to manufacture spikes "of

such kind and character as they see fit, notwithstanding their conflicting claims up to this time." This was held to include hook-headed spikes as well as other kinds. *Troy Iron & Nail Factory v. Corning et al.*, 1 Blatch. 467.—NELSON, 1849.

22. A written instrument gave defendants a right to construct a patented telegraph line between Philadelphia, Pittsburg, Wheeling, Cincinnati, St. Louis, "and also to the principal towns on the lakes." The lakes contemplated were held to be Erie, Huron, Michigan, and Superior. *Smith v. Selden et al.*, 1 Blatch. 475.—NELSON, 1849.

23. He who acquires a right to the use of a certain machine takes the right to repair it and to replace parts thereof, but not to wholly replace such machine. *Wilson v. Simpson et al.*, 9 Howard, 109.—SUP. CT. 1850.

24. A license under the Woodworth planer patent carried the right "within said limits, to dispose of the plank or other things dressed or repaired in the said machines." It also provided that the licensee, "within the limits above mentioned," should not "sell and dispose of any plank or other things dressed and prepared in such machines, anywhere else within the United States and territories thereof." It was held that "the sale of the products of the machine was restricted within the limits of the county within which their operation was confined." *Woodworth et al. v. Cook*, 2 Blatch. 151.—NELSON, 1850.

25. A license to run four patented planing machines contained the condition that the licensee should not dress plank or other material, for other persons, to be carried out of the licensed territory, and sold as merchandise. The court held that under no circumstances could the patented article, with the privity and consent of the licensee, be sold outside the licensed territory as an article of merchandise, or with the privity or consent of the licensee be sold within the territory, to be carried out and resold as merchandise. *Wilson v. Sherman et al.*, 1 Blatch. 536.—NELSON, 1850.

26. Where a license contains a condition which the licensee violates, the license does not thereby become necessarily forfeited at the first violation, for a money compensation may be an ample remedy for the injury.—*Ib.*

27. Although a licensor and a licensee may agree as to a mode for ascertaining the value in use of the licensed thing, the licensor may give evidence otherwise of such value. *W. A. & G. Steam-Packet Co. v. Sickles et al.*, 10 Howard, 419.—SUP. CT. 1850.

28. "The right to make a machine is distinct

from that of using it." *Bicknell et al. v. Todd et al.*, 5 McLean, 237.—McLEAN, 1851.

29. "It may be admitted that a licensee may repair his machine, but he cannot construct one. He may have a right to purchase one, for the right of use necessarily implies the right of purchase; but the right to construct, as before remarked, is distinct from the right of use."—*Ib.*

30. If a person should make an invention and declare his intention not to patent it, and thereupon another should make the machine, that other would thereby be licensed to use the machine, after patent granted. *Pitts v. Hall*, 2 Blatch. 230.—NELSON, 1851.

31. A, a patent owner, sued B for infringement of patent; the suit was discontinued, and in a written agreement in reference thereto it was specified, "and it is further agreed, that the said parties may hereafter manufacture and vend spikes of such kind and character as they see fit, notwithstanding their conflicting claims to this time." "And each party, in consideration of the premises, hereby releases to the other, or others, all claim, demand, and cause of action, by reason of any violation of the patent rights claimed by them as aforesaid, to the date thereof." The court held that this agreement simply settled matters between the said parties for the past, and did not give B the right to use the patent invented by A in the future. *Troy Iron & Nail Factory v. Corning et al.*, 14 Howard, 193.—SUP. CT. 1852.

32. "A mere license to a party, without having his assigns, or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensees, and is not transferable by him to another."—*Ib.*

33. For an example of a construction of contract, held to give defendants a right under an extended patent, where plaintiff held the legal title, see —. *Day v. Candee et al.*, 3 Fish. P. C. 9.—INGERSOLL, 1853.

34. When a licensee, under a license upon a royalty, gives up the business which the license contemplates, his rights revert to the licensor. *Pitts v. Jameson et al.*, 15 Barbour, 310.—JOHNSON, 1853.

35. So long as the party to a contract connected with a license "elects to keep it on foot, and goes on under it as if it were a valid subsisting contract, and does not avail himself of a breach by the other party to rescind and put an end to it, so long he is bound by it, and an action may be maintained upon him for it, and he can only set up the breach by the other party by way of recoupment."—*Ib.*

36. An exclusive license does not guarantee the licensee against the acts of wrong-doers. *Baker et al. v. Mason et al.*, 3 R. I. 45.—STAPLES, 1854.

37. "Where a licensee undertakes to use a patent without paying for it the amount specified in the license, . . . equity will so far enjoin him, whether the license thereby becomes voidable at law or not, that unless he will pay he shall not be allowed to use." *Day v. Hartshorn*, 3 Fish. P. C. 32.—PITMAN, 1855.

38. "It was entirely competent for two persons, being joint owners of letters-patent, whether valid or invalid, to enter into copartnership for the manufacture and sale of the patented machines, and to stipulate that one of them should alone conduct the business. This was a provision for the prosecution of the business in a particular mode, and not for its restraint." *Kinsman et al. v. Parkhurst*, 13 Howard, 289.—SUP. CT. 1855.

39. Where a licensee agrees with his licensor to work an invention under a royalty, and at the time of the agreement knows of an outstanding claim against the validity of the patented improvement, the licensee cannot purchase such outstanding claim and set it up against the licensor when the latter seeks to recover his royalty.—*Ib.*

40. If a license fee is adopted as a rule of damages, that will operate to vest the right to use the invention in the defendant. *Sickles v. Borden*, 3 Blatch. 535.—NELSON, 1856.

41. "When a license is granted to any one to use a patent in the manufacture of goods, which license is accompanied with an obligation in favor of the patentee, on the part of the one to whom it is granted, to do or not to do a particular thing, and which obligation is the consideration upon which the license is granted, he upon whom the obligation rests must perform it, and, if he will not perform it, an injunction will be granted, to restrain him from any further right to use the patent under the license." *Goodyear v. Congress Rubber Co. et al.*, 3 Blatch. 449.—INGERSOLL, 1856.

42. A written conveyance conveyed to a person the exclusive right "to make, use, and vend to others to construct and use," the Woodworth planing machine within certain designated territorial limits. It was held that such person thereby had the right to make and sell machines outside of those limits to such other persons only as were duly licensed to use such machines. *Jenkins v. Greenwald*, 1 Bond, 126.—LEAVITT, 1857.

43. "The person having the title to a patent

for a new or improved mechanical structure has three distinct rights which he may dispose of separately to different individuals. These are the right to make the machine, the right to use, and the right to vend."—*Id.*

44. "If even a party originally obtains a license from a patentee to use his invention, but neglects to pay his license price for a long time, and finally, when prosecuted, abandons his license, or, while relying upon it, depends also upon other grounds, the license will be forfeited, and he will be liable as an infringer." *Bell v. McCullough et al.*, 1 Bond, 194.—LEAVITT, 1858.

45. "A licensee is one who has transferred to him, in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such interest, or an exclusive sectional interest." *Potter et al. v. Holland*, 4 Blatch. 206.—INGERSOLL, 1858.

46 The sale of a machine and of the right to use it with a certain patented part imports a license to use such part. *Buss v. Putney*, 38 N. H. 44.—SAWYER, 1858.

47. If a person employed in the manufactory of another, and while receiving wages, makes experiments at the expense of his employer, constructs the article invented, and permits his employer to use it, no compensation for the use being paid or demanded, and then obtains a patent, these facts justify the presumption of a license to the employer to use the invention. *Slemmer's Appeal*, 58 Penn. St. 155.—SHORSWOOD, 1868.

48. In a conveyance under a patent "the grantors gave, granted, bargained, and sold unto Sylvanus Bartlett one of Baldwin's peg-splitting machines, and the right to use the same, and of vending to others to be used, in the county of Cheshire, excepting in the town of Hinsdale in said county, being the same machine for which letters-patent were issued under the seal of the Patent Office of the United States." This was held to be a "conveyance, not of the right to make and construct a machine, but of the machine itself, as already constructed and in existence, and of the right to use and sell the same within the described territory." *Baldwin v. Sibley et al.*, 1 Clifford, 150.—CLIFFORD, 1858.

49. "Licenses to make and use a machine for the purposes for which it is constructed, when derived from the patentee, or from one holding a territorial right by virtue of a valid conveyance from him, are not required to be recorded, and consequently need not be in writing. Contracts not required by law to be in writing may be proved by parol evidence; and therefore a mere

license to make and use the thing patented, when derived from an authorized source, may be proved in that way."—*Id.*

50. "When the patentee sells to another a patented machine made by himself, or permits such other person to make the machine, the party thus authorized becomes a licensee, with the right of using and selling the machine; but he has no interest in the patent, and it is well settled that he cannot, by virtue of such a contract, authorize a third person to make the machine."—*Id.*

51. Section 7 of the act of March 3d, 1839, provided, "That every person or corporation who has or shall have purchased any newly invented machine, manufacture, or composition of matter prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor or other person interested in such invention." With reference to this act it was held that if any other party than the inventor obtained knowledge, before application for patent, of the inventor's machine, and thereupon, at the instigation of a third party and with knowledge on the part of the third party of the surreptitiousness of the act, constructed the patented machine for the third party, such third party would not have the right to continue to use the same after patent granted; but if the third party had the machine constructed before the application for patent, after a plan authorized by the inventor, or if he consented thereto, then the third party might lawfully continue to use the machine after patent granted. *Kendall et al. v. Winsor*, 21 Howard, 322.—SUP. CT. 1858.

52. If an inventor makes an invention and then intentionally conceals it from the public, and during such concealment "an invention similar to or identical with his own should be made and patented, or brought into use without a patent, the latter could not be inhibited or restricted, upon proof of its identity with a machine previously invented, and withheld and concealed by the inventor from the public." (Said with reference to Section 7 of the act of March 3d, 1839.)—*Id.*

53. Goodyear's patent of March 9th, 1844, mentioned a certain kind of "shirred or corrugated goods." A license under that patent included within its scope "shirred or corrugated goods," and was held to include such goods generally and others than those described in the said patent of March 9th, 1844. *Day et al.*

*v. Stellman et al.*, 1 Fish. P. C. 487.—GILES, 1859.

54. "If a man owns two rights to manufacture goods, by patents of different dates, and he sells to A his right under one specifically, and to B the right to manufacture the goods generally, as a matter of course the fair construction of the latter grant will be held as a conveyance of the right to manufacture under both patents; because in the first grant, when he intends to limit it to one, he so recites on the face of the grant, and in the second he does not."—*Ib.*

55. "When certain terms are used in a grant which have a well-known general meaning, then, in the interpretation of such grant, such well-known general meaning must be given to the term used, unless it appears that some other or different meaning was intended by them." *Day et al. v. Cary et al.*, 1 Fish. P. C. 424.—INGERSOLL, 1859.

56. Where a party had different patents on rubber goods, and by a license conveyed the right to make and sell "shirred or corrugated goods," the license was held to extend only to such goods as were mentioned in the particular patent describing that particular kind of goods.—*Ib.*

57. Where a license, strictly considered, required the consent of a third person, which had not been given, it was held that the licensor, who had accepted royalties, was estopped from setting up such lack of assent. *Bloomer v. Gilpin et al.*, 4 Fish. P. C. 50.—LEAVITT, 1859.

58. Where a complainant would take advantage of his forfeiture of a license in suing for infringement, that allegation must be set up in the bill.—*Ib.*

59. Where a licensee under a planing-machine patent was not to work for less than a given sum, but did sometimes receive pay in lumber at market rates, this was held not to be an infraction of the license.—*Ib.*

60. For a discussion as to the meaning of the words "shirred or corrugated goods" found in a license, see —. *Goodyear et al. v. Cary et al.*, 4 Blatch. 271.—INGERSOLL, 1859.

61. A conveyance of an exclusive right to make and sell a patented article in a certain territory during the term of the patent is a license, and the licensee need not be joined in bringing a suit for infringement. *Hussey v. Whitely et al.*, 1 Bond, 407.—LEAVITT, 1860.

62. Where a royalty contract provides for a minimum yearly royalty, and it is terminated in the middle of a year, a proportionate part of the royalty is to be paid. *Gale v. Nourse*, 15 Gray, 300.—DEWEY, 1860.

63. Goodyear conveyed to A the right to use his patented compound, known as "vulcanized india-rubber," in the manufacture of "hose pipe and tube," or "conduit hose pipe and tube," and no further. He conveyed to B the exclusive right to use the said rubber "in combination with all wringing, washing, and starching machines." The licensee, A, sold rubber pipe to C, who used it in the manufacture of wringer rolls. C was held not to be an infringer. *Metropolitan Washing Mach. Co. et al. v. Earle et al.*, 3 Wall. Jr. 320.—GRIER, 1861.

64. A patentee licensed a railroad company to use his patent on brakes. The railroad company farmed out its railroad to one of its creditors, and this creditor was sued for infringement. He was held not to infringe. *Emigh v. Chamberlain*, 1 Bissell, 367.—MILLER, 1861.

65. "The value of the franchise granted to the patentee depends on the mode in which he may find it most profitable to exercise it. He has a right to divide out his monopoly, 'to make, use, and vend to others to be used,' the thing patented, in the category of its locality, and may thus create any number of exclusive franchises, each bounded by the limits of the city, county, or state, where the patentee himself may be treated as a trespasser, if he interferes." *Burr v. Duryee et al.*, 2 Fish. P. C. 275.—GRIER, 1862.

66. The respondents were licensed to use two machines, "constructed according to said patents," etc. It was held that the licensees might use two machines, at all times, whether constructed by themselves or by another.—*Ib.*

67. A licensee of a patented machine may purchase and use any other machine, and if such other machine be claimed to be an infringement by the licensor, the licensee may defend himself by any plea that any other person might use.—*Ib.*

68. Complainant licensed a railroad company to use his patent on brakes. The road was afterward consolidated with other roads, and the improvement used on the whole consolidated road. The use on the other than the old road was held to be an infringement. *Emigh v. C. B. & Q. Railroad Co.*, 1 Bissell, 400.—DRUMMOND, 1863.

69. Where a party is licensed to make certain goods under a patent, he is an infringer if he makes other goods under that patent. *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Cliff. 351.—CLIFFORD, 1864.

70. For example of construction of a license, see —. *Lowell M'f'g Co. v. Hartford Carpet Co.*, 2 Fish. P. C. 472.—NELSON, 1864.

71. A party held a license upon royalty under an original patent, which license, by its language, comprehended the extended term. The patent being extended, the licensee contended he had the right to use the patent without compensation after the expiration of the original term. The court held the license in force during the extended term, and held defendant to pay the royalty. *Union M'fg Co. v. Lounsbury*, 42 Barbour, 125.—CLERKE, 1864.

72. A license conveyed to the licensee "the exclusive right to supply a certain district with such prepared flour, and to manufacture and vend therein the patented ingredients used in the preparation of the same, promised to account with and pay over to the plaintiff a certain tariff for every barrel of flour so supplied, and for the patented ingredients, when manufactured and sold separately, to be used in this preparation." This was held a good and valid license. *Heckers v. Fowler*, 2 Wall. 123.—SUP. CT. 1864.

73. Where a license conveyed the right to make a patented thing "as mentioned in the patent of 1851," this patent being afterward reissued, it was held that the licensee was not restricted to the precise construction shown in the 1851 patent. *Burdell et al. v. Denig et al.*, 2 Fish. P. C. 588.—SWAYNE, 1865.

74. In an action for the recovery of a license fee, defendant sought to attack the patent, but the court held that the defendant was not able to do this. *Birdsall v. Perego*, 5 Blatch. 251.—HALL, 1865.

75. In a suit against an exclusive licensee for the recovery of license fees, it will not avail as a defense that the licensor has himself made and sold the patented machines.—*Id.*

76. "A recovery does not vest the infringer with the right to continue the use, as the consequence of it may be an injunction restraining the defendant from the further use of it." (This was said of a patent for a cotton cleaner as to which it was not the custom of the owner to give licenses.) *Suffolk Co. v. Hayden*, 3 Wall. 315.—SUP. CT. 1865.

77. A gave a license to B under a patent, and subsequently another license under same patent to C. C sold some of the patented machines to B, and B resold them. Both licenses were upon royalty. It was held that A could not recover from B the royalty upon the machines which B bought from C. *Howe et al. v. Woodbridge et al.*, 12 Allen, 18.—GRAY, 1866.

78. "A licensee may proceed, by a petition in equity, to enjoin any party who has actually infringed his right under the license." *Brammer v. Jones et al.*, 2 Bond, 100.—LEAVITT, 1867.

79. A conveyance under a patent said: "I have assigned, sold, and set over unto the said Darius C. Brown, all the right, title, and interest which I have in said invention, as secured to me by said letters-patent in these United States, to be applied exclusively to the knitting or construction of harnesses for looms and for other purposes." This was held to be an exclusive license for the use of the invention as applied to the construction of harnesses for looms and for other purposes. *Aiken v. Dolan*, 3 Fish. P. C. 197.—CADWALADER, 1867.

80. In an action on a note given for accrued royalties, the licensee cannot defend on the ground that some other party claims that the patent in question is void. *Davis v. Gray*, 17 Ohio St. 330.—BRINKERHOFF, 1867.

81. A licensee, under a patent for a brake, conveyed to the Hudson River Railroad Company the right "to construct and use the said improvement on any and all cars belonging to said company, and to use the same improvement upon the entire length of their road, and upon all parts thereof, extending from the city of New York to the city of Troy in said state, for and during the term for which said letters-patent are or may be granted." Thereof the court said: "Brakes belonging to the company, attached to trucks and running gear belonging to them, and so used, are undoubtedly, within the meaning of the license, used on cars belonging to the company, even though the superstructures which are borne upon the tracks do not belong to the company." *Hodge et al. v. Hudson River R. R. Co.*, 6 Blatch. 85.—BLATCHFORD, 1868.

82. "The presumption of law in regard to every license under a patent is, that the parties deal only in regard to the terms existing when the license is given, unless an express provision is inserted looking to a further interest."—*Id.*

83. A license granted the right "for and during the term for which said letters-patent are or may be granted." This was held not to give a right under an extended term of the patent.—*Id.*

84. A license to the New York & Harlem Railroad Company licensed "said company, and any and all other parties that may hereafter own and operate the said New York & Harlem Railroad, to construct and use said improvement on any and all cars now or hereafter owned by said company, or by parties that may hereafter own and operate said New York & Harlem Railroad, all such construction and use to extend to and over the said New York & Harlem Railroad, and on, to, and over the roads where said cars may be employed or run on joint business." Thereof the court said: "This license

extends only to cars owned by the New York & Harlem Railroad Company. It does not extend to cars belonging to the Hudson River Railroad Company, or to cars belonging to the New York & New Haven Railroad Company. The New York & New Haven Railroad Company cannot properly be considered as within the meaning of the license as operating the New York & Harlem Railroad, in running their own cars on their road under a permission to that effect. Therefore, the license to the New York & Harlem Railroad Company does not authorize the use on its road of the brakes which are on the freight cars in question belonging to the Hudson River Railroad Company."—*Id.*

85. A, a patent owner, for a valuable consideration appointed B irrevocably sole agent for the manufacture and sale of the patented machines. A subsequently signed the patent to C. B sought to stop C operating under the invention. It was held he could not. *Kempton v. Bray et al.*, 99 Mass. 350.—GRAY, 1868.

86. Two owners of a patented tent had a contract with the Government, by which the Government manufactured the tent for itself and paid a royalty. One of the patent owners entered the Confederate service. It was held that the other patent owner could recover half the royalty from the Government. *Burns v. United States*, 4 Nott & Hunt, 113.—LORING, 1868.

87. The Boston & Worcester Railroad Company and the Western Railroad Company had, respectively, licenses under a patent for axle-boxes for railroads. These companies were subsequently consolidated by act of the Legislature of Massachusetts. The licenses of the old companies stipulated that the licensee might use the invention on all roads "that may be operated by said company, or may hereafter be constructed, owned, used, or leased by said company." The present defendant was the consolidated company, and was held not to infringe. *Lightner v. B. & O. R. R. Co.*, 1 Lowell, 338.—LOWELL, 1869.

88. "Mere authority to use a patented invention will not always, and perhaps not usually, be transferable. Whether it is or not will depend in each case on the terms or nature of the contract."—*Id.*

89. Where the licensee violates his license, and the licensor thereupon gives notice that the license is forfeited, the licensor may thereafter recover the royalty due upon goods manufactured after as well as those manufactured before the notice. *Union M'fg Co. v. Lounsbury*, 41 N. Y. 363.—DANIELLS, 1869.

90. A licensee had a license to use a patented invention at a certain tannery. This licensee

enlarged the tannery until it extended across a brook. The license was held to apply to the new parts as well as to the old. *England v. Thompson et al.*, 3 Clifford, 271.—CLIFFORD and LOWELL, 1869.

91. Although a license may give to a licensee the option of taking a new license when it expires, yet if the licensee does not take such a license, but refuses so to do, the licensee becomes an infringer by continuing to work under the patent, even though willing to stand by the terms of the old license.—*Id.*

92. An instrument gave one Chaffee, "his executors, administrators, and assigns, a free license to use the said Goodyear's gum-elastic composition for coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear; . . . the right and license hereby conferred being limited to the United States, and not extending to any foreign country, and not being intended to convey any right to make any contract with the Government of the United States." Of this license the court said: "It authorizes Chaffee to use it himself. It gave him no right to authorize others to use it in conjunction with himself, or otherwise, without the consent of Goodyear, which is not shown, and not to be presumed. It was to be used at his own establishment, and not at one occupied by himself and others. Looking at the terms of the instrument and the testimony in the record, we are satisfied that its true meaning and purpose were to authorize the licensee to make and sell india-rubber cloth, to be used in the place and for the purposes of patent or japanned leather. In our judgment it conveyed authority to this extent and nothing more." *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

93. "The practical construction which the parties themselves have given to a contract by their own conduct is, in cases of doubt, always entitled to great weight."—*Id.*

94. The city of Louisville advertised a contract for the laying of some Nicholson patent pavement; A, licensee under the patent, permitted a contractor, B, to lay the pavement, giving notice that he should still hold the city. The defendant city was held not liable. *Bigelow v. City of Louisville*, 3 Fish. P. C. 602.—BAL-LARD, 1869.

95. Licenses do not need to be recorded. *Far-rington et al. v. Gregory*, 4 Fish. P. C. 221.—LONGYEAR, 1870.

96. "The purchase of a patented thing always

carries with it the right to use the thing purchased, by implication."—*Ib.*

97. "The act of Congress makes no provision for the recording of a mere license, and therefore it is not required." If recorded, the recording affects no legal rights of any one. *Chambers v. Smith et al.*, 5 Fish. P. C. 12.—McKENNAN, 1870.

98. "In the absence of any statutory provision, there is no principle of equity which requires the owner of a patented invention to give notice to a voluntary purchaser of a licensee's right, to enable him to hold such purchaser to the restricted use and enjoyment of the invention stipulated in the license. It is the duty of the purchaser to inform himself of the nature of the licensee's ownership and the extent of his right. If he fails to do this, he cannot complain that the patentee has misled him, or set up his own remissness to secure to himself a larger interest than was granted to his predecessor in the ownership."—*Ib.*

99. The sale of a licensed machine at a marshal's sale carries with it only the right which the licensee had in the machine.—*Ib.*

100. The contract of license of a corporation may be valid without any authorized resolution or order in writing by the trustees or directors, and although the seal used on it was the private seal of one of its officers instead of the corporate seal. *Eureka Co. v. Bailey Co.*, 11 Wall. 488.—SUP. CT. 1870.

101. One Sibley took a patent on a tent and licensed the Quartermaster-General of the United States to make it upon a royalty of \$5 for each tent; afterward Sibley assigned one half his right to Burns. Sibley, during the war of the rebellion, went into the Confederate service; thereupon one half the royalty was paid to Burns up to a certain time, when the Government ceased to pay the royalty. The Government was holden to pay Burns \$2.50 on each tent. *United States v. Burns*, 12 Wall. 246.—SUP. CT. 1870.

102. Where a licensee upon royalty sells out his business to another party, and the other party continues the business, the licensee is liable for the royalty. *Wilder v. Stearns*, 48 N. Y. 656.—HUNT, 1871.

103. "Where a patentee does not use a patented machine himself, nor establish a patent fee, but manufactures the patented article, and sells it at fixed prices, seeking his compensation in the profits of the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover, and does recover, the

full amount of profits which he himself would have obtained on said articles had he manufactured and sold them at his ordinary prices, by such claim and recovery he adopts the sale made by the party infringing, and the right to use the specific articles so sold, and for which the recovery has been had, vests in the purchaser."—*Ib.*

104. The owner of a patent for an improvement in the manufacture of sewing silk, for the consideration of \$1000 granted unto "Howarth & Co. the right to use the aforesaid invention for the purpose of manufacturing a quantity of silk not exceeding one hundred [100] pounds per week, during the term for which said letters-patent are granted." The firm of Howarth & Co., consisting of two partners, subsequently dissolved, one of the partners taking the business, and this partner continued the use of the invention in the shop of, and delivered the whole product to, a third party. Injunction against his partner was refused. *Belding et al. v. Turner*, 8 Blatch. 321.—SHIPMAN, 1871.

105. A worked for B under agreement which said, "in regard to any patentable improvements which he might make, he was to receive \$500 for such improvements." He made an improvement during such employment, applied for patent thereon, and after leaving such employment took the patent and assigned it to a third party, C, who brought suit thereunder against B, the said employer of A. It was held that B was not an infringer. Also that the transactions worked a license to B. *Continental Windmill Co. v. Empire Windmill Co.*, 8 Blatch. 295.—WOODRUFF, 1871.

106. In construing a conveyance under a patent, "parol testimony to show all the circumstances is admissible when the language may be susceptible of more than one meaning, such as their knowledge of the subject-matter of the contract, and all other facts that would throw light upon the intention of the parties." *May et al. v. Chaffee et al.*, 2 Dillon, 385.—NELSON, 1871.

107. A conveyance under letters-patent read as follows: "We, William Sisson and Clinton H. Sage, aforesaid, have assigned, sold, and set over, and by these presents do assign, sell, and set over unto the said Willard M. Fuller and David M. Ford, the sole and exclusive right to manufacture and sell machines of the said invention as secured to us by the said letters-patent and assignment, in the city of Chicago, county of Cook, state of Illinois, and in no other place or places, the same to be held and enjoyed by the said Willard M. Fuller and David M. Ford, for their own use and behoof, and their legal representatives, to the full end of the term for which



such letters-patent have been granted, as fully and entirely as the same would have been held and enjoyed by us had this sale and assignment not been made." Defendants bought one of the patented machines in Chicago from Fuller & Ford, and used it outside of Chicago; defendants, being sued for infringement, were held not to infringe.—*Ib.*

108. A license to a person for a specific number of years passes to the licensee's administrator upon his death. *Oliver et al. v. Morgan*, 10 Heiskel, 322.—NICHOLSON, 1872.

109. The patent in question was for sewing-machines. Complainant had worked for the defendant corporation, experimented with their tools, stock, and materials, and thereby produced the improvement in question. In that factory he made five thousand sewing-machines, on contract, having the improvement, his special tools going to the corporation at the end of the contract. It was held that this state of facts created a license to the defendant corporation. *Chabot v. Am. Buttonhole & Overseaming Co.*, 6 Fish. P. C. 71.—MCKENNAN, 1872.

110. By a written instrument, a patentee conveyed to another party "two thirds of all his machinery, furnaces, engines, retorts, buildings, and materials whatsoever, now on or about the premises of the Wetherill Zinc Company, in the town of Wetherill, Penn., with rights to use all his patents and processes for the manufacture of zinc oxide, metallic zinc, retorts, etc., which said Wetherill now has, or has in contemplation to obtain, . . . it being understood that the patents heretofore referred to mean only those which he holds in his own right." Thereof the court said: "I do not . . . think it an unwarranted inference, from the words and tenor of the contract, that the parties intended the right to use Wetherill's patents and processes to be exercised in connection with the buildings, machinery, furnaces, engines, retorts, and materials granted with it, and consequently that such use was intended to be local and restricted." And as to the words, "it being understood that the patents heretofore referred to mean only those which he holds in his own right," the court said: "The qualifying words above quoted apply only to such patents as he was the apparent but not the real owner of, nor do they exclude patents of which his tenure was not exclusive." *Wetherill et al. v. Passaic Zinc Co. et al.*, 9 Phil. 385.—MCKENNAN, 1872.

111. In considering a license, "it is proper to consider facts cognate to the subject of the contract and within the knowledge of the parties, to which it may, therefore, be presumed that the

stipulations of the contract were intended to be applied, and by which their effect and meaning were to be governed."—*Ib.*

112. "A license or contract for the use of an invention is subject to the same rules of construction which apply to any other contract. The intention of the parties, as expressed in the contract, is to be ascertained, and effect must be given to it accordingly."—*Ib.*

113. "A transfer of an interest in a subsisting patent will not extend beyond the term of the patent, unless there are words which indicate an intention to convey more than a present interest."—*Ib.*

114. The words of a license were, in part, "with rights to use all his patents and processes for the manufacture of zinc oxides, metallic zinc, retorts, etc., which said Wetherill now has or has in contemplation to obtain." Thereof the court said: "The significance of the words 'now has or has in contemplation to obtain,' is merely to individuate the patents which the contract was intended to embrace, and has no reference to the renewal or extension of such patents."—*Ib.*

115. Where a license right expires with the original term of a patent, the right to the use of any machines derived from it ceases then.—*Ib.*

116. The license in question conveyed "the right to use the said patented invention, to the extent of one machine." Thereof the court said: "The right conferred upon the defendant, subject to the conditions of the agreement, was a right to construct and use the machines therein mentioned;" and further, "the agreement conferred the right to repair, and, if necessary, to rebuild the first machine made, paid for, and put to use in the quarry." *Steam Stone Cutter Co. v. Sheldon et al.*, 10 Blatch. 1.—WOODRUFF, 1872.

117. The violation, by a licensee, of a limitation contained in a license, does not, in the absence of a forfeiture clause, work a forfeiture.—*Ib.*

118. Defendants had a license to use one machine and used it; they had a right to use additional machines upon making certain payments. They used other infringing machines, and after suit brought tendered the patent owners money as said additional payments. Defendants were held to infringe.—*Ib.*

119. "Any assignment which does not convey to the assignee the entire and unqualified monopoly which the patentee holds in the territory specified, or an undivided interest in the entire monopoly, is a mere license. *Sanford et al. v. Messer et al.*, 1 Holmes, 149.—SHEPLEY, 1872.

120. "Unquestionably a contract for a pur-

chase of a portion of a patent right may be as good between the parties as a license, and enforced as such in the courts of justice; but the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it."—*Ib.*

121. For an example of construction as to the effect of a license upon different contracts, see — *Hammond et al. v. Mason & Hamlin Organ Co.*, 1 Holmes, 296.—SHEPLEY, 1873.

122. The defendant company was the owner of patents for making buttonholes, owned a factory, made machines, and entered into a contract with the complainant corporation, by which complainant was to be sole exclusive agent for the sale of machines except in Boston and France. Complainant had bought one thousand machines. Defendant conveyed its patents to a trustee and sought to avoid the contract. Provisional injunction was granted. *Singer M'fg Co. v. Union Buttonhole & Embroidery Co.*, 1 Holmes, 253.—LOWELL, 1873.

123. Where a party, having a license under a patent, transcends the right given by the license, he is an infringer. *Wood v. Wells et al.*, 6 Fish. P. C. 382.—WOODRUFF, 1873.

124. As a general rule, a violation of the provisions of a license by the licensee does not, of itself, work a forfeiture of the license.—*Ib.*

125. "The mere fact that, in the course of business, the licensee has infringed the patent, will not work a revocation of the license, and especially in a case where the license covers a distinct and specific privilege, which has been paid for, once for all, and conveys, without further fee or consideration, rights which are fixed and definite. Such a privilege, conveyed absolutely and for a consideration paid, becomes a clear vested right, and to the extent to which it became so vested, a court of equity, as well as a court of law, is bound to recognize it."—*Ib.*

126. The purchase of a patented article, lawfully manufactured, and sold without restriction or condition by a territorial assignee of a patent right, within his territory, conveys to the purchaser the right to use and sell the article in another territory for which another person has taken an assignment of the same patent. *McKay v. Wooster et al.*, 2 Sawyer, 373.—SAWYER, 1873.

127. Where the rights of him who assumes to sell a patented machine are restricted under a license, a notice to the purchaser from him is not required, as the law imposes the risk upon the purchaser as against the real owner, whether the title of the seller is such that he can make

a valid conveyance. *Mitchell et al. v. Hawley*, 16 Wall. 544.—CLIFFORD, 1873.

128. A license described as "personal" cannot be transferred by the licensee to another. *Houghton v. Rowley*, 9 Philadelphia. 288.—SHERWOOD, 1873.

129. "The sale by a person who has full right to make, sell, and use . . . a machine, carries with it the right to the use of that machine to the full extent to which it can be used, in point of time." *Adams v. Burlingame*, 17 Wall. 433.—SUP. CT. 1873.

130. "The right to manufacture, the right to sell, and the right to use, are all substantial rights, and may be granted or conferred separately by the patentee."—*Ib.*

131. "In the essential nature of things, when the patentee, or the person having his rights, sells the machine or instrument whose sole value is in its use, he receives the consideration for its use, and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly—that is to say, the patentee by his assignee having, in the act of sale, received all the royalty or consideration which he claims for the use of his invention, in that particular machine or instrument, it is open to the use of the purchaser without further restriction, on account of the monopoly of the patentee."—*Ib.*

132. A, as a licensee under a patent, had the right to manufacture, sell, and use patented coffin lids within ten miles of Boston. B, living outside that circle, purchased one of the patented improvements in Boston, and used it outside the circle. The owner of the territory outside the circle brought suit for infringement. B was held not to infringe. The scope of the decision was specially limited to articles which perish in the first use thereof.—*Ib.*

133. Where a defendant has a license from and a contract with the patentee, he cannot deny the validity of the patent, and refuse to recognize any title in the patentee, and afterward set up the license as a defense against an infringement suit. *Moody v. Taber*, 1 Holmes, 325.—SHEPLEY, 1874.

134. Where a party's manufacturing rights are limited by a license, and, at his insolvency, another party buys the manufactures in question, the last party, in selling these manufactures, would be an infringer in any case where the party first mentioned would be an infringer.—*Ib.*

135. "A mere license is not apportionable, so as to permit the licensee . . . to grant to others separate rights to use or work the patent, by

subdividing the rights that may have been granted to himself." *Consolidated Fruit Jar Co. v. Whitney et al.*, 1 Bann. & Ard. 356.—NIXON, 1874.

136. "The right to make and vend, and the right to use, are completely severable; and, while a grant of the right to make and sell to others might be deemed to imply the right in the purchasers to use the thing purchased, a patentee may restrict the use. The patent as effectually secured to him a monopoly of the right to use it as it does of the right to make. The patentee, or his assignee, may, therefore, give the exclusive right to make and sell for use within a certain territory; and such a restriction would be entitled to enforcement." *Dorsey Revolving Harvester Rake Co. et al. v. Bradley M'fg Co.*, 12 Blatch. 202.—WOODRUFF, 1874.

137. "Especially may one having a license to make and sell within a limited territory only deliberately contract to supply the patented invention for use in other territory, provided his manufacture and his actual negotiation of sales are within the privileged limits, and may practically avail himself of the markets of the whole country."—*Ib.*

138. A licensee may maintain a suit for infringement against his licensor. *Littlefield v. Perry*, 21 Wallace, 205.—SUP. CT. 1874.

139. A licensed B to use a patented machine in Newark, N. J. B sold the machine to C, who took it to New York and there used it. It was held that B had no right to use the machine in New York, and could convey none. *Wicke v. Kleinknecht et al.*, 1 Bann. & Ard. 608.—BLATCHFORD, 1874.

140. Mistake of law furnishes no ground for escaping the force of the covenants in a license, and, although the term of the license has expired, the recitals and covenants in it bind and estop the licensee. *Wooster v. Taylor et al.*, 12 Blatch. 384.—BLATCHFORD, 1874.

141. Where defendants claim under a license, and complainant urges that the license was procured by fraud, and the determination of this question rests in doubt, a provisional injunction will be denied. *Beane v. Orr et al.*, 2 Bann. & Ard. 176.—LOWELL, 1875.

142. "If the licensee 'uses the patented invention beyond the limits of the license or grant, or in any way not authorized by the license or grant, then there has been a violation of the right secured to the patentee under a law of the United States giving to him the exclusive right to use the thing patented, although such licensee performs, according to their terms, all the covenants entered into by him.'" *Magic Ruffle Co. v.*

*Elm City Co.*, 13 Blatch. 151.—SHIPMAN, 1875.

143. "If the licensees have . . . expressly covenanted, in their agreement of license, that they will do or will not do a particular act, or will not use the invention for a particular purpose, a violation of such covenant is . . . a breach of contract, not arising under the laws of the United States, but for which remedy may be sought in the circuit courts of the United States, provided the citizenship of the parties gives jurisdiction to such court."—*Ib.*

144. Where A grants an exclusive license to B, and covenants to prosecute infringers, such agreement is not a warranty against B's being disturbed by unlicensed wrong-doers. In an action by B against A for breach of contract. A may show the invalidity of his patent. *Jackson et al. v. Allen*, 120 Mass. 64.—GRAY, 1876.

145. "Good faith requires that the licensee shall give to the owner of the patent notice of his renunciation of the license, so that the privilege may be sold to others, before he can be permitted to repudiate his obligations under it." *Marsh v. Dodge*, 4 Hun, 278.—GILBERT, 1875.

146. So long as a licensee continues to work under his license he is estopped from denying the validity of the patent.—*Ib.*

147. A licensee upon a royalty sold certain of the patented articles in an unfinished state, and he was holden to pay the license fee.—*Ib.*

148. "In general, the sale of a machine to a purchaser for use carries with it the right to use it, the presumption being that whatever license fee or compensation for the use is due to the vendor is included in the price." *Gilbert & Barker M'fg Co. v. Bussing*, 12 Blatch. 426.—WOODRUFF, 1875.

149. "When a patentee claims and recovers, not only the actual gains and profits of the manufacture and sale, but all the damages which he has sustained therefrom, it is, at least, to be presumed that such recovery embraces all the profit which the patentee would have received had he made and sold the machine to such purchaser with the like incidental or consequential right to use it."—*Ib.*

150. By the court: "I do not . . . mean to affirm that a patentee may not have a decree against him who manufactures and sells an infringing machine, and also a decree against the purchaser thereof, enjoining such manufacture and sale, and also enjoining the future use of the infringing machine; but only that the patentee cannot take compensation for the infringement, including manufacture, sale, and use, and thereafter enjoin that use for which

he has taken compensation. The patentee, in such last supposed case, would stand very much in the condition of one who sues in trover for the value of his property wrongfully converted, and recovers and receives such value, in compensation for his damages. He thereby so far affirms the conversion that his title to the property is gone. But, to effect this, something more than the bringing of the action, and more than a verdict assessing damages, is necessary. There must be satisfaction."—*Id.*

151. "When a patentee gets his remuneration by patent or license fees, a recovery of the license or patent fee from an infringer, and its payment, authorize him to use the particular article for which such recovery has been had." *Perrigo et al. v. Spaulding*, 13 Blatch. 389.—JOHNSON, 1876.

152. "When a patentee chooses to use his invention himself, and finds his remuneration in the sale of the products of its use, and to prevent others from using his invention, it is his right, and then a recovery for profits and damages will be limited to the profits and damages up to the time of the recovery. Such a recovery will not carry with it any right to the further use by the infringer of the invention."—*Id.*

153. "Where the patentee sells his patented instrument or machine for use by others, finding his remuneration in the profit of the sale of the manufactured machine or instrument, it is obvious that his interest is promoted by increasing the sale of the manufactured machine or instrument, and that into his profit enters the value of the patented invention over and above the cost of manufacture and the ordinary fair profit of the manufacture. Even if no patent or license fee is fixed, the value thereof, as a profit, enters into the selling price, and, if not capable of the exact ascertainment, may nevertheless be approximated to by estimation, when necessary. When the patentee sells, he receives his profit, and thus obtains full compensation for the article sold and for the right to use while it lasts. When, for an infringement, he obtains both the profits and damages, he will be presumed to have obtained a full compensation for all the injury he has sustained, and to be placed in as good position as if he had made and sold the article himself."—*Id.*

154. "When a patentee manufactures and sells his patented article for use, the right to use passes by the sale. If an infringer manufactures and sells he must account for and pay the profits, which are to be calculated upon the principle that the gain by the appropriation of

the patentee's invention is their measure. If there are damages sustained and proved by the plaintiff, beyond the profits made by the infringer, these also may be recovered. But when a full recovery and satisfaction from one party has been had, the patentee has obtained all that the law gives him, and the particular article or machine, if it be a machine, becomes, in effect, licensed by the patentee, and may be used so long as it lasts free from any further claim by the patentee."—*Id.*

155. A license given by one of the joint owners of a patent is valid. *Dunham v. Indianapolis & St. Louis R. R. Co.*, 7 Bissell, 223.—DRUMMOND, 1876.

156. Complainant and defendants had negotiations with reference to a license upon royalty, and defendants had verbally agreed to take the same. From time to time complainant transmitted to defendants blanks for returns of royalties which were executed and returned by defendants. Subsequently complainant offered defendants a printed license, which defendant refused to accept, contending that the transmission and execution of the royalty blanks constituted a license. Complainant sued defendants as an infringer, and prevailed. *Tilghman v. Hartell et al.*, 2 Bann. & Ard. 260.—MCKENNAN, 1876.

157. A license which is to remain in force "until the full expiration of the contract for which said letters-patent have been granted, and during such period as the same may be hereafter renewed or extended," has life and force under an extended term of the patent. *Hammond et al. v. Mason & Hamlin Organ Co.*, 92 U. S. 724.—SUP. CT. 1876.

158. An exclusive license excludes the licensor as well as others. *Ferree et al. v. Smith*, 29 La. Annual, 811.—DE BLANC, 1877.

159. Where a party takes a license upon a royalty, while a contest is pending over the patent of which the licensee has knowledge, the party will be bound to pay the royalty. *Jones et al. v. Burnham et al.*, 67 Maine, 93.—APPLETON, 1877.

160. Procurement of service of an injunction upon a licensee by his licensor is a breach of the license. *Sullings v. Goodyear Dental Vulcanite Co.*, 36 Mich. 313.—COLLEY, 1877.

161. Where a patented pavement has been laid under a license, the fact that the license fee has not been paid does not make it an infringement. *Stow v. City of Chicago*, 8 Bissell, 47.—BLONGETT, 1877.

162. A license may be proved by any kind of evidence ordinarily competent to prove such

facts. *Black et al. v. Hubbard et al.*, 3 Bann. & Ard. 39.—WHEELER, 1877.

163. Where an inventor, working for another, puts the invention into use in the factory of that other before patent granted, he gives that other a special license to continue such use after patent granted. *Magoun v. New England Glass Co.*, 3 Bann. & Ard. 114.—SHEPLEY, 1877.

164. "When a patentee has infringed his license, and, while holding the legal title to the patent in trust for his licensee, has been faithless to his trust, 'courts of equity are always open to the redress of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the Circuit Court has jurisdiction.'" *Stanley Rule & Level Co. v. Bailey*, 14 Blatch. 510.—SHIPMAN, 1878.

165. Defendant had granted to complainant a license under certain conditions. Complainant sued defendant for infringement of its own patent. Defendant objected that the bill did not affirmatively aver that complainant had fulfilled the conditions of the license. The court held that the conditions were conditions subsequent, and that such averment was not necessary.—*Id.*

166. "Contracts touching the transfer, use, and enjoyment of patented inventions are to be construed in the same way as contracts respecting other species of property, so as to carry into effect the intention of the parties as collected from the language employed, the subject-matter, and the surrounding circumstances." (Said of a license.) *Star Salt Caster Co. et al. v. Crossman et al.*, 4 Cliff. 568.—CLIFFORD, 1878.

167. Defendant was the licensee of complainant under royalty. Defendant declined to pay royalty, and was sued as an infringer. Provisional injunction was asked for. It appeared that the licensor had sold other parties licenses at a less price than that paid defendant, in violation of the license. Provisional injunction was refused for that reason. *Crowell v. Parmenter*, 3 Bann. & Ard. 480.—LOWELL, 1878.

168. Licensees "cannot be permitted to put an end to the contract, or deny the validity of the patent, repudiate the title of the licensor, refuse to pay the stipulated royalty, and, when the validity of the patent is sustained in spite of their hostility to the rights of the owner, set up successfully, as a defence to the charge of infringement, the prior license which they had wrongfully repudiated, and whose terms and conditions they had refused to acknowledge and perform, upon the ground that the patent was inoperative, invalid, and void." *Cohn v.*

*National Rubber Co.*, 3 Bann. & Ard. 568.—CLIFFORD, 1878.

169. "If licensees refuse to perform on their part, and repudiate the license, they may be treated by the owner of the patent, at his election, as infringers. He may have his remedy by suit upon the license, in case they have repudiated the license, or he may elect to treat them in future as infringers of his exclusive rights under the patent. Being infringers, they cannot set up the license in defence of a suit any more than if they had never possessed any such authority."—*Id.*

170. Complainant's patent in suit was for a buckle for cotton-ties. Complainant sold the buckles with the words printed on them "Licensed to use once only." Up to the season of 1876 there was printed on complainant's bill-heads and invoices, "The cotton-ties sold by this invoice are licensed to be used only as baling-ties, and sold and purchased subject to this restriction." During the season of 1876 the complainant printed the following on the bills: "The buckles accompanying these bands are the property of the American Cotton-Tie Company, Limited, and are licensed to be used one season only, the company reserving the right after such use to recover possession of them wherever found." When cotton bales on which these ties were used were opened for use at the factory, the manufacturer sold the ties and buckles to junk dealers. Defendants purchased them from junk dealers, repaired them, and sold them again. The court held that defendants were not infringers, and that in selling the cotton-ties complainant could not reserve the rights it attempted to. *American Cotton Tie Co. v. Simmons et al.*, 3 Bann. & Ard. 320.—SHEPLEY, 1878.

171. Where there is an existing license between complainant and respondent, which respondent is ready to stand by, complainant cannot treat it as abrogated, and proceed against respondent as an infringer. *Hartell v. Tilghman*, 99 U. S. 547.—SUP. CT. 1878.

172. Where a license is given upon a royalty, with no provision for revocation for failure to pay royalty, it will not lie with the licensor to accomplish such revocation. *Cook et al. v. Bidwell*, 20 O. G. 1083.—ACHESON, 1879.

173. Three licenses of the same date are to be considered together. *Hamilton v. Kingsbury et al.*, 17 Blatch. 264.—BLATCHFORD, 1879.

174. Licenses need not be recorded. Recording them has no legal effect.—*Id.*

175. A licensee may maintain a suit against his licensor and all parties claiming under the

licensor to prevent infringement of the patent. *Perry v. Littlefield et al.*, 17 Blatch. 272.—BLATCHFORD, 1879.

176. For an example of future invention held to be covered by license to that effect, see —. *Ib.*

177. A assigned a patent to B on condition that the assignment should be void unless certain notes which B gave to A were duly paid. The notes were not duly paid, and B reassigned to A; but previous to reassignment B granted a license to C. The license was held void. *Abbott et al. v. Zusi*, 5 Bann. & Ard. 38.—NIXON, 1879.

178. A conveyance under a patent gave "the right to use said patented machine or any number of said machines" at a given place. The court held that this instrument conveyed "the right to make machines for the use expressly granted, and this would include the right to procure them to be made, and cover the making them by the one procured to make them." *Steam Stone Cutter Co. v. Shorisleaves*, 16 Blatch. 381.—WHEELER, 1879.

179. "It is a maxim of the common law, that any one granting a thing impliedly grants that also without which the thing expressly granted cannot be had. . . . The foundation of it is the presumed intention of the grantor to make the grant effectual. . . . And it is as applicable to grants of rights under patents, whether assignments or mere licenses, as to any other subject, where the true intent is sought for."—*Ib.*

180. A patent owner asked for provisional injunction. He was accustomed to exercise his rights under the patent by granting licenses. A provisional injunction was granted, but in connection therewith the court ordered an inquiry into the matter of complainant granting the defendant a license. *Colgate v. Gold & Stock Telegraph Co.*, 16 Blatch. 503.—BLATCHFORD, 1879.

181. If the avails of sales of infringing machines made by defendants are claimed and taken by the complainant patent owner, the right to the thing sold is parted with. *Steam Stone Cutter Co. v. Winsor M'fg Co. et al.*, 17 Blatch. 24.—WHEELER, 1879.

182. Complainant's patent in suit was for a cotton-tie. Complainant sold its cotton-tie stamped with the words "licensed to use once only," and printed similar matter on its bill-heads. Defendants used these cotton-ties a second time, and were held to infringe. *American Cotton Tie Supply Co. v. Bullard et al.*, 17 Blatch. 160.—BLATCHFORD, 1879.

183. A license recited that "Whereas, letters-patent of the United States, dated November

6th, 1866, numbered 59,375, were lawfully granted," etc. Then, after authorizing the licensors to revoke the license upon non-payment of royalty, the license provided that such revocation should not impair "the effect of the admission of the validity of said letters-patent or reissue, or of the novelty, utility, and practicability of the said invention." It was held that the licensees had admitted the validity of the licensed patent, and that unless the recitals were introduced by fraud, imposition, mistake, or accident, the licensee could not deny their truth in an action for license fees accrued before the revocation of the license. *Evory et al. v. Candee et al.*, 17 Blatch. 200.—SHIPMAN, 1879.

184. Where a license contains a recital of the validity of the patent, evidence is not admissible to contradict such a recital.—*Ib.*

185. "It requires very little to prove that a deed duly and carefully made and executed, and especially if it is but one of several made at the same time, some of which are admitted to have gone into effect, has been delivered. Delivery is not now a deliberate ceremony performed in the presence of witnesses, and if it is questioned, must often be inferred from conduct or other circumstances." *Hammond v. Hunt et al.*, 4 Bann. & Ard. 111.—LOWELL, 1879.

186. "If a deed is left with a stranger to be delivered to the grantee on the happening of a contingency, the first delivery is complete, and irrevocable by death or otherwise. And by a stranger is meant one who is not a party to the deed."—*Ib.*

187. Complainant had a process patent for manufacturing flour, and sold to another party the "exclusive right to manufacture and sell rolls for crushing grain or middlings, . . . which right or process to manufacture and sell rolls is secured to me by said patent." Held, that complainant had the right to sue in his own name for infringement. *Downton v. Yaeger Milling Co.*, 3 McCrary, 414.—DILLON, 1879.

188. A licensee may defend against a patent on the ground of its invalidity, and where the Government is the licensee it may do likewise. *Morse Arms M'fg Co. v. United States*, 16 Nott. & Hop. C. C. 296.—DAVIS, 1880.

189. As to when a licensee may and when he may not defend against a suit for compensation for the use of the patent, on the ground of the invalidity of the patent, see —. *Ib.*

190. It seems that acquiescence by a patent owner in the embodiment of the invention in a machine estops him from claiming the machine to be an infringement. *Downton v. Yaeger Milling Co.*, 1 McCrary, 26.—TREAT, 1880.

191. Where a decree of infringement and for perpetual injunction is issued by consent of parties, the decree and injunction are not annulled or affected by a conditional license afterward granted respondents by complainant. *Pentlauge v. Beeston et al.*, 18 Blatch. 38.—BENEDICT, 1880.

192. *Doubted*—in view of *Hartell v. Tilghman*, 99 U. S. 556—whether, in the absence of a termination of a license by mutual agreement, a revocation of a conditional license can be effected by giving notice merely.—*Id.*

193. A licensor having granted a single license under a patent to five persons, three of the licensees, by agreement with the licensor, surrendered their interest therein to the licensor. *Held*, that this was permissible by law, and further that the releasors need not be joined as plaintiffs in an action under the license against the licensor. *Theberath et al. v. Celluloid Mfg Co.*, 3 Fed. Rep. 143.—NIXON, 1880.

194. A license taken by defendant giving it permission to sell goods it had on hand when the patent issued is "rather in the nature of a compromise to save trouble than a deliberate acknowledgment of the validity of the patent." *White v. Harris' Sons Mfg Co.*, 3 Fed. Rep. 161.—LOWELL, 1880.

195. Defendant had taken a license from complainants which provided for returns, payments, etc., and for written revocation if defendant failed to keep his agreement. Complainants proceeded against defendant, by bill of complaint, as an infringer, without averring the written revocation. Bill demurred to and demurrer sustained. *White et al. v. Lee*, 3 Fed. Rep. 222.—LOWELL, 1880.

196. "In some few patent cases, beginning with *Brooks v. Stolley*, 23 McLean, 523, it has been held that the patentee enjoyed the unusual privilege of treating a breach of covenant as if it, of itself, worked a forfeiture. No doubt the parties may agree that such an effect shall follow; and this will account for some of the decisions. The others of this sort are overruled by *Hartell v. Tilghman*, 99 U. S. 547." A breach of a condition of a license by a licensee does not, of itself, work a forfeiture of the license.—*Id.*

197. By the court: "The license to Angelina Brown was revocable, and was revoked by the conveyance of the title of the licensors." *Faulks et al. v. Kamp et al.*, 17 Blatch. 432.—WHEELER, 1880.

198. Licenses do not need to be recorded. *Hamilton v. Kingsbury et al.*, 17 Blatch. 460.—BLATCHFORD, 1880.

199. The patentee, Fosburgh, gave an exclu-

sive license to Dare, with royalties to be paid at the end of each quarter or within ten days thereafter. Fosburgh then went into Dare's employ. At the end of the first quarter, and before the expiration of the ten days' grace, Dare notified Fosburgh that the royalties were ready for him at Dare's office. He did not call, and the royalties were not paid in the specified time. Fosburgh then made an exclusive license to defendant, the latter having knowledge of Dare's license, but afterward accepted royalties from Dare. Defendant proceeded to manufacture, and Dare brought suit for infringement. The license to Dare was held valid, and defendant found to be an infringer. *Dare v. Boylston*, 18 Blatch. 548.—BLATCHFORD, 1880.

200. The construction of a patented machine, by defendant, before issue of patent, does not authorize defendant to use, after patent granted, other than the machine made prior to the date of the patent. *Brickill et al. v. New York*, 18 Blatch. 273.—WHEELER, 1880.

201. A license which authorizes the licensee to use the patent "for his own proper business" does not authorize him to permit another to use the patent. *Putnam et al. v. Hollander et al.*, 19 Blatch. 48.—BLATCHFORD, 1881.

202. A suit being brought charging defendant as an infringer, by reason of forfeiture of the license from complainant to defendant, through breach of the condition of a license, the bill was dismissed (under authority of *Hartell v. Tilghman*, 99 U. S. 557). *Adams v. Meyrose*, 2 McCrary, 360.—TREAT, 1881.

203. A company which had the right to use, but not the right to vend for use, the patented machines, sold them to defendant, telling defendant that it was doubtful if the right to use passed with the machines. *Held*, that no right to use passed to defendant. *Union Met. Cartridge Co. v. U. S. Cart. Co.*, 7 Fed. Rep. 344.—LOWELL, 1881.

204. Where defendants set up a license, and its existence is disputed, the defendants must offer preponderating evidence in order to prevail. *Watson et al. v. Smith et al.*, 7 Fed. Rep. 350.—WHEELER, 1881.

205. The mere taking of a license under a patent, there being no covenants, etc., as to validity of the patent, does not estop the licensee from denying the validity of the patent in a suit against the licensor. *Nat. Mfg Co. v. Meyers*, 7 Fed. Rep. 355.—SWING, 1881.

206. A license to a railroad company "to make and use all of said improvements and inventions so patented, . . . for and during the several terms of the patents, and any extension

of either of the same in, upon, and about the locomotive engines used by said . . . company, on the . . . railroad, or on any road or roads now owned, or that may hereafter be owned or operated by the said company," carries the right to use said inventions on locomotives thereafter acquired, and on roads thereafter coming under the control and operation of said company. *Matthews v. Pa. R. R. Co.*, 8 Fed. Rep. 45.—BUTLER, 1881.

207. Where a license is granted to use a certain machine, the patented part whereof is a combination, parts of the machine which become worn out may be replaced, and the use of the machine continued under the license. If the patented part had been a single part of the structure, and that part had worn out, the user would have no right to replace it. *Gottfried v. Seipp Brewing Co.*, 10 Bissell, 368.—BLODGETT, 1881.

208. The owner of a patent who sees machines made under his patent go into use with silent acquiescence, and then consents to the sale of the machines at a sheriff's sale, parts with the right to afterward object to the use of the machines. *Detweiler v. Voegel et al.*, 19 Blatch. 482.—BENEDICT, 1881.

209. Defendant filed a plea to complainant's bill setting up rights under the patent emanating from one of the complainants, and embodied in writing. Of this the court said: "The writing under private signature between Lillienthal and Moses is certainly not admissible until genuineness is established. The contract between Moses and Washburn having been acknowledged by the parties before a notary public and two witnesses, may have the same effect as an authentic act and prove itself." *Lillienthal et al. v. Washburn*, 8 Fed. Rep. 707.—PARDEE, 1881.

210. The fact that defendants formerly had a license from complainant under his patent, and put the patent stamp on their goods, does not estop them from contesting the patent on the question of infringement. *Blatherwick v. Carey et al.*, 10 Bissell, 494.—BLODGETT, 1881.

211. A written transfer contained the following language: "I hereby sell, assign, and set over to . . . the exclusive right to manufacture and sell rolls for crushing grain middlings or other substances, which right or process is secured to me under patent numbered 162, 157," etc. The patent was a process patent. *Held*, that the title to the patent did not pass with this transfer. *Downton v. Allis*, 9 Fed. Rep. 766.—DYER, 1881.

212. One Stromberg sold to defendant the machine complained of. Stromberg, with others, subsequently owned the patent sued on, which

covered the machine, and Stromberg, selling out to his co-owners, took a release validating all Stromberg's past acts in the premises. This was held to protect and license defendant's machine. *Gottfried v. Miller*, 10 Fed. Rep. 471.—DYER, 1881.

213. A license to parties, permitting them to manufacture at their shop, in a certain place, is not transferable, and is a license to make only. *Searles v. Bouton et al.*, 20 Blatch. 426.—WHEELER, 1881.

214. One Stromberg sold to defendant the machine complained of, with the right to use it, Stromberg at that time owning no interest in the patent sued on. Stromberg subsequently owned an interest in such patent, and on his selling out to complainant took a release from complainant ratifying all his former acts as to said patent. *Held*, that complainant's suit would not lie. *Gottfried v. Miller*, 104 U. S. 521.—SUP. CT. 1881.

215. A bill in equity will lie to nullify a forfeitable license. *Adams v. Meyrose et al.*, 10 Fed. Rep. 671.—TREAT, 1882.

216. "The rights of an owner of a patented machine, without any conditions attached to his ownership, to continue the use of his machine during an extended term of the patent, is well settled. . . . Power to sell the machine, and transfer the accompanying right of use, is an accident of unrestricted ownership." *Union Paper Bag Mach. Co. et al. v. Nixon et al.*, 105 U. S. 766.—SUP. CT. 1882.

217. A license to defendant being found in defendant's possession, the burden of proof is upon complainants to show that defendant has no right to this license. *Mellon et al. v. D. L. W. R. Co.*, 21 O. G. 1616.—SUP. CT. 1882.

218. Where a complainant sets up facts amounting to a license, and the defendant denies the validity of the patent, the defendant cannot avail itself of such license. *Shaw v. Colwell Lead Co.*, 20 Blatch. 417.—WHEELER, 1881.

219. An assignment of a patent operates as a revocation of a revocable license; and a mere permission to make and sell is a revocable license.—*Id.*

220. A license by a corporation, referring generally to its patents, will not include a patent belonging to an officer of such corporation.—*Id.*

221. The fact that defendant incurred expenses in the practical development of complainant's patented invention does not operate to give defendant a license under the patent.—*Id.*

222. Complainant sold its patented cotton-tie stamped with the words "Licensed to use once only." Cotton manufacturers, in removing



these ties from cotton bales, necessarily cut the ties in two. Defendants bought the ties in that condition, reconstructed the band, and sold them. Defendants were held to infringe. *Am. Cotton Tie Co. v. Simmons et al.*, 106 U. S. 89.—SUP. CT. 1882.

223. A licensee being sued for royalties, made the defense that the patent was invalid. The court said: "The law is, I think, that a plea or answer that the patent is void is not of itself a sufficient defense, but that evidence of what may be called an eviction is such defense." *White et al. v. Lee*, 14 Fed. Rep. 789.—LOWELL, 1882.

224. By the court: "Whatever right to use a patented machine a defendant, in an execution, may have, passes with the machine when sold by the sheriff to his vendee." *Wilder v. Kent et al.*, 23 O. G. 831.—ACHESON, 1882.

225. Where complainant has had a decree for the recovery of its profits upon infringing machines against one party, such machines go to a third party free from liability to complainant. And the injunction restraining the use of such machines *pendente lite* will be dissolved. *Stam Stone Cutter Co. v. Sheldons et al.*, 21 Blatch. 260.—WHEELER, 1883.

226. By the court: "The damages recovered by the orator are not for a sale for use, which would probably free the whole use." *Matthews v. Spangenberg*, 15 Fed. Rep. 813.—WHEELER, 1883.

227. By the court: "If the workman, by using the tools and time and money of his employer, with his consent, makes an invention and applies it in his employer's business, the employer may continue to use it. If the improvement is a process, it has been held that the employer may continue to practise the process for the whole period of the patent. . . . But if the invention pertains to a machine, it is understood that only the specific machine, or machines which have been so made are licensed." *Wade v. Metcalf et al.*, 16 Fed. Rep. 130.—LOWELL, 1883.

228. The principle of the decision last quoted applies to an invention made by a member of a firm, and the resulting license does not end with the dissolution of the employer firm.—*Ib.*

229. By the court: "The more commonly expressed and therefore presumably better judicial opinion is to the effect that when the license has been revoked by the plaintiff, and the bill treats the defendant as a naked infringer, he is at liberty to avail himself of any defence ordinarily open to any defendant who is charged with infringement." *Wooster v. Singer M'fg Co.*, 23 O. G. 2513.—SHIPMAN, 1883.

230. A decree for nominal damages recovered

by a patentee against the manufacturer of infringing machines does not operate to license those machines, so far as users of such machines are concerned. "The infringement by the manufacturer and the infringement by the user of an infringing machine are separate trespasses, and the judgment because of one is no bar to an action for the other. To create a bar there must be satisfaction, and nominal damages is not satisfaction." This rule is not altered, because the nominal damage against such a manufacturer was found under a stipulation entered into by the parties. *Blake v. Greenwood Cemetary*, 21 Blatch. 222.—BENEDICT, 1883.

231. "Where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser, who is a user of the machine, will be protected in such use against a suit for infringement as he would be if he were a licensee from the patentee. . . . To effect such a result it must further appear that the patentee's claim to profits and damages against the manufacturer has been actually paid and satisfied." *Allis v. Stowell*, 16 Fed. Rep. 783.—DYER, 1883.

232. Where a license was granted before the patent issued, and referred simply to the invention as set out in the application, and the application was afterward changed by amendment, the license was held to apply to the resultant patent. *Kelly v. Porter et al.*, 8 Sawyer, 482.—SAWYER, 1883.

233. Where there was nowhere in a license any limitation as to time and no right of revocation reserved in terms, it was held that the license was irrevocable unless by some fault of the parties.—*Ib.*

234. Where a license granted the use of patented machines on royalty, at the same time mentioning the value of a certain number of the machines, it was held that the machines were not sold outright, but remained within the scope of the license. *Porter Needle Co. v. Nat'l Needle Co.*, 17 Fed. Rep. 536.—LOWELL, 1883.

235. There are cases in which "the ownership of the machine will not necessarily carry with it the right to use it without the permission of the patentee."—*Ib.*

236. Where defendant, under the stress of a provisional injunction, took a license and paid royalties, and the patent was afterward adjudged invalid, it was held that defendant could not recover back the royalties he had paid, so long as he had not suffered actual eviction. *McKay v. Jackman*, 17 Fed. Rep. 641.—WHEELER, 1883.

237. Where a defendant repudiates his license, he cannot use it as a defence, when sued as an

infringer. *Fetter et al. v. Newhall*, 21 Blatch. 445.—WHEELER, 1883.

238. Where complainant has an exclusive license from the patentee, the patentee will be enjoined from manufacturing under the patent until the license is set aside for good reason. *Goddard v. Wilde et al.*, 17 Fed. Rep. 845.—COLT, 1883.

239. By written instrument a patent owner conveyed to one Morgan the right to use the invention in question for five years within a specified territory. The court held this to be a license not descending to Morgan's administrator after his death, and said: "The instrument of license is not one which will carry the right conferred to any one but the licensee personally, unless there are express words to show an intent to extend the right to the executor, administrator, or assignee, voluntary or involuntary." *Oliver et al. v. Rumford Chemical Works et al.*, 109 U. S. 75.—SUP. CT. 1883.

240. Where a contract of license with royalty was entered into, and two years afterward the licensee desired a correction made in the contract, which the licensors were willing to make, but the licensee, in lieu thereof, desired to avoid the whole contract, it was held that the facts did not warrant the avoidance of the contract. *Laver v. Dennett et al.*, 3 Sup. Ct. Rep. 73.—SUP. CT. 1883.

241. Where A was for some time an active stockholder in the infringing corporation, then sold out and purchased the patents in suit, which were transferred to the company who brought the suit, of which A was an active stockholder, it was held that this state of facts did not burden the parties with an equity which should prevent the issuance of an injunction against defendants. *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1883.

242. One Curran took patents for improvement in lumber driers, and conveyed the same to defendant for the state of Wisconsin. Curran and the other complainants subsequently bought patents covering the lumber driers which defendant properly made under the Curran patents, and brought suit against defendant for infringement of these patents last acquired by Curran and the other complainants. It was held that Curran's assignment of his own patents to defendant estopped him from claiming that defendant's devices were infringements of the later acquired patents, and also served as a license under the later acquired patents. *Curran et al. v. Burdall*, 27 O. G. 1319.—BLODGETT, 1883.

243. "A patentee cannot sell his rights to

another and then buy or obtain control of an older patent, and through such older patent dispossess his assign of the full benefit of what he purchased."—*Id.*

244. A patentee granted to one Sherwood a license, known as a "shop-right," to operate the patented process at Buffalo, and at all times to associate with him such party or parties as he might desire. Subsequently Sherwood sold all his patented machinery to defendants, with the right to use it, so far as Sherwood could give that right. It was held that Sherwood's right was a mere personal license, not covering the power to give defendants the right to practise the invention, as they did, entirely disassociated from Sherwood. *Gibbs v. Hoefner et al.*, 22 Blatch. 36.—COXE, 1884.

245. Where, during the life of a partnership, one partner invented and patented a machine, and one such machine was made and used by the partnership, and the patent was paid for by the partnership funds, after the dissolution of the partnership it was held that no license accrued to the other partner. *Keller et al. v. Stolzenbach et al.*, 27 O. G. 209.—ACHESON, 1884.

246. For a discussion of a license and an agreement revoking the same on conditions, see —. *Andrews et al. v. Fielding*, 20 Fed. Rep. 123.—SHIPMAN, 1884.

247. "The purchase of a patented article from the patentee or owner of the patent confers upon the buyer the right to use the article to the same extent as though it were not the subject of a patent; but the sale does not import the permission of the vendor that it may be used in a way that will violate his exclusive property in another invention. Where the article is of such peculiar characteristics that it cannot be dealt in as a trade commodity, and cannot be used practically at all, unless as part of another patented article of the vendors, it would be preposterous to suppose that the parties did not contemplate its use in that way." *Rossvell v. Western Electric Light Co.*, 20 Fed. Rep. 724.—WALLACE, 1884.

248. By the court: "If the complainant has refused to fulfil any of his obligations in matters of substance under the license, a court of equity will not interfere to assist him in compelling the defendants to observe the obligations on their part." *Foster v. Goldschmidt et al.*, 22 Blatch. 287.—WALLACE, 1884.

249. For discussion of various points concerning licenses, see —. *Id.*

250. Where one party uses a patent of another under promise to pay for the same, but the specific sum is not agreed upon, "the law

will imply a reasonable price." *Milligan v. Lalance & Grosjean M'fg Co.*, 21 Fed. Rep. 570. —WHEELER, 1884.

251. Where défendant was sued for royalties as a licensee, and had stamped its goods with the date of complainant's patent, it made the defence that such goods were not within the patent, but was held to pay the royalty as if they were.—*Ib.*

252. A license is personal to the licensee, and an executor, administrator, or assignee, voluntary or involuntary, does not succeed to the privilege of the grant. *Curran v. Craig*, 22 Fed. Rep. 101.—TREAT, 1884.

253. Recovery of the profits of a sale for use vests the title of the use in the purchaser of the patented machines. *Steam Stone Cutter Co. v. Sheldons et al.*, 22 Blatch. 484.—WHEELER, 1884.

254. "Where an owner of the patent has compensation for the sale of a specific machine embodying the invention, that machine is forever freed from the monopoly."—*Ib.*

255. "If one person is in any case exempt from being sued for damages for using the same machine for the making and selling of which damages have been recovered against and paid by another person, it can only be when actual damages have been paid, and upon the theory that the plaintiff has been deprived of the same property by the acts of the wrong-doers, and has received full compensation from one of them." *Birdsell et al. v. Shatol et al.*, 112 U. S. 485.—SUP. CT. 1884.

256. "A license from the patentee to use and sell machines gives the licensee the right to do so within the scope of the license throughout the term of the patent, and has the same effect upon machines sold by the licensee, under authority of his license, that the sale of the patentee has upon machines sold by himself, of wholly releasing them from the monopoly and discharging the claim of the patentee for their use by anybody, because such is the patentee's voluntary act of licensing or selling in consideration of the sum paid him for the license or sale."—*Ib.*

257. Where it appeared that the complainant's patentee had been in defendant's employ, and while there had put in use for defendant's business the patented articles for which the suit was brought, it was held that the circumstances created a license from complainant to defendant to use those identical articles so long as they should last. *Barry v. Crane Bros. M'fg Co.*, 22 Fed. Rep. 396.—BLODGETT, 1884.

258. Generally a license to make and use a

patented invention is a privilege personal to the licensee, incapable of assignment; but where no royalty is reserved to the owner of the patent, and the right is granted not only to the licensees but also to their executors, administrators, and assigns, such a license is assignable. *Adams et al. v. Howard et al.*, 23 Blatch. 27.—WALLACE, 1884.

259. Where a license runs to the administrators, executors, and assigns of the parties of the second part, it plainly provides for a devolution or transfer of the title in severalty.—*Ib.*

260. "It is no longer open to doubt that a licensee, holding under a license containing acknowledgments of the validity of complainant's patent and the like, is estopped from denying the validity of the patent; and it is about as well settled that, so long as defendant continues to manufacture and sell during the life of the licensee, defendant must pay royalties." *Washburn & Moen M'fg Co. v. Cincinnati Barbed Wire Fence Co.*, 22 Fed. Rep. 712.—SAGE, 1884.

261. In complainant's license to respondents upon sewing-machines, certain patents were specified, and then the license said: "Said machines also embodying other patents which the said party of the first part now has, or may hereafter obtain, applicable to the said machines, or either of them." In mentioning the term of said license, it made use of the following language: "For the term of the existence of said patents or any of them, and of all renewals or extensions of the same; . . . and also all patents which the said party of the first part now has or may hereafter obtain." The license further proceeded: "This lease or license shall continue . . . until the expiration of all the letters-patent which the lessees are hereby licensed to use." Thereupon the court said: "At the date of the license, other patents than those individuated by specific discrimination were owned and controlled by the lessor, were actually embodied in the leased machine, and were essential to its profitable use; these patents were within the general description of the licensing clause, and therefore comprehended by its terms as fully as if they had been specifically identified." And the license was held to extend to the expiration of patents not specifically mentioned. *McKay, Trustee, v. Mace et al.*, 23 Fed. Rep. 76.—MCKENNAN, 1884.

262. Where a license between a patentee and a licensee is such that the patentee could be enjoined from infringing, and the patentee sells his right to a third party with knowledge of the facts, the third party can be enjoined from

infringing at the instance of the licensee. *Hapgood et al. v. Rosenstock et al.*, 23 Blatch. 95.—WALLACE, 1885.

263. Where a local telephone company is forbidden by its licensee to connect with a telegraph company, unless authorized by the licensor, and connection with one telegraph company is authorized by the licensor, another telegraph company may enforce connection with itself. *Mo. v. Bell Telephone Co.*, 23 Fed. Rep. 539.—BREWSTER and TREAT, 1885.

264. An assignment of a license by the widow of the deceased owner—it not appearing that she is administratrix—does not avail to pass the title to such license. *Creecy v. United States*, 21 N. & H. 3.—NOTT, 1885.

265. "When the owner of a patent sells the patented article under circumstances which imply that the purchaser is not to acquire an unqualified property in the thing purchased, as where a license accompanies the transfer, the purchaser's rights are limited to the extent of the monopoly granted him." *Holliday et al. v. Matheson et al.*, 23 Blatch. 239.—WALLACE, 1885.

266. "A license by a patentee is personal to the licensee, and not transferable." *Eclipse Windmill Co. v. Woodmanse Windmill Co.*, 24 Fed. Rep. 650.—BLODGETT, 1885.

267. Where an inventor, employed by a firm, permitted that firm to use the afterward patented machine, before application, that machine is not within the afterward granted patent. *Duffy v. Reynolds et al.*, 24 Fed. Rep. 855.—NIXON, 1885.

268. "While the patentee may, if he choose, confine himself to a recovery for past infringement, and insist that the further use of the infringing machine be enjoined, yet, if he elect as his measure of damages the full license fee established by himself, the payment thereof operates to vest in the defendant the right to use the machine during the term of the patent, or until that particular machine is worn out." *Stutz v. Armstrong et al.*, 25 Fed. Rep. 147.—ACHESON, 1885.

269. A, patentee and owner of his patent, assigned it to B. B subsequently reconveyed to A all of B's right "to apply the invention to the purpose of lighting gas jets." A subsequently conveyed to C all his right. C brought suit for infringement. It was held that C was a mere licensee, and unable to maintain a suit in his own name. *Bogart et al. v. Hinds*, 33 O. G. 1268.—COXE, 1885.

270. A written agreement contained the following: "It is agreed that the party of the first

part shall not sell twin-wire to any party or parties for a less price than twenty per cent in addition to the price which he shall charge the parties of the second part, and he shall pay to the parties of the second part five per cent on all sales of twin-wire which he may make to any party or parties other than the parties of the second part." This was held to give the parties of the first part the right to sell twin-wire for use in the making of corsets, complainant's patent being for substantially that thing. *Birdseye et al. v. Heilner et al.*, 26 Fed. Rep. 147.—WALLACE, 1885.

271. Where the patentee, while working for defendants, has the patented machine built for defendants, under his supervision and direction, defendants have a right to the use of such a machine. *Am. Tube Works v. Bridgewater Iron Co. et al.*, 34 O. G. 1047.—COLT, 1885.

272. "It is undoubtedly the rule that where there appears to be a subsisting license between the complainant and the respondent, the jurisdiction of the court under the patent law will not be extended to cover a suit to enforce the terms of the license, or to forfeit the license on the ground that the terms thereof have been violated. . . . Where a suit is brought for infringement, and the existence of a license is alleged by the respondent and denied by the complainant, it is competent for the court to determine whether, at the time of the filing of the bill, there was a subsisting license between the parties." *Hammacher et al. v. Wilson*, 26 Fed. Rep. 239.—CARPENTER, 1886.

273. Where it is provided in a license that, upon failure of one party thereto to perform his engagements, the license may be forfeited by a written notice served on him, the forfeiture accrues on the making of such service.—*Id.*

274. For an example of relations between employer and employé held to give the employer license to use the employé's invention, see —. *Bensley v. Northwestern Horse Nail Co. et al.*, 26 Fed. Rep. 250.—BLODGETT, 1886.

275. Where A has a pending suit against B for infringement of A's patent, wherein a settlement is made, and a decree goes against defendants by consent, and a release is granted defendants as to past sales of the infringing goods, he who previously bought such goods from the defendants cannot be enjoined against their sale. *Alabastine Co. v. Richardson et al.*, 26 Fed. Rep. 620.—CARPENTER, 1886.

276. Where a licensee attempted to enforce a specific enforcement of its agreement with the licensor, and the license had been violated by the licensee, relief was refused. *Ohio Steel Barbed*

*Fence Co. v. Washburn & Moen M'fg Co. et al.*, 26 Fed. Rep. 702.—GRESHAM, 1886.

277. The plaintiff had a contract with the defendant in which defendant agreed to pay \$30 for "each of the first four hundred locomotive engines" to which defendant was to apply plaintiff's inventions. The terms of payment were \$6000 within thirty days after the contract was executed, and the remainder in a period of one year thereafter. It was held that complainant was bound to pay the \$6000 within thirty days, but not bound to use the invention on any definite number of engines. *Babcock v. Northern Pacific R. R. Co.*, 26 Fed. Rep. 756.—NELSON, 1886.

278. "There is no fair question but that a licensee under a patent is estopped to deny its validity on any question arising out of that relation between the parties. . . . It does not follow that he will always be estopped because he has stood in that relation. When he stands out from under the license, and claims nothing from it, and does nothing under it, with full knowledge to the licensor of his position, he would appear to be at as full liberty to contest the patent as any one." *Brown v. Lapham et al.*, 23 Blatch. 475.—WHEELER, 1886.

279. It seems that taking and operating under a license is sufficient evidence of acquiescence in the validity of complainant's patent to warrant provisional injunction without previous adjudication.—*Id.*

280. A license contained a provision for royalty, and a provision for revocation of the license upon failure of payment of the royalty. Licensor forwarded to licensee a letter, as follows: "Your royalty return for February has not come to hand. Failure to forward same within five days from March 10th subjects your license to revocation." This was held to be a revocation of the license. *Pope M'fg Co. v. Owsley*, 27 Fed. Rep. 100.—BLODGETT, 1886.

281. The mere fact that a patent owner alleges infringement and threatens suit unless settlement is made, in which settlement defendant takes a license, cannot be held to make such settlement void through fraud or intimidation.—*Id.*

282. A license included different patents, one of which had expired when the license was granted. That fact was held not to taint the transaction as fraudulent.—*Id.*

283. Where a license includes a number of patents, and any one of them is declared void by a court in a suit between other parties, that fact does not render the license void.—*Id.*

284. In the absence of provision to the con-

trary, the power to sell, under a patent or a license, is personal, and not transferable. *Racine Seeder Co. v. Joliet Wire Check Rower Co.*, 27 Fed. Rep. 367.—BLODGETT, 1886.

285. A defendant, by paying royalty, acquires a license to practise the patented improvement. *Bragg v. City of Stockton*, 27 Fed. Rep. 509.—SAWYER, 1886.

286. "In a contract for the purchase of a privilege under letters-patent, the seller at the time of the purchase supposing his patent to be valid, its being pronounced afterward by a legal tribunal not to be so, will not operate as a failure of consideration." *Schwarszenbach v. Odorless Excavating Apparatus Co.*, 35 O. G. 1339.—RITCHIE, 1886.

287. "A licensee who has paid an annuity in consideration of a license to use a patent privilege which he has had the full benefit of cannot recover back the money, on the ground of the invalidity of the patent, in an action for money had and received."—*Id.*

288. The complainant and patentee had previously worked for the defendant corporation. He made the invention in the time and with the tools and materials of the defendant corporation, and they put it in use at his desire. This state of facts was held to create a license not terminating with his employment. *Jencks v. Langdon Mills et al.*, 27 Fed. Rep. 622.—COLT, 1886.

289. Where a license is an absolute license to manufacture and sell, "failure to pay the royalty stipulated and agreed to be paid does not forfeit the license, unless some condition of forfeiture for non-payment be inserted in it, and . . . the power to manufacture and sell is not at an end; but . . . the licensor, the patentee, or person granting the license is left to his action for the royalty or rent, and cannot file a bill upon the patent as for an infringement." *Consolidated Middlings Purifier Co. v. Wolf et al.*, 37 O. G. 567.—BRADLEY, 1886.

290. An inventor went to work for another person for a year, agreeing "to devote all his time and energy during the said period in superintending the manufacturing department of said business, as well as in the buying and selling of goods belonging to said business." The inventor's duties were not otherwise specified, but the duties he had been accustomed to perform embraced the preparation of new designs, many of which he had prepared for such party, and for some of which he had obtained patents. During this employment he invented a patentable design and patented it and left the employ of the company. The court held that the facts constituted a license or special privilege to the

defendant to use the invention. *Hermann v. Hermann*, 37 O. G. 892.—BROWN, 1886.

291. "The right of the patent owner to permit or license the use of the invention is not the creature of the federal franchise or statute, but of the common law." *United States v. Am. Bell Telephone Co. et al.*, 29 Fed. Rep. 17.—JACKSON, 1886.

292. Violation of a license contract by a licensor does not relieve a licensee from the consequences of infringement. *Willis et al. v. McCollin*, 38 O. G. 1017.—BUTLER, 1886.

293. Where a licensee has a license to sell only to persons who have a license to use, he is an infringer if he sells to other persons.—*Id.*

294. Where a license contains no words of limitation, it extends to the expiration of the patent; and one party thereto cannot, without the consent of the other party thereto, terminate the license. *Starling v. St. Paul Plough Works*, 29 Fed. Rep. 790.—NELSON, 1887.

295. Where a partnership makes patented articles under a patent owned by one of the individual partners, after the expiration of that patent either partner has an equal right with the other to sell such patented articles. *Montross v. Mabie*, 30 Fed. Rep. 234.—BROWN, 1887.

296. "The extent of" a "license is a question of construction, and as in the case of other contracts expressed or implied, it is to be determined in accordance with the intention of the parties. A license to a man engaged in business to make and sell a patented article in his business generally, unless there was something else to restrict it, would manifestly be coextensive with his business, and would continue until his business was wound up. The license in such a case is not restricted to manufacturing with his own hands or selling by his own personal efforts only. He may employ as many hands and as many salesmen and agents as his business will admit. So long as the articles are made and are sold in his business, and for his use and benefit, the sale would be within the license, though effected by the hands of hundreds of different agents and employes."—*Id.*

297. Where, under a license, the licensee, B, has to furnish the patented articles to the licensor, A, it was held that the licensee was not bound to furnish the licensor such articles after the expiration of the patent. *Gally v. Colt's Patent Fire Arms M'fg Co. et al.*, 30 Fed. Rep. 118.—SHIPMAN, 1887.

298. Where royalty payments under a license are to be made before a certain date, and the payments are made and accepted afterward, the acceptance amounts to a waiver of the violation.

*Rogers v. Reissner et al.*, 30 Fed. Rep. 525.—WHEELER, 1887.

299. A licensee upon a royalty, who has not been evicted from the enjoyment of any right under his license, is not in a position to dispute the validity of the patent.—*Id.*

300. A claim contained a clause by which it was agreed "that any improvement made on the patented articles shall be for the mutual benefit of the parties." For a discussion as to the breadth of such a license, see—. *Topliff v. Topliff*, 122 U. S. 121.—SUP. CT. 1887.

301. Where A, an inventor, begins with B the manufacture and construction of a number of machines under A's patent, and while the machines are being constructed the inventor leaves the manufacture and forbids B to complete the machines, the manufacturer has the right to complete the machines, but not to begin to make new ones. *Aspinwall M'fg Co. v. Gill et al.*, 40 O. G. 1133.—BRADLEY, 1887.

302. A license to make a hundred machines will protect the licensee in making that number, but no more.—*Id.*

303. Complainant brought suit to have his license to the defendant cancelled. The only specific allegations were that the defendant had failed to make return of its manufacture and sale and to pay royalty. It was held that such allegations if proved, afford no ground for annulling the license. *Densmore v. Tanite Co.*, 32 Fed. Rep. 544, *per curiam*, 1887.

304. A license to make a hundred patented machines protects the licensee in making that number, even though some delay takes place, the delay being reasonably explained. *Aspinwall M'fg Co. v. Gill et al.*, 32 Fed. Rep. 702.—BRADLEY, 1887.

## LIMITATION OF ACTION.

### "LIMITATION OF ACTION" IN THE PATENT ACTS.

Act approved July 8th, 1870.

SECTION 55. . . . All actions shall be brought during the term for which the letters-patent shall be granted or extended, or within six years after the expiration thereof. [Repealed June 22d, 1874.]

### CASES.

1. "It is well settled that when state laws for the limitation of time within which actions may be brought affect merely the remedy and do not impair the obligations of a contract, they are to be regarded as rules of decision by the courts of

the United States." *Parker v. Hawk*, 2 Fish. P. C. 58.—LEAVITT, 1857.

2. In the absence of legislation by Congress upon the subject, a state statute of limitations applies to an action on the case in a federal court for infringement of a patent.—*Id.*

3. State statutes cannot limit the time within which actions for the infringement of letters-patent may be brought in the courts of the United States. Congress failing to legislate upon this subject, there is no limit to the time for bringing such actions. [Said with reference to a suit at law.] *Collins et al. v. Peebles*, 2 Fish. P. C. 541.—SWAYNE, 1865.

4. No state statute of limitation can bar action in a federal court for infringement of a patent. *Read et al. v. Miller et al.*, 2 Bissell, 12.—McDONALD, 1867.

5. "Suits in equity, to recover gains and profits, or actions at law, to recover damages for the infringement of letters-patent, may be maintained in a proper case, even after the patent has expired, if the alleged infringement took place during the term for which the patent was granted, and the suit was commenced before the claim was barred by the statute of limitations. Claims of the kind may be barred by the statute of limitations." *Hoves v. Nute*, 4 Cliff. 173.—CLIFFORD, 1870.

6. A plea set up the statute of limitations of the state of New York, and thereupon the court held that "no limitation had been prescribed by Congress, in cases of this character, unless the state statute has been made applicable by Section 31 of the Judiciary Act of September 24th, 1789, . . . which provides that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Rick v. Ricketts*, 7 Blatch. 230.—HALL, 1870.

7. Defendants contended that "as the patent sued on was issued under the authority of the act of July 4th, 1836 [5 U. S. Statutes at Large, 117], and as that act is repealed by Section 111 of the act of July 8th, 1870 [16 *Id.* 216], such repeal vacated and made void the said patent; and that, if this is not so, yet no suit can be maintained upon said patent for any cause of action which accrued after July 8th, 1870." The court held otherwise. *Union Paper Bag Mach. Co. et al. v. Newell et al.*, 11 Blatch. 379.—BLATCHFORD, 1873.

8. "The right to plead the statute of limitation, like any other defence, does not depend

upon the pleasure or discretion of the court." *Packet Co. v. Sickles*, 19 Wall. 611.—SUP. CT. 1873.

9. Where a litigation has been pending for a number of years, it is not proper to permit an amendment of a declaration setting up the statute of limitations.—*Id.*

10. "In ordinary actions at common law, the statutes of limitation of the state where the suit is brought may be pleaded in bar. . . . Whenever the cause of action is one cognizable by a court of common law, a court of equity, in accordance with the general rules of equity jurisprudence, follows the law in relation to the limitations of actions." *Anthony et al. v. Carroll*, 2 Bann. & Ard. 195.—SHEPLEY, 1875.

11. "State statutes of limitation are authoritative in the federal courts in cases only where federal and state tribunals have concurrent jurisdiction of the cause of action. Statutory rights, which are cognizable exclusively by the federal courts, can be affected only by the laws enacted by Congress." *Wetherill et al. v. N. J. Zinc Co.*, 1 Bann. & Ard. 485.—McKENNAN, 1874.

12. Claims for damages and profits arising under the patent laws are exclusively cognizable in the federal courts, and when there is no act of Congress applicable to them and limiting the remedy, infringers are without the protection of any statutory limitation of their liability.—*Id.*

13. Where a cause of action is one over which both national and state courts have jurisdiction, the case clearly falls within Section 34 of the Judiciary Act.—*Id.*

14. No state statute of limitation may be pleaded in bar in an action for infringement of a patent.—*Id.*

15. "Act of limitation will be construed to operate prospectively only, unless the contrary intention clearly appears." *Vaughan v. East Tenn., Va. & Ga. R. R. Co.*, 1 Flippin, 621.—BROWN, 1877.

16. A "state statute of limitation has no application to suits in respect of the rights granted by letters-patent for inventions." *Sayles v. Dubuque & Sioux City R. R. Co.*, 5 Dillon, 561.—DILLON and LOVE, 1878.

17. A bill of complaint for infringement of a patent was brought in February, 1877. The original term of the patent expired July 6th, 1866, and the extended term, July 6th, 1873. It was held that no recovery of profits and damages could be had for the original term.—*Id.*

18. Section 55 of the patent act of July 8th, 1870, provided that the circuit courts should have cognizance of all patent actions, and that

all such must be "brought during the term for which the letters-patent shall be granted or extended, or within six years after the expiration thereof." In the next revision of the statutes, said Section 55 was re-enacted as Section 4921, less the limitation clause above quoted, which was repealed by the operation of another section, 5596. Section 5591 contained a saving clause by which the said limitation clause of Section 55 of the act of 1870 was continued in force. *Sayles v. Oregon Central R. R. Co.*, 6 Sawyer, 31.—DEADY, 1879.

19. Section 34 of the act of September 24th, 1789, made the laws of the several states "the rules of decision in trials at common law, except where the laws of the United States otherwise provide. Under this section it has been uniformly held that where Congress had not otherwise specially provided, that state statutes of limitations apply to actions in national courts."—*Id.*

20. "In providing that the laws of the several states shall be the rules of decision in trials at common law in courts of the United States, except where treaties or acts of Congress otherwise provide, Congress virtually adopted the statute of limitations of each state as the limitations of actions brought in the United States courts held in that state. . . . This action excepts, in terms, cases in which any acts of Congress may provide other rules of decision; and Congress did enact a special statute of limitation as to patents, in Section 55 of the act of July 8th, 1870. . . . It was virtually repealed by Section 5596 of the revised statutes of the United States, in having been omitted in the revision from Sections 4919 and 4921." *Sayles v. Richmond, Fredericksburg & Potomac R. R. Co.*, 3 Hughes, 172.—HUGHES, 1879.

21. "Section 66 of the act of 1870, Section 4927 of the revised statutes, provides, in its last clause, that a patent shall be extended for seven years after the expiration of the first period for which it was granted; it 'shall have the same effect in law as though it had been originally granted for twenty-one years. . . . The necessary effect of this language is to consolidate the seven and fourteen years of the two patents into one term, as under one patent, and to make the limitation apply to the period of twenty-one years as a single integral term.'—*Id.*

22. Complainant brought suit in equity after expiration of patent. Defendant demurred, and alleged that the suit was barred by the statute of limitations. The question had once been argued before the full bench at Washington, when the court was equally divided in opinion.

Until new decision by Supreme Court, the Circuit Court for the first circuit permitted such suits to proceed. *Hayden v. Great Falls Mfg Co.*, 3 Fed. Rep. 519.—LOWELL, 1880.

23. The defence of the statute of limitations may be availed of by answer, plea, or demurrer. *Adams et al. v. Bridgewater Iron Co. et al.*, 6 Fed. Rep. 179.—LOWELL, 1881.

24. A state statute of limitations does not apply to patents, Congress having made one. *Sayles v. Louisville City R. R. Co.*, 9 Fed. Rep. 512.—BARR, 1881.

25. The statute of limitations contained in Section 55 of the act of July 8th, 1870, and preserved by Section 5599 of the revised statutes, means that actions for infringement must be brought within the original term thereof; or—in case of an extended term and infringement accruing therein—within said extended term or within six years thereafter.—*Id.*

26. By the court: "The state statute does not apply, inasmuch as Congress has fixed the date in patent cases, whereof the federal government has exclusive jurisdiction. It is contended that the Congressional limitation has been repealed. If so, no limitation would prevail except by the state statute. Without repeating what has been so ably considered by other United States courts, it is held that the federal statute, in this respect, has not been repealed so far as to relieve either of the parties to this case from the federal limitations of six years." *Hayward et al. v. City of St. Louis et al.*, 3 McCrary, 614.—TREAT, 1882.

27. Statutes of limitation created by states have effect in actions at law for infringement of patents. *Hayden v. Oriental Mills*, 15 Fed. Rep. 605.—LOWELL, 1883.

28. "A court of common law has no discretion to refuse to entertain stale claims. . . . The states cannot declare when actions on patent rights should be barred." A national statute of limitation having been repealed, "the state law became again applicable to future infringements."—*Id.*

29. It seems that in an action at law for the recovery of damages, for the infringement of a patent, distinct and several pleas of the statute of limitations, covering different periods of time, may be pleaded. *Hayden v. Oriental Mills*, 22 Fed. Rep. 103.—COLT, 1884.

30. "The act of July 8th, 1870, Section 55, provides that all causes of action shall be brought within the term for which letters-patent shall be granted or extended, or within six years thereafter. By omission from the revised statutes, this part of the patent law was repealed June



22d, 1874. But Section 5599 of the revised statutes reserves all existing causes of action, so far as limitations are concerned, precisely as though no repeal had been made. Infringements committed prior to June 22d, 1874, the date of the repeal, are therefore governed by the federal law."—*Ib.*

31. "State statutes of limitations can never apply to any right of action under a patent, if that particular right is subject to the running of a national statute of limitation. . . . The statute in force when the suit is brought determines the right of a party to sue."—*Ib.*

32. "Section 5599 saves all rights the same as if suits had been commenced before the repeal. It follows that the federal act 'applies even to rights of action that were old enough at the time of approval of the national limitation to have been fully barred by some state limitation, if they had been sued upon and if the state limitation had been pleaded, and had been held applicable.'"—*Ib.*

33. "The argument . . . that Section 5597 of the revised statutes, which saves accrued rights, does not refer to Section 55 of the act of July 8th, 1870, because a statute of limitations does not confer a right, is . . . inadmissible, if sound in view of the specific language of Section 5599."—*Ib.*

34. "Section 55 supersedes all state laws applicable to the limitations of patent rights, and we can see nothing in Section 55 which, upon a fair construction, limits the rights of recovery to a period of six years."—*Ib.*

35. Damages for infringement accruing during the original term of a patent must be sued for within that original term, or within six years thereafter, even though the original patent has been extended.—*Ib.*

36. A state statute of limitations does not apply to the recovery of damages for infringement of a patent. *Adams v. Bellaire Stamping Co.*, 33 O. G. 623.—SAGE, 1885.

37. The patent in suit was issued May 12th, 1868. The action was at law. The court held "the statutes of limitations" (not saying what ones) to apply. *Royer et al. v. Coupe*, 29 Fed. Rep. 358.—CARPENTER, 1886.

38. "By Section 55 of the patent act of 1870 it was provided that 'all actions shall be brought during the term for which the letters-patent were granted or extended, or within six years after the expiration thereof.' As to causes of action arising after June 22d, 1874, this limitation was repealed by the adoption of the revised statutes, according to the provisions of Section 5596 thereof, but, by Section 5599, was continued in force

as to all causes of action then in existence." *May v. Buchanan Co.*, 29 Fed. Rep. 469.—SHIRAS, 1886.

39. "[1] . . . As it is not within the power of the state legislature, by direct enactment, to define or limit the time within which an action to recover damages for an infringement of a patent may be brought in the United States courts, it follows that the general statute of limitations of the state does not, *ex proprio vigore*, apply to or control such action. [2] . . . To limit the time within which an action under Section 2919 of the revised statutes of the United States may be brought, it must appear that the Congress of the United States has fixed a limitation of time; which may be done by showing that Congress has, as in the patent act of 1870, prescribed the time within which such actions must be brought, or that it has expressly adopted, and made applicable thereto, the provisions of the state statute. In the latter case, as well as in the former, it is, however, the act of Congress which creates the limitation. [3] . . . Section 721 of the revised statutes declares that the laws of the states shall be followed as a rule of decision in cases where they apply; this, in cases which involve matters or rights within the legislative jurisdiction of the states. [4] . . . As the subject of granting letters-patent, and authorizing actions to be brought for the protection of the rights thus created, is wholly without state control, the general statute of limitations of the state does not, *ex proprio vigore*, apply thereto, and, not applying, is not made a rule of decision governing the United States court, by the provisions of Section 721."—*Ib.*

40. "By Section 55 of the patent act of July 8th, 1870, it was provided that 'all actions (for infringements of patents) shall be brought during the term for which letters-patent shall be granted or extended, or *within six years after the expiration thereof*.' This provision remained in force until the enactment of the revised statutes, June 22d, 1874, when, by operation of Section 5596, it was repealed as to all rights of action *thereafter to accrue*; but by Section 5599 it was left in full force as to all rights of action in existence at the date of said repeal. Under the operation of these two sections, there is no federal statute of limitations in respect to infringements committed before July 8th, 1870, and after June 22d, 1874; said statute of limitation still applies, and suits to enforce causes of action accruing between said dates 'may be commenced and prosecuted within the same time, as if said repeal had not been made.' In other words, as to rights of action for infringe-

ments of patents committed prior to June 22d, 1874, the national statutes of limitations, prescribed by Section 55 of the act of July 8th, 1870, still applies under the saving clause of Section 5599, and suits to enforce the same may be commenced and prosecuted "during the term for which letters-patent shall be granted or extended, or within six years after the expiration thereof." This national statute of limitations is still in force." *May v. Logan Co.*, 30 Fed. Rep. 250.—JACKSON, 1887.

41. "The process and procedure acts of Congress, as embodied in Section 34 of Judiciary Act of 1789, and in Section 721, revised statutes, . . . have their full operation when applied and confined to civil actions or suits at common law, in which there is concurrent jurisdiction in the state and federal courts. Letters-patent, together with the rights of action and remedies given for the infringement of the same, are matters under the exclusive control of the federal legislature and federal judiciary."—*Ib.*

42. "State statutes of limitation have no application to actions arising out of infringement of a patent, even in the absence of a federal statute of limitations on the subject."—*Ib.*

43. Where there is a federal statute of limitations in force as regards suits for infringements of patents, a state statute is without force.—*Ib.*

44. A state statute of limitation is not applicable to actions for infringements of patent rights. *May v. Cass Co.*, 30 Fed. Rep. 762.—SHIRAS, 1887.

45. A state statute of limitation cannot be pleaded in bar of an action for infringement of a patent. *May v. County of Ralls*, 31 Fed. Rep. 473.—THAYER, 1887.

### LOST ART.

#### CASES.

1. One James Conner made a safe of a certain construction, for his own use, between the years 1829 and 1832, and continued to use it until 1838, when it passed into other hands. "It was kept in his counting-room and known to the persons engaged in the foundry; and after it passed out of his hands, he used others of a different construction. It does not appear what became of this safe afterward. And there is nothing in the testimony from which it can be inferred that its mode of construction was known to the person into whose possession it fell, or that any value was attached to it as a place of security for papers against fire; or that it was ever used for that purpose." Complainants'

patentee took a patent for such a safe June 1st, 1843. The court was of the opinion that the patent was not invalidated by the Conner safe, saying: "If the Conner safe had passed away from the memory of Conner himself, and of those who had seen it, and the safe itself had disappeared, the knowledge of the improvement was as completely lost as if it had never been discovered." The court said that Conner might have omitted to test his safe and also to bring it into public use, and neither circumstance would prevent it from being an anticipation of the patent; provided its mode of construction was still in Conner's memory before recalled by the patent. *Gayler et al. v. Wilder*, 10 Howard, 477.—SUP. CT. 1850.

2. "If the original inventor of the machine abandons the use of it, and does not take a patent first, no other person can entitle himself to a patent for it. There are exceptions to this general rule, as in the case of a lost art, where the knowledge of it has been lost for ages." And if, in the case of a patented safe, it be found that prior to the invention of the patentee the improvement had been put into practice, but that the safe itself had disappeared and the knowledge of the improvement was as completely lost as if it had never been discovered, then the patent might stand; but if the prior safe was in existence and use, and the knowledge of it not entirely forgotten and lost, the omission to bring it into public use or notice would not give the inventor a right to the patent. The earlier inventor might have abandoned its use and been ignorant of the extent of its value, yet if the invention was substantially the same, the later inventor would not upon that ground be entitled to a patent provided the earlier safe and its mode of construction were still in the memory of others. *Rich et al. v. Lippincott et al.*, 2 Fish. P. C. 1.—GRIER, 1853.

### MALICIOUS INFRINGEMENT SUIT.

#### CASES.

1. A patent owner sued another person for alleged infringement of patent, and in the proceedings such person was imprisoned. Subsequently such person brought suit against the patent owner for malicious suit and imprisonment. The court held that "if there was an actual infringement upon the defendant's patent by the plaintiff, and if the defendant really believed that there was such an infringement, his belief being reasonably founded, there was proper cause for the institution of the suit, and

the plaintiff cannot recover ; but if there was no infringement, and the defendant had no reason which would have induced a person of ordinary sagacity to believe that his rights had been trespassed upon, there was no proper cause, and from its absence malice may be inferred by the jury unless disproved by the other evidence in the cause." *Beach v. Wheeler*, 24 Pa. 212.—KNOX, 1855.

### MECHANICAL EQUIVALENT.

[See "Equivalent—Mechanical."]

### MECHANICAL SKILL.

[Comprised under "Invention—Insufficiency of."]

### MODEL.

#### CASES.

1. The specification, the patent, the drawing, and the model are all to be taken as parts of the description. *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON and BALD. 1831.

2. "There is no kind of testimony that is more reliable in regard to the true structure and character of a machine than an accurate model. It is a witness that cannot lie." *Swift et al. v. Whisen et al.*, 2 Bond, 115.—LEAVITT, 1867.

3. Where experts of equal intelligence testify in direct opposition to each other, models form excellent evidence for the court. *Crompton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.

4. Models of machines, when rightly comprehended, afford very persuasive evidence. *Carter et al. v. Baker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

5. The existence of a feature in a model where it is not referred to in the specification will not help the patentee on the question of construction of his patent. *Barry v. Gugenheim et al.*, 5 Fish. P. C. 452.—MCKENNAN, 1872.

6. A certified copy of a Patent Office model is not conclusive evidence of the character of the model. *Johnson v. Beard*, 2 Bann. & Ard. 50.—WOODRUFF, 1875.

7. "The court can always best judge from models whether one machine differs in principle and mode of operation from another." *Birdsall v. Hagerstown Agricultural Implement Mfg Co.*, 1 Hughes, 59.—BOND and GILES, 1877.

8. "The statute has not placed the lack of

specimens among defences to a patent." *Badische Anilin & Soda Fabrik v. Cochran et al.*, 16 Blatch. 155.—WHEELER, 1879.

9. "The model" of an alleged anticipatory patent, "if differing from the description and drawings of the patent, cannot be regarded to effect" complainant's patent. *Thatcher Heating Co. v. Spear et al.*, 1 Fed. Rep. 411.—BLATCHFORD, 1880.

10. It seems that, in considering a reissue, the character of the model filed with the application for the original patent is a matter for proof. *Meyer et al. v. Goodyear Ind. Rubber Glove Mfg Co.*, 20 Blatch. 91.—SHIPMAN, 1881.

11. Although reissue drawings and specification may show and describe parts not shown or described in the original, yet, in the absence of the model appurtenant to the original application, it cannot be assumed that the change is an unwarranted one. *Hendy v. Golden State & Miners' Iron Works*, 8 Sawyer, 468.—SAWYER, 1888.

12. While the model appurtenant to the application for the patent in question is not to be resorted to for the purpose of construing the patent, except in cases where the specification is ambiguous or uncertain, still, where there is doubt as to what the patentee means by the language used, the court may resort to an inspection of such model for ascertaining the patentee's meaning. *Frayer et al. v. Gates & Scoville Iron Works*, 22 Fed. Rep. 439.—BLODGETT, 1884.

### NATURE OF PATENT PRIVILEGE.

#### CASES.

1. An original inventor has an inchoate right from the time of making the invention. *Evans v. Jordan et al.*, 1 Brock. 248.—MARSHALL, 1813.

2. For a lengthy diatribe against patents, see —. *Thompson v. Haight*, 1 U. S. Law Jour. 563.—VAN NESS, 1822.

3. "Every patent is a monopoly, and nothing can justify it but the natural right of property which a man has in the products of his own labor and ingenuity. With this exception, it is in derogation of common right, and it should be strictly confined to the case excepted." *Kemper's Application*, 9 MacArthur's P. C. 1.—CRANCH, 1841.

4. "That a man should be secured in the fruits of his ingenuity and labor is a sound maxim of the common law. And it seems difficult to draw a distinction between the fruits of mental

and physical labor." *Brooks et al. v. Bicknell et al.*, 3 McLean, 250.—McLEAN, 1843.

5. "The patent laws are not now made to encourage monopolies of what before belonged to others or the public—which is the true idea of a monopoly; the design is to encourage genius in advancing the arts, through science and ingenuity, by protecting its productions of what did not before exist, and of what never belonged to another person or the public." *Davoll et al. v. Brown*, 1 W. & M. 53.—WOODBURY, 1845.

6. "At common law the better opinion probably is, that the right of property of the inventor to his invention or discovery passed from him as soon as it went into public use with his consent; it was then regarded as having been dedicated to the public as common property, and subject to the common use and enjoyment of all." By grant of patent the law has imposed upon an invention "all the qualities and characteristics of property for the specified period, and has enabled" the inventor "to hold and deal with it the same as in case of any other description of property belonging to him, and on his death it passes, with the rest of his personal estate, to his legal representatives, and becomes part of the assets." *Wilson v. Rousseau et al.*, 4 Howard, 646.—SUP. CT. 1846.

7. "An invention possesses value beyond the first patent on it; being valuable for purposes abroad on the ground of a patent there, and also for a renewal at home, independent of an unexpired period of the original term which might go as assets to an administrator." *Woodworth et al. v. Hall et al.*, 1 W. & M. 248.—WOODBURY, 1846.

8. "The policy of the law which protects inventors is wise. It stimulates genius by endeavoring to secure a reasonable compensation to those who have spent their time and money in producing something of utility to the public. It is not a monopoly the inventor receives. Instead of taking anything from the public, he confers on it the greatest benefits; and all he asks and all he receives is that for a few years he shall realize some advantage from his own creation; not that he withholds his machine or discovery from the country, but that in distributing it he may receive a small compensation for the great benefit he confers. The triumphs of the inventor are intellectual triumphs. His demonstrations are made through mechanical agencies, but these in the highest degree are attributable to mind; and the same may be said of useful, inventive mechanics generally. The usage of their thought embraces the system of

natural philosophy in all its practical bearings; and, in carrying out their views, the highest degree of mechanical ingenuity. Through the labors of these men our country has been advanced by machinery on the land and on the water; in the saving of labor and in a rapid and increasing intercourse, and especially in the communication of intelligence in the last forty years more than could have been hoped for, without their instrumentality, in many centuries." *Parker v. Haworth*, 4 McLean, 370.—McLEAN, 1848.

9. The right to patents is created by Congressional legislation. *Dudley v. Mayhew*, 3 Comstock, 9.—STRONG, 1849.

10. "The exclusive right of the inventor to make and vend his newly discovered implement is wholly statutory."—*Id.*

11. "A patent right that shall compensate the inventor is not a monopoly in the general sense of that term. The inventor takes nothing from society. He confers upon it a benefit by his labor and ingenuity, and it is reasonable that he should be paid for such services; and the law designs to give him nothing more than a compensation; he is entitled to this by the immutable principles of justice, and it is believed to be given to him by the laws of all civilized nations." *Bloomer v. Stolley*, 5 McLean, 158.—McLEAN, 1850.

12. "The invention which is set forth in letters-patent belongs to the inventor as rightfully as the house he has built or the coat he wears. It cannot detract from the dignity of his title that the subject of it is of his own creation, his thought, conceived and developed and matured in the recesses of his mind—that it has cost no man else anything; and he asks nothing in return for the contribution it makes to the general wealth and happiness, but that security of enjoyment, during a limited period, which the laws engage for all other property without limitation of time and without stipulating a price. It would be a reproach to the judicial system if any ownership of this sort could be violated profitably or with impunity." *Sloat v. Patton*, 1 Fish. P. C. 154.—KANE, 1852.

13. "Patentees are not monopolists. This objection is often made, and it has its effect on society. The imputation is unjust and impolitic. A monopolist is one who, by the exercise of the sovereign power, takes from the public that which belongs to it, and gives to the grantee and his assigns an exclusive use. On this ground monopolies are justly odious. It enables a favored individual to tax the community, for his exclusive benefit, for the use of that to which

every other person in the community, abstractedly, has an equal right with himself.

"Under the patent law this can never be done. No exclusive right can be granted for anything which the patentee has not invented or discovered. If he claim anything which was before known, his patent is void, so that the law repudiates a monopoly. The right of the patentee entirely rests on his invention or discovery of that which is useful, and which was not known before. And the law gives him the exclusive use of the thing invented or discovered, for a few years, as a compensation for 'his ingenuity, labor, and expense in producing it.' This, then, in no sense partakes of the character of monopoly." *Allen v. Hunter*, 6 McLean, 303.—McLEAN, 1855.

14. "The monopoly is not a matter of common right, but purely of statutory grant." *Hunt v. Howe*, 1 MacArthur's P. C. 366.—MORSELL, 1855.

15. "Congress legislates upon the subject of patents under the provision of the Constitution, which declares that Congress shall have power 'to promote the progress of science and the useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.' The patent acts have been passed for the promotion of the useful arts, for the ultimate benefit of the public, and not for the sole benefit of inventors and patentees. It is the policy of the Government, and the intention of the acts of Congress, to promote the progress of the useful arts by offering rewards for useful inventions. These rewards have been hitherto offered in the form of special and exclusive privileges for a limited time. It is for the ultimate benefit of the public that such privileges are granted, allowed to operate, and protected for limited times, for the direct benefit of inventors and their assignees and grantees. But there is another and less remote object to be attained by the privileges and protection thus afforded. These privileges are granted for the additional purpose of inducing inventors and their assignees and grantees to make the required expenditures and investments in order to put the patented inventions in practice and thereby to give the public the benefits to be derived from a successful use of the inventions, at the earliest day and to the fullest extent required by the public interests. The value of most inventions is, at first, quite uncertain, and the success of those undertaking to put them in practice is by no means sure." *Day v. Union India Rubber Co.*, 3 Blatch. 488.—HALL, 1856.

16. "For the purpose of promoting the prog-

ress of the useful arts, Congress has the power, under the Constitution of the United States, to give for a limited time to inventors the exclusive right or privilege of using their inventions; and when that right is given in accordance with the law of Congress adopted for that purpose, that exclusive privilege becomes the property of the inventor, and any person who takes that property from him by an unauthorized use of the invention patented becomes an infringer of his rights, and is liable in damages precisely as though he had been guilty of taking any other property belonging to the patentee." *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

17. A patent for a new and useful thing "is a valid grant of right, and gives to the patentee as good title to it as . . . to any property." *Poppenhusen v. N. Y. Gutta-Percha Comb Co.*, 2 Fish. P. C. 62.—INGERSOLL, 1858.

18. "Where a patent is valid, the rights secured by that patent are as much secured to the patentee as the right which you have to the houses in which you live, and which are made your property by the deeds which you have in your possession; and they are as much to be protected as any other right to any other species of property. If the patent is valid, it secures to the patentee rights which should be protected; and the one right should be no more protected than the other." *Waterbury Brass Co. v. N. W. & Brooklyn Brass Co.*, 3 Fish. P. C. 43.—INGERSOLL, 1858.

19. "It is undeniably true that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit and advantage; the benefit to the public or community at large was another, and doubtless the primary object in granting and securing that monopoly. This was at once the equivalent given by the public for the benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects. The true policy and ends of the patent laws enacted under this Government are disclosed in that article of the Constitution, the source of all these laws—viz., 'to promote the progress of science and the useful arts,' contemplating and necessarily implying their extension and increasing adaptation to the uses of society." *Kendall et al. v. Winsor*, 21 Howard, 322.—SUP. CT. 1858.

20. "The inventor who designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public, comes not within the policy or objects of the Constitution or acts of Congress. He does not promote, and, if aided in his design,

would impede the progress of science and the useful arts. And with a very bad grace could he appeal for favor or protection to that society which, if he had not injured, he certainly had not benefited or intended to benefit."—*Id.*

21. "All the rights and powers affecting the subject of patents arise out of positive law, and have been so benignly regarded by the framers of our institutions that they have been especially secured and confided to the care of the Federal Government by the provisions of the Constitution itself. One portion of the law is not to be construed more rigidly than another, but all the parts, having their common source in the statutes, are to be interpreted with a wise liberality of construction, in furtherance of justice, and to give equal aid and facility of vindication to every right which grows out of patentable discoveries." *Babcock v. Degener*, 1 MacArthur's P. C. 607.—MERRICK, 1859.

22. "It is an undoubted truth that an inventor has no legal rights or immunities under a patent, except such as are conferred by the statute. With whatever solemnity or observation of legal form it may have issued, if wanting in any substantial statutory requisite, it is a nullity. And such defect is always available as a defence in a suit for an infringement." *Moffitt v. Gear et al.*, 1 Bond, 315.—LEAVITT, 1860.

23. "Probably of all species of property, this property in patent rights should be most carefully guarded and protected, because it is so easily assailed. If a man invade my farm, the act is patent and open; if he assails my person, it is an open act; if he assails my personal or real property, it is an act easily capable of proof; but the most difficult thing in the world is to prove an invasion of property of this character—property protected by patents. It is equally entitled to the protection of courts and juries with all other property of the citizen; it should be most carefully protected from the difficulty of proving the invasion." *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

24. "Patents are not monopolies, . . . because a monopoly is that which segregates that which was common before and gives it to one person or to a class for use or profit; a patent is that which brings out from the realms of mind something that never existed before, and gives it to the country; and when we consider the priceless blessings which have accrued to our land by the intellect and ingenuity of the country in this department, we feel almost lost in wonder at the vastness of the interests which have been created by the ingenuity of the country and the

immense amount now invested in this department of property."—*Id.*

25. "At common law an inventor has no exclusive right to his invention or discovery. That exclusive right is the creature of the statute, and to that we must look to see if the right claimed in a given case is within its terms." *Morton v. N. Y. Eye Infirmary*, 5 Blatch. 116.—SHIPMAN, 1862.

26. "Congress has wisely provided by law that inventors shall exclusively enjoy, for a limited season, the fruits of their invention. To enable them thus to reap the benefits of their inventions, letters-patent are issued to them conferring upon them an exclusive grant, authorizing them alone to manufacture, sell, or practice what they have invented." *Clark Patent Steam & Fire Regulator Co. v. Copeland*, 2 Fish. P. C. 221.—SHIPMAN, 1862.

27. "A patent right . . . is a right given to a man by law; where he has a valid patent, he has a legal right, just as sacred as any right of property, and no more so." *Hayden v. Suffolk Mfg Co.*, 4 Fish. P. C. 86.—SPRAGUE, 1862.

28. "The object of every patent is to secure to the patentee, his heirs and assigns, the exclusive property in the invention set forth in the specification, free from all control or invasion by others. The patent is granted upon inquiry according to the forms of law, and assumes the patentee to be the original and first inventor, and therefore gives him the exclusive property in his invention for the benign and just object of rewarding him for his creative labors and ingenuity, and stimulating the inventive genius of others." *Magic Ruffle Co. v. Douglas et al.*, 2 Fish. P. C. 330.—SHIPMAN, 1863.

29. "Rights . . . emanating from and existing under a patent are as sacred and as well entitled to protection as any other species of property." *Potter et al. v. Muller*, 2 Fish. P. C. 465.—LEAVITT, 1864.

30. Patent "acts should be liberally construed to meet the wise and beneficent object of the legislature. Patentees are a meritorious class." *Commissioner of Patents v. Whiteley*, 4 Wallace, 522.—SUP. CT. 1866.

31. "Patent rights are only granted upon the theory that the thing discovered, and for which the party asks for an exclusive right, is new as well as useful; in other words, that it is the invention of the party who claims a patent for it, and was not known before his invention." *Blanchard et al. v. Puttman et al.*, 2 Bond, 85.—LEAVITT, 1867.

32. "An inventor has no right to his invention at common law. He has no right of prop-

erty in it originally. The right which he has derived is a creature of statute and of grant, and is subject to certain conditions incorporated in the statutes and in the grants.

"If to-day you should invent an art, a process, or machine, you have no right at common law, nor any absolute natural right, to hold that for seven, ten, fourteen, or any given number of years, against one who should invent it to-morrow, without any knowledge of your invention, and thus cut me and everybody else off from the right to do to-morrow what you have done to-day. There is no absolute right at common law that I, being the original and first inventor of to-day, have to prevent you and everybody else from inventing and using to-morrow or next day the same thing." *Am. H. & L. S. & D. M. Co. v. Am. T. & M. Co. et al.*, 1 Holmes, 503.—SHEPLEY, 1870.

33. "The patentee gets his right to the patent not on the ground of any inherent natural right which he has, or right at common law, but because he is entitled to it by the terms of the statute of the United States which gives it to him, and, therefore, he has no rights except in compliance with those terms and upon those conditions."—*Id.*

34. "Inventions secured by letters-patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted. Letters-patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use, and vend to others to be used, their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress." *Seymour v. Osborne*, 11 Wall. 516.—SUP. CT. 1870.

35. "The right claimed depends upon express statute, and exists only by its force and according to its terms." *Sisson et al. v. Gilbert et al.*, 9 Blatch. 185.—WOODRUFF, 1871.

36. "The property under a patent is just as much under the protection of the law as property

in land. The owner has the same right to invoke the protection of the court, and when he has made good his claim to the patent and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases." *McComb v. Ernest*, 1 Woods, 195.—WOODS, 1871.

37. "Inventions lawfully secured by letters-patent are the property of the inventors, and the franchise and the patented product are as much entitled to legal protection as any other species of property, real or personal. They are, indeed, property even before they are patented, and continue to be such, even without protection, until the inventor abandons the same to the public, unless he suffers the patented product to be in public use or on sale, with his consent and allowance, for more than two years before he files his application for patent." *Jones et al. v. Sewall*, 3 Clifford, 563.—CLIFFORD, 1873.

38. "Whoever receives letters-patent from the United States receives thereby a *prima facie* right to maintain an action against every infringer." *Celluloid M'fg Co. v. Goodyear Dental Vulcanite Co.*, 13 Blatch. 375.—HUNT, 1876.

39. "A patent for a useful invention is not, under the laws of the United States, a monopoly in the old sense of the law." *Attorney-General v. Rumford Chemical Works et al.*, 2 Bann. & Ard. 298.—SHEPLEY, 1876.

40. "So far as any inquiry may relate to the relations between the Government and the grantee of letters-patent of the United States, but little light can be reflected from the English decisions."—*Id.*

41. The patent systems of the United States and Great Britain rest upon different bases.—*Id.*

42. "Letters-patent for inventions in England are grants made by the crown *de gratia speciale*, the words 'of our special grace,' in the patent, importing that the patent proceeds merely from the grace and bounty of the crown, the grantee having no right or title to the grant except through the favor of the crown. . . . In this country they are issued, neither in fact nor by implication, by any special grace or favor, and in no sense *ex mere motu*, but as a matter of right, under the provisions of a statute, to the inventor who has complied with the conditions which the statute imposes."—*Id.*

43. "Inventions secured by letters-patent are property in the holder of the patent, and as such are as much entitled to protection as any other property consisting of a franchise, during the term for which the franchise or exclusive right

or privilege is granted." *Brady v. Atlantic Works*, 4 Cliff. 408.—CLIFFORD, 1876.

44. "Inventions secured by letters-patent are property in the holder of the patent, and as such are as much entitled to protection as any other property consisting of a franchise, during the term for which the franchise or the exclusive right is granted. Such a holder may sell, assign, lease, or give away the property, or enter into any arrangement or agreement respecting the same, not enlarging the right granted to the same extent as he might any other personal property." *Star Salt Caster Co. et al. v. Crossman et al.*, 4 Cliff. 568.—CLIFFORD, 1878.

45. "The purchaser of a patented right is made a monopolist as to the article or commodity described in his letters-patent." *Millner v. Schofield et al.*, 4 Hughes, 258.—HUGHES, 1881.

46. "As the product of his inventive faculty, the improvement is just as much the property of the inventor as his house or farm, and no man has the right to appropriate it any more than he has to take from him his house or farm. The laws of the United States on this subject are designed to encourage meritorious and useful inventions, and to protect their owners in the profitable enjoyment of them during the period fixed by the statute." *May v. County of Fond du Lac*, 27 Fed. Rep. 691.—DYER, 1886.

## NEW TRIAL.

This title embraces all modes of getting a rehearing of a case, without reference to the stage of the case when the application therefor is made, and without reference to the technical name of the proceeding by which the rehearing is sought.

### CASES.

1. Neither matter of surprise, nor objected to as it arises, nor mere cumulative evidence, nor the capability of making a better defence, are ground for new trial. *Ames v. Howard et al.*, 1 Sumner, 482.—STORY, 1833.

2. A verdict giving large damages where the amount is supported by some evidence, but contradicted and opposed by other evidence, cannot be set aside as opposed to the evidence. *Stanley v. Whipple*, 22 McLean, 35.—MCLEAN, 1839.

3. That the damages are large, where no gross mistake is made, is not ground for setting aside the verdict of a jury. *Alden et al. v. Dewey et al.*, 1 Story, 336.—STORY, 1840.

4. He who seeks a reopening of a case upon the ground of newly discovered evidence must, in order to be successful, show reasonable dili-

gence in obtaining the newly discovered evidence. *Washburn et al. v. Gould*, 3 Story, 122.

—STORY, 1844.

5. "Although the evidence submitted to a jury may be conflicting, a new trial will not be allowed where there was evidence sustaining the finding of the jury. *Brooks et al. v. Bicknell et al.*, 4 McLean, 70.—MCLEAN, 1845.

6. Motions for new trials "are not matters of right as to being granted, but the discretion of the court is to be exercised." *Allen v. Blunt et al.*, 2 W. & M. 121.—WOODBURY, 1846.

7. "It is well settled that a new trial should not be granted for a cause existing at the trial, but which was not stated or excepted to therein." —*Ib.*

8. "The verdict of a jury will not be set aside where there has been evidence on both sides, . . . and no misdirection as to the law." *Blanchard Gunstock Factory v. Jacobs*, 2 Blatch. 69.—BETTS, 1847.

9. A new trial will not be granted in any case unless the verdict is clearly without evidence or against the weight of evidence; nor for the purpose of introducing new evidence to points before in controversy." —*Ib.*

10. Although there may be some plausible appearance that a verdict is against the weight of evidence, a new trial will not be allowed if it is not shown so clearly as to raise a strong presumption that the jury either wantonly abused their powers or made some inadvertent mistake. *Aiken v. Bemis*, 3 W. & M. 348.—WOODBURY, 1847.

11. In order to prevail in seeking for a new trial upon newly discovered evidence, the limitations are: *first*, the evidence must not have been known before the trial; *second*, it must be material; *third*, it must not be merely cumulative. And the party seeking the new trial must show due diligence.—*Ib.*

12. "In these cases of new trials for newly discovered evidence, the terms are usually that the costs of the former trial be first paid." —*Ib.*

13. A motion was made to open a judgment in the Supreme Court for the purpose of amending a bill of exceptions, and rehearing the case upon the ground that material evidence offered by the plaintiffs in error, which might have influenced the judgment of the court, had been omitted in the bill of exceptions contained in the record; the court said that if any error had been committed in framing the exception it could be corrected by certiorari, but that no argument upon that exception or objection could be had. *Gayler et al. v. Wilder*, 10 Howard, 509.—SUP. CT. 1850.



14. "It must be a very extreme case . . . where a judgment below should be reversed on account of damages . . . in an action *ex delicto*, and where the instructions suggested to the jury the true general rule and the leading ground of mitigation, as well as against excess, and when, if appearing to be clearly excessive under all circumstances, a new trial could have been moved and had on that account in the Circuit Court." *Hogg et al. v. Emerson*, 11 Howard, 587.—SUP. CT. 1850.

15. New trial may be granted by the court on the ground that the verdict given by the jury was against evidence. *Wilson v. Jones et al.*, 3 Blatch. 227.—BETTS, 1854.

16. "Motions to rehear in Chancery and for new trials at law are motions addressed to the discretion of the court, from the refusal to grant which there is no appeal." *Rouse, W., In re*, 1 MacArthur's P. C. 286.—DUNLOP, 1854.

17. For an example of a new trial granted after a verdict for the complainant by a jury, see —. *Carr v. Rice*, 4 Blatch. 200.—NELSON, 1858.

18. A motion to amend an answer and set up new defence before testimony is taken should be granted, even though the hearing on the motion is not had until the testimony is completed, provided the motion is otherwise properly supported. *Moorehead v. Jones*, 3 Wall. Jr. 306.—GRIER, 1860.

19. "When evidence is given on both sides, and the verdict of the jury is satisfactory to the court, the parties must not expect an extended argument from the court in disposing of the motion for a new trial." *Bray v. Hartshorn*, 1 Clifford, 538.—CLIFFORD, 1860.

20. If a verdict of a jury gives excessive damages, the verdict will be set aside for that reason. *Stafford v. Pawtucket Hair Cloth Co.*, 2 Clifford, 82.—CLIFFORD, 1862.

21. Where a jury has clearly not followed the instructions of the court, a new trial will be granted. *Johnson v. Root*,<sup>2</sup> 2 Clifford, 108.—CLIFFORD, 1862.

22. Where a court instructs a jury to give nominal damages and they give substantial damages, a new trial may be awarded.—*Id.*

23. "Irregularity on the part of the party charged, or of the jury, must be satisfactorily proved in order to lay the foundation for the interposition of the court; but when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. In that state of the case, it is sufficient that the irregularity appears to be of such a character that it might have affected the impartiality of the proceedings."—*Id.*

24. "Courts of the United States have power to grant new trials where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of common law."—*Id.*

25. A grossly erroneous verdict of a jury as to damages is proper basis for a new trial. *Burdell et al. v. Denig et al.*, 2 Fish. P. C. 588.—SWAYNE, 1865.

26. Where a verdict is set aside and a new trial is granted, the costs will abide the result. *Densmore et al. v. Schofield et al.*, 4 Fish. P. C. 148.—SWAYNE, 1868.

27. Defendants sought to have a perpetual injunction dissolved, and the decree which had been made on final hearing opened; defendants had paid the taxed costs awarded to the plaintiff, and were held by this to have so affirmed the regularity and validity of the decree as to prevent them from having it opened. *Doubleday v. Sherman et al.*, 6 Blatch. 513.—BLATCHFORD, 1869.

28. Before the Supreme Court, a motion was made that the mandate of the court be stayed and that applicants have leave to file a bill of review; it appeared that the alleged new evidence, of which the applicants desired to avail themselves, had been accessible to them for seven years. The court held that their laches was fatal to the application, and said that it was a settled rule in this class of cases "that the matter must not only be new, but such as the party, by the use of reasonable diligence, could not have known; for if there be any laches or negligence in this respect, that destroys the title to the relief. . . . Whether such an application be granted or refused rests in the sound discretion of the court. The requisite leave is not a matter of right." *Rubber Co. v. Goodyear*, 9 Wall. 805.—SUP. CT. 1869.

29. A search for new evidence, after decree made, with successful result, is evidence that the same result would have been reached by a search at the proper time; and, with no adequate excuse for not making the search at the proper time, a new trial will be refused. *India Rubber Comb Co. v. Phelps*, 8 Blatch. 85.—BLATCHFORD, 1870.

30. "As to disputed questions of fact upon conflicting evidence, the verdict of the jury should be taken as conclusive." *Cowing v. Rumsey et al.*, 8 Blatch. 36.—WOODRUFF, 1870.

31. Where the court is of opinion that a charge to a jury was erroneous in a substantial point, plaintiff may avoid a new trial by remitting the damages.—*Id.*

32. Where a court is of opinion that a verdict

gives too large damages, a new trial may be avoided by remission of the excess by the plaintiff. *Russell v. Place et al.*, 9 Blatch. 173.—WOODRUFF, 1871.

33. At a hearing, defendant attempted to use a prior patent in anticipation, without its having been set up in the answer, under a claim of verbal agreement between counsel, which was denied; and thereupon the patent was not considered after judgment for the complainant. Defendant moved for rehearing on that account. Motion denied. *Am. Saddle Co. v. Hogg*, 1 Holmes, 177.—SHEPLEY, 1872.

34. Where a case has once been tried by a court, "if a mistake had been made, it was the duty of the counsel to himself, his clients, and the court, to get the case reopened if possible." *Baldwin v. Bernard et al.*, 5 Fish. P. C. 442.—BLATCHFORD, 1872.

35. "The want of proper expert testimony is no ground for granting a rehearing. Application should have been made to the court prior to the first hearing, for opportunity to procure and put in such testimony." *Hitchcock v. Tremain et al.*, 9 Blatch. 550.—BLATCHFORD, 1872.

36. The discovery of a reissue, the original of which was used in a defence, is no ground for rehearing.—*Id.*

37. Rehearing upon alleged newly discovered evidence will not be allowed where the moving party does not show that he could not, with reasonable diligence, have obtained the evidence for the former hearing.—*Id.*

38. "It is a rule that counter-affidavits must be examined and considered by the court," on motion for leave to file a bill of review. *Blandy et al. v. Griffith et al.*, 6 Fish. P. C. 434.—SWAYNE, 1873.

39. In an application for leave to file a supplemental bill in the nature of a bill of review, "the application for leave must be made to file the bill as soon after the new evidence is discovered as can reasonably be done."—*Id.*

40. "Cumulative evidence as to a point already at issue is an insufficient warrant to give leave" to file a bill of review.—*Id.*

41. In May or June, 1870, defendants had their attention called to alleged new testimony. Application to file a bill of review was filed January 30th, 1872. It was held that a lack of diligence prevented allowance of the application.—*Id.*

42. "To permit parties to range over the country and hunt up witnesses after a case has been once fairly heard, and then make application for leave to file a new bill, is to render liti-

gation expensive, and to involve the most serious consequences to parties seeking justice."—*Id.*

43. Bill of complaint for infringement of patent was filed May 13th, 1873; answer was filed June 7th, 1873; replication was filed August 25th, 1873; complainants took proofs and rested their case November 6th, 1873. November 26th, 1873, after full hearing of both parties, provisional injunction was granted. Afterward, on affidavits, defendants sought to have provisional injunction dissolved, the affidavits setting up two years' public use prior to application for patent, and also that complainants' patentee was not the original and first inventor. These defences had not been regularly made in the answer filed July 7th, 1873. Complainants contended that defendants could not, at this stage of the case, by affidavits, avail themselves of this defence, and the court sustained the contention. *Union Paper Bag Mach. Co. et al. v. Newell et al.*, 11 Blatch. 549.—BLATCHFORD, 1874.

44. After five years of litigation, in which no doubt as to infringement had been suggested by the defendants, and more than a year after decree defendants asked that the litigation be opened and their answer amended and a contest be had over the question of infringement, therefore the court said: "The indulgence here sought is not only without precedent, but beyond the power of the court, if that power is to be deemed governed by any rule whatever, in the existence of its judicial discretion." *Ruggles v. Eddy et al.*, 11 Blatch. 524.—WOODRUFF, 1874.

45. "It is true that the same weight is not given by courts to the verdict of a jury upon the validity of a patent which is justly given to the opinion of a jury upon other questions of fact. The subject-matter involved often requires a patient and quiet examination of different structures, and an investigation of the modes of operation of machinery, for which the hurried and imperfect scrutiny which the jury can give during the trial of a case is sometimes inadequate. . . . It is equally true that the verdict of a jury is not to be set aside merely because the court might have arrived at a different conclusion. Unless the court can see that the jury was palpably mistaken, and that the weight of evidence is decidedly against their verdict, it should not be set aside." *Roberts v. Schuyler et al.*, 12 Blatch. 444.—SHIPMAN, 1875.

46. A final decree may be modified or vacated by the court during the term at which it was entered. *Reeves v. Keystone Co.*, 2 Bann. & Ard. 256.—MCKENNAN, 1876.

47. "Until a decree is made from which an

appeal will lie, it is the clear implication of the rule that the cause remains under control of the court, and that a rehearing may be granted at any time before final decree."—*Ib.*

48. After a decree is made, application for rehearing on the ground of newly discovered evidence must be by a petition to the court for leave to file a supplemental bill setting forth the newly discovered evidence, and for a rehearing of the case at the time when the supplemental bill may be ready for hearing.—*Ib.*

49. On application by defendant for a rehearing, on the ground of newly discovered evidence, "It is incumbent on the defendant to satisfy the court that the omission to produce the evidence, which it now seeks to make available, before the former hearing of the cause, is not due to any negligence on its part, but that it made diligent efforts to discover and obtain it." Moreover, the newly discovered evidence must not be merely cumulative or corroborative of any of the original proofs, and must sustain a distinct and independent relation to the fundamental question in the cause.—*Ib.*

50. As regards an application for the reversal of a former decree and suspension of injunction, "there are two grounds only on which the court will grant a rule in such cases: [1] When the original decree shows upon its face that it is contrary to law; [2] upon the allegation and *prima facie* proof of the existence of material facts which, if known, would have hindered the decree, and which the complainant in the bill of review did not know at the former trial, and could not have discovered by the exercise of reasonable diligence." *Yerrington v. Putnam*, 2 Bann. & Ard. 601.—NIXON, 1877.

51. Where a party has submitted to a decree *pro confesso*, under no mistake or apprehension of facts or neglect of counsel, he will be held thereto. *Andrews et al. v. Denslow et al.*, 14 Blatch. 182.—BENEDICT, 1877.

52. Where A and B have been in interference in the Patent Office and A has prevailed, and A fourteen years afterward sues B for infringement and asks for a provisional injunction, it is then too late, and on such a motion, for B to reopen the question of priority of invention. *Am. Shoe Tip Co. v. National Shoe Toe Protector Co.*, 2 Bann. & Ard. 551.—NIXON, 1877.

53. "Interlocutory orders and decrees are subject to revision until a final decree is made." *Magic Ruffle Co. v. Elm City Co.*, 14 Blatch. 109.—SHIPMAN, 1877.

54. After an interlocutory decree had been entered, defendants petitioned for the same to be opened because of the discovery of new matter

and the failure of their counsel to fully represent their interests. It appeared that the facts had been fully known to the defendants and their counsel. The court held that not only was the question at issue foreclosed by the said interlocutory decree, but also by a judgment the same way in an action at law, on the law side of the court, between the same parties. *Ingersoll v. Benham et al.*, 3 Bann. & Ard. 179.—WHEELER, 1877.

55. In an attempt to secure a rehearing and new trial it would be unsafe and unjust, not only to the complainant but also to the solicitor, to assume that the solicitor had not done his full duty, without proof to that effect.—*Ib.*

56. "It is not understood that, after a full hearing, and especially after decision thereupon, the parties to a cause have any right to have it reargued by either the same or different counsel." *Ready Roofing Co. et al. v. Taylor et al.*, 15 Blatch. 94.—WHEELER, 1878.

57. "A motion for a new trial, for the introduction of new evidence, must be governed by the same rules that such motions are. These rules require that the evidence be newly discovered in fact; that by the exercise of ordinary diligence it could not be discovered so that it could be introduced at the former trial, and that it should be of such materiality and weight that it would probably change the result. And, upon such questions, the knowledge and diligence of counsel must be considered the same as those of the party."—*Ib.*

58. "There is no universal nor absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence under a bill of review to prove facts which were in issue on the former hearing. But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause." *Craig v. Smith*, 100 U. S. 226.—SUP. CT. 1879.

59. A brought suit against B for infringement of patent, and B entered into a written agreement under seal with A, wherein B admitted the validity of complainant's patent and his exclusive right, agreed upon the amount of damages, and consented to a decree upholding the patent, awarding the damages and also a perpetual injunction. Many terms of the court having elapsed, B petitioned for leave to file a supplemental bill for the purpose of having the former decree set aside. Thereof the court said: "In the first place, the application is in substance for leave to file a bill of review. It is therefore

governed by Equity Rule 88, and comes too late. In the second place, the bill of review for setting aside a decree, entered by consent, without fraud, will not be entertained. In the third place, so long as the agreement made between the parties prior to the entry of the decree stands, its admissions must operate by way of estoppel." *Pentlarge & Beeston, in re*, 17 Blatch. 306.—BENEDICT, 1879.

60. Defendants asked leave to file a bill of review, the real gravamen of the application being alleged laches, inexperience and incompetency of counsel. The court denied the application, saying: "If such grounds were to be admitted as reasons for opening cases, there would never be an end of a suit, so long as new counsel could be employed who could allege and show that prior counsel had not been sufficiently diligent, or experienced, or learned." *De Florez et al. v. Reynolds et al.*, 16 Blatch. 397.—BLATCHFORD, 1879.

61. "It is well settled that, in the case of an application, on the ground of newly discovered evidence, to vacate the decree in an equity suit on a patent, and allow the answer to be amended and the case retried, the application can be granted only 'for the gravest reasons and the plainest proof of the sufficiency of the newly offered evidence to lead the court to a different result.'"—*Id.*

62. "Defendants ought not to be heard to allege matter claimed to have been then existing, which they . . . neglected to present to the court, and have the benefit of it now to dissolve an injunction properly granted." *National School Furniture Co. v. Paton et al.*, 13 Blatch. 563.—BLATCHFORD, 1879.

63. "Rule 88 in equity provides that 'No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court.'" *Barker v. Stowe*, 4 Bann. & Ard. 485.—BLATCHFORD, 1879.

64. Where it does not appear affirmatively that the alleged newly discovered testimony could not have been produced before, it will not avail to procure a new trial.—*Id.*

65. A proposed amendment to an answer, setting up a new defence, after the case has gone to a master, is to be denied. *Evory et al. v. Candee et al.*, 5 Bann. & Ard. 67.—SHIPMAN, 1880.

66. "The English practice of granting a rehearing upon the certificate of two counsel, as a matter of course, does not prevail in the federal courts of this country. According to the present practice in this court, the granting of such motion rests in the sound discretion of the

judges who have heard the cause or made the decision. This seems to be the general practice in the circuit courts of the United States." *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 18 Blatch. 50.—WHEELER, 1880.

67. The solicitor of the defendant, a corporation, made oath that "the defendant had used, as it supposed, all due diligence to obtain all important evidence of 'past inventions,'" etc. Held insufficient to evidence due diligence on petition for rehearing. *Page et al. v. Holmes B. A. T. Co.*, 18 Blatch. 113.—BLATCHFORD, 1880.

68. By the court: "The affidavit in support of the motion sets forth no particular facts constituting defences desired to be brought forward, and no reason why they have not been brought forward in the usual manner, if they exist, except that the case was not attended to either by the defendants or their solicitors. Such an affidavit is wholly insufficient for the purpose." *Day v. Schwab et al.*, 2 Fed. Rep. 544.—WHEELER, 1880.

69. By the court: "I do not think it can be proper to grant an application like the present, addressed to the favor of the court and strongly opposed, when the result will be to compel the complainant, after he has brought his case to a final hearing and it has been submitted by both sides for decision, again to renew the contest upon additional testimony, and in substance with another party, in order that detriment to the interests of such third party, which it is anticipated may follow a decision in favor of the plaintiff, may be avoided." *Schneider v. Thill*, 18 Blatch. 241.—BENEDICT, 1880.

70. After entry of final decree in a court of original jurisdiction, a petition for rehearing cannot be considered *ex parte*. *Giant Powder Co. v. Cal. Vigorit Powder Co. et al.*, 5 Fed. Rep. 197.—FIELD, 1880.

71. "The general power of the court over its own judgments, orders, and decrees in civil and criminal cases, during the existence of the term at which they are first made, is undeniable." "The power to vary a final judgment or order, at least in a case where there was jurisdiction to make it, does not exist after the term at which it was made." *Fischer v. Hayes*, 19 Blatch. 13.—BLATCHFORD, 1881.

72. A motion for rehearing cannot be granted in the absence of adequate excuse for not presenting the alleged defences within the time prescribed by the law and rules. *Brown v. Deere et al.*, 2 McCrary, 425.—TREAT, 1881.

73. Defendant, being under decree for injunction and account, made motion to reopen the case and admit newly discovered defence, the

same being an English patent. The court did not think the patent would have changed the judgment, if it had originally been in the case, and refused the motion for that reason. *Adair v. Thayer*, 7 Fed. Rep. 920.—WHEELER, 1881.

74. The patent in suit was granted to Jordan and Smith as joint inventors. After a decree by court that defendants had infringed, defendants moved to reopen the case on the ground that Jordan was the sole inventor. Jordan so made affidavit—Smith being dead—and shopmates made affidavit that Jordan originally spoke of himself as the sole inventor, and that Smith made no such pretension. Jordan swore, in obtaining the patent, that both were joint inventors; the patent had been sold to complainant many years before. *Held*, that the evidence did not warrant the grant of the motion. *Collins Co. v. Coes et al.*, 8 Fed. Rep. 517.—LOWELL, 1881.

75. Where defendants sought to have their answer amended, to let in a new patent, but they did not show its materiality, or why it could not have been set up before, the application was denied. *Richardson v. Croft et al.*, 20 O. G. 372.—BLATCHFORD, 1881.

76. After making a decretal order dismissing a bill of complaint, and before signing the decree, a motion to reopen the case for new evidence [as to novelty and utility] was made. The court said: "It is plain that the motion should not be granted unless the new evidence would vary the case and probably lead to a different result." *McCloskey v. Du Bois*, 20 Blatch. 7.—WHEELER, 1881.

77. "After parties have had a full opportunity to ascertain, take, and present all their proofs, and they have been taken, presented, considered, and their weight determined, there is no just ground for opening the case to afford opportunity to explore for further proofs. In applications for a new trial on newly discovered evidence the evidence offered should of itself be such as to make it probable that its introduction would change the result. The authorities are full to this extent at least." *Munson v. New York*, 20 Blatch. 358.—WHEELER, 1882.

78. By the court: "It is never too late at any time during the pendency of the proceeding for the court to examine into its right and power to make a decree or enter a judgment in a case." Nor need the objection be raised in the pleadings. *Spring et al. v. Domestic Sewing Mach. Co.*, 13 Fed. Rep. 446.—NIXON, 1882.

79. "A rehearing will be denied if the non-product of the evidence is attributable to the

laches of the party or his counsel." *Colgate v. W. U. Telegraph Co.*, 22 Blatch. 118.—BLATCHFORD, 1884.

80. Where defendant waits three years after the discovery of new evidence before making application for a rehearing, and meanwhile a perpetual injunction has been ordered against the defendant, and the defendant has recognized the complainant's rights by compromising for past use, and taking a license for the future use of the invention, and for a considerable period has been enjoying the use of the invention under a license, a rehearing will not be allowed.

"The law of laches, as applied to motions for new trials or rehearings, is founded on a statutory policy. It is for the interest of the public as well as of the litigants that there should be an end of litigation, and that efforts to reopen controversies, after they have had a full opportunity to be heard and a careful hearing and consideration, should be discouraged"—*Id.*

81. By the court: "We do not say that circumstances may not arise which would justify the court in opening a final decree, allowing new defences to be added, new proofs to be taken out, and another hearing to be had. But such a course is unusual, and, if easily obtained, it would render a final decree in equity of little practical value. Courts do not look upon applications of this kind with favor." *Lockwood v. Cleveland et al.*, 20 Fed. Rep. 164.—NIXON, 1884.

82. "Amendments of pleadings, which introduce a new defence, are permitted with great reluctance in equity after a cause has been set for hearing; and, after a hearing, are rarely allowed. When the application is based upon the ground of newly discovered evidence, a more liberal rule obtains, but courts of equity, as well as courts of law, in such cases proceed with great caution, and extend no indulgence to the negligent. Unless it appears affirmatively that the evidence could not have been obtained in due season, if the party applying had used all reasonable efforts in that behalf, the application will be denied. It is due to the public interests, as well as to the immediate litigants, that rehearings for the purpose of letting in evidence which might have been and ought to have been introduced before the hearing should not be tolerated. In no class of cases should the practice of allowing rehearings be more strictly guarded than in cases . . . where the defence of prior use is relied on to defeat the novelty of a patented invention; because it is seldom that a defendant cannot make it appear that he has discovered additional evidence in support of such a

defence." *Hicks v. Otto et al.*, 22 Blatch. 122.—WALLACE, 1884.

83. In an application for a new trial or rehearing upon other evidence than that before the court, in the case, the applicant, in order to prevail, must show that he has not been guilty of laches in obtaining the new evidence and bringing it into court. *Lockwood v. Cleveland et al.*, 20 Fed. Rep. 164.—NIXON, 1884.

84. "Interlocutory decrees remain under the control of the court and subject to its revision until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy are disposed of by a final decree." *Wooster v. Handy*, 22 Blatch. 307.—BLATCHFORD, 1884.

85. A petition for a rehearing or new trial must show "that the petitioner could not with reasonable diligence have obtained, prior to the former hearing, the testimony which he now seeks to adduce." *Spill v. Celluloid M'fg Co.*, 22 Blatch. 441.—BLATCHFORD, 1884.

86. A suit was brought for the infringement of two patents. At the hearing the complainant withdrew one of the patents from the consideration of the court. After decision, defendant sought for a rehearing on the ground that defendant had supposed that the withdrawn patent was the one mainly relied upon, and that important matters concerning the other patent had failed to come to the attention of the court. The court held the reasons insufficient. *Everest v. Buffalo Lubricating Oil Co.*, 22 Blatch. 524.—COXE, 1884.

87. "New evidence, discovered after the hearing before the master is closed, may, in proper cases, be a ground for a bill of review, on which issue may be joined and evidence adduced by both parties in the usual way. The defendants are not concluded by the refusal of the court, on mere affidavits, to refer the cause back to the master." *Thompson et al. v. Wooster*, 114 U. S. 104.—SUP. CT. 1885.

88. He who seeks to have a case reopened for further testimony must, as a rule, show that the testimony in question could have been offered at the former trial of the case. *U. S. v. Gunning et al.*, 23 Fed. Rep. 668.—WHEELER, 1885.

89. Where it is sought to reopen a case for further testimony, it is proper for the court to inquire into the case far enough to see whether the new testimony will materially change the former conclusion, and to deny the motion if not.—*Id.*

90. Where a party seeks a rehearing on the ground of new evidence which is procurable, it is not material to show that the party did not

know of and could not by reasonable diligence have found the new evidence, so as to put it into the original case. *Railway Register M'fg Co. v. Broadway & Seventh Ave. Railway Co.*, 32 O. G. 257.—WHEELER, 1885.

91. Certain causes were pending for the purposes of an accounting before a master pursuant to an interlocutory decree made upon hearing in chief. A motion was made for a rehearing on the merits. The motion was granted upon the condition and order that, in case there should afterward be a decree in the case for an accounting, the testimony already taken before the master should stand for use before the same or any other master in the case, as if taken by the parties respectively upon such accounting. *Am. Diamond Rock Boring Co. v. Sheldons et al.*, 23 Blatch. 286.—WHEELER, 1885.

92. Where a decree is interlocutory and not final, the court has power to open the same and allow a new defence on motion and without the formality of a bill of review. But where the application is in fact and substance for a rehearing on the ground of newly discovered evidence, it must be supported by the same sort of proof as the court requires in order to give a party relief upon a bill of review, or a supplemental bill in the nature of a bill of review, after a final hearing. *Willimantic Linen Co. et al. v. Clark Thread Co. et al.*, 32 O. G. 1356.—NIXON, 1885.

93. Where more than twelve years have elapsed since the bill of complaint was filed, and an acknowledged error in the evidence of certain date is committed, and it does not clearly appear that the defendants could not, with reasonable diligence, have discovered the facts which are sought to be introduced, there is too great laches to permit of the reopening of the case.—*Id.*

94. In order to procure the reopening of a case on the ground of newly discovered evidence, it must be shown that there was no laches in procuring the evidence, and that the new proofs sought to be introduced are material. *Hoe et al. v. Kahler*, 23 Blatch. 354.—BLATCHFORD, 1885.

95. After litigations about the same subject-matter had been going on five years, defendant desired a rehearing on the ground of newly discovered evidence. It not appearing to be newly discovered, the motion for rehearing was denied. *Albany Steam Trap Co. v. Felthousen*, 26 Fed. Rep. 318.—COXE, 1886.

96. "A reargument is never granted to allow a rehash of old arguments, and . . . the proper remedy for errors of the court on points argued in the first hearing is to be sought by appeal, when the decree is one which can be reviewed

by an appellate tribunal." *Railway Register M'f'g Co. v. North Hudson County Railroad Co. et al.*, 26 Fed. Rep. 411.—NIXON, 1886.

97. "The grounds on which courts ordinarily listen to such applications are . . . [1] upon allegations that any question decisive of the case and duly submitted by counsel has been overlooked by the court; or [2] that the decision is in conflict with an express statute, or with a controlling decision either overlooked by the court or to which attention was not drawn through the neglect or inadvertence of counsel."—*Id.*

98. It is not a sufficient ground for reargument that a party did not present his defence as fully and ably as it might have been done.—*Id.*

99. In an action on the case, after the evidence was in, the judge instructed the jury to return a verdict for the defendants, which was done, the defence being that the patent had been anticipated. The Supreme Court held this action to be erroneous, saying that there were obvious differences between the prior device and that of the patent; that in such a case it was not a matter of law, that they were identical, and that the question should have been submitted to the jury, wherefore a new trial was ordered. *Keyes et al. v. Grant et al.*, 118 U. S. 25.—SUP. CT. 1886.

100. "It would tend to great confusion and uncertainty in the administration of the law if a conclusion, reached after mature deliberation, should," while the situation remained unchanged, "be set aside and reversed by the same tribunal that rendered it." *Gage v. Kellogg et al.*, 36 O. G. 234.—COXE, 1886.

101. "If the newly discovered evidence which is submitted would not change the result of the verdict and judgment, it is well settled that new trial should not be granted." *Starling v. St. Paul Plough Works*, 32 Fed. Rep. 290.—NELSON, 1887.

102. An unincorporated association of persons was sued as the "Cunard Steamship Company," incorporated. They made answer to the bill under that designation, and the decree went against them. It was held that it was then too late to open the decree on the ground of misdescription, etc. *Bate Refrigerating Co. v. Gillett et al.*, 31 Fed. Rep. 809.—BRADLEY, 1887.

103. By the court: "It would be doing violence to the rightful and decorous courses of judicial practice if, upon the pretext of a rehearing had for the purpose of considering the effect of newly discovered evidence, which it is found cannot disturb the decree, we should proceed to overhaul the decree hitherto declared by the superior authority, however widely we might differ, if the matter were fairly open to us."

*Reed et al. v. Lawrence et al.*, 32 Fed. Rep. 228.—SEVERENS, 1887.

104. A misquotation by the court in its opinion of testimony, when the matter is not material, is not a basis for a rehearing and reargument.—*Id.*

105. Where, on a motion for a new trial, the evidence offered by the defendant is met by the evidence offered by the complainants, new trial will be refused. *Pfanschmidt et al. v. Kelly Mercantile Co.*, 32 Fed. Rep. 667.—NELSON, 1887.

## OATH.

### "OATH" IN THE PATENT OFFICE.

Act approved February 21st, 1793.

SECTION 3. *And be it further enacted*, That every inventor, before he can receive a patent, shall swear or affirm that he does verily believe that he is the true inventor or discoverer of the art, machine, or improvement for which he solicits a patent, which oath or affirmation may be made before any person authorized to administer oaths. [Repealed July 4th, 1836.]

Act approved April 17th, 1800.

SEC. 1. *Be it enacted, etc.*, . . . Every person petitioning for a patent for any invention, art, or discovery, pursuant to this act, shall make oath or affirmation before some person duly authorized to administer oaths before such patent shall be granted, that such invention, art, or discovery hath not, to the best of his or her knowledge or belief, been known or used either in this or any foreign country, and that every patent which shall be obtained pursuant to this act, for any invention, art, or discovery which it shall afterward appear had been known or used previous to such application for a patent, shall be utterly void. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 6. *And be it further enacted*, . . . The applicant shall also make oath or affirmation that he does verily believe that he is the original and first inventor or discoverer of the art, machine, composition, or improvement for which he solicits a patent, and that he does not know or believe that the same was ever before known or used; and also of what country he is a citizen; which oath or affirmation may be made before any person authorized by law to administer oaths. [Repealed July 8th, 1870.]

Act approved March 3d, 1837.

SEC. 13. *And be it further enacted*, That in all cases in which an oath is required by this act, or by the act to which this is additional, if the person of whom it is required shall be conscien-

tiously scrupulous of taking an oath, affirmation may be substituted therefor. [Repealed July 8th, 1870.]

Act approved August 29th, 1842.

SEC. 4. *And be it further enacted*, That the oath required for applicants for patents may be taken, when the applicant is not, for the time being, residing in the United States, before any minister, plenipotentiary, *chargé d'affaires*, consul, or commercial agent holding commission under the Government of the United States, or before any notary public of the foreign country in which such applicant may be. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 30. *And be it further enacted*, That the applicant shall make oath or affirmation that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent; that he does not know, and does not believe that the same was ever before known or used; and shall state of what country he is a citizen. And said oath or affirmation may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, *chargé d'affaires*, consul, or commercial agent, holding commission under the Government of the United States, or before any notary public of the foreign country in which the applicant may be.

SEC. 34. Provides for issue of patent to executor or administrator, and proceeds: "The oath or affirmation required to be made shall be so varied in form that it can be made by them." [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4892. The applicant shall make oath that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent; that he does not know, and does not believe that the same was ever before known or used; and shall state of what country he is a citizen. Such oath may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, *chargé d'affaires*, consul, or commercial agent holding commission under the Government of the United States, or before any notary public of the foreign country in which the applicant may be.

SEC. 4896. Provides for issue of patent to executor or administrator, and proceeds: "And when the application is made by such legal rep-

resentatives, the oath or affirmation required to be made shall be so varied in form that it can be made by them."

#### CASES.

1. The omission of the oath of invention, or of the payment of Government fees in making application for patent—as directed by statute—does not invalidate the patent. *Whittemore v. Cutter*, 1 Gall. 429.—STORY, 1813.

2. The patentee's oath of invention counterbalances the oath of a single witness that he communicated the invention to the patentee. *Alden et al. v. Dewey et al.*, 1 Story, 336.—STORY, 1840.

3. Whether an oath in an application for patent be or be not sufficient is not material on the question of the validity of the patent. *Dyer v. Rich*, 1 Metcalf, Mass. 180.—SHAW, 1840.

4. "Under Section 7 of the act of 1836, . . . the oath anew is to be taken only when the applicant persists in his application, after having been informed by the Commissioner of the errors or defects of his specification. If this happens before his claim is rejected, no new oath is necessary to enable him to appeal." *Crocker, M. A., in re*, 1 MacArthur's P. C. 134.—CRANCH, 1850.

5. "There is no act which requires the jurat to be dated at all." *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—KANE, 1851.

6. "The oath of the party is to be considered in the character of *prima facie* evidence of the novelty of the invention." *Wagner, J. Z. A., in re*, 1 MacArthur's P. C. 510.—MORSELL, 1857.

7. The oath, in an application for reissue, did not aver that the original patent was "inoperative or invalid," but did aver that it is "not fully valid or available." The reissue was held void for this reason. *Whitely v. Swayne*, 4 Fish. P. C. 117.—LEAVITT, 1865.

8. Where, in an application for a patent, a substitute specification is filed, varying from the original substantially, it must be verified by supplemental oath or the patent is not valid.—*Id.*

9. Where a notary public signs his name to an oath as a notary public, and affixes his official seal, his office is sufficiently evidenced under the act of Congress of September 16th, 1860, paragraph 1. *Goodyear et al. v. Hultiken et al.*, 2 Hughes, 492.—JACKSON, 1867.

10. The application for the patent in suit did not show an oath, but did show a blank form therefor unexecuted. Evidence held insufficient to prove that the oath was not made. *Crompton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.



11. "The taking of the oath, though to be done prior to the granting of the patent, is not a *condition precedent*, failing which the patent must fail."—*Ib.*

12. Where letters-patent recite that the required oath was taken before the same were granted, such recitals, in the absence of fraud, are conclusive evidence that such oath was taken. *Seymour v. Osborne*, 11 Wall. 516.—SUP. CT. 1870.

13. The law does not leave the validity of a patent open to be inquired into by the courts upon the ground that no oath was made in the application. *De Florez et al. v. Reynolds et al.*, 14 Blatch. 505.—WHEELER, 1878.

14. Marinoni and Chandre had jointly taken French, Belgian, and British patents on the invention in question. Marinoni, making the usual oath of sole invention, took a sole United States patent for the same invention. On the trial Chandre testified that he was a joint and equal inventor of the improvement. *Held* insufficient to overcome Marinoni's said oath, and the United States patent sustained. *Hoe et al. v. Cottrell et al.*, 17 Blatch. 546.—SHIPMAN, 1880.

15. A certified copy of the file wrapper and contents appurtenant to an application for patent, showing a defective oath, does not alone prove that a proper oath was not made at some other time. *Hoe et al. v. Kahler*, 20 Blatch. 430.—BLATCHFORD, 1882.

16. By the court: "A petition and affidavit were filed, upon which the reissued patent sued on herein was predicated. But the affidavit does not affirm that the original or first reissue was either inoperative or invalid, but in lieu of this statutory requirement, the affidavit alleges that the same was not 'fully valid and available.' The language thus employed is not the equivalent of that prescribed by the statute; it is an evasion declared by this court in *Whitney v. Swayne*, 4 Fish. 117, to be insufficient to support a reissued patent." *Page v. McGowan et al.*, 15 Fed. Rep. 398.—BAXTER, 1883.

17. The statute requiring an oath by an applicant for an original patent is directory merely; and if the oath be irregular, or omitted altogether, the patent is not thereby vitiated. *Hartshorn v. Eagle Shade Roller Co. et al.*, 18 Fed. Rep. 90.—LOWELL, 1883.

18. With respect to reissues, the argument that irregularity or omission of oath does not invalidate the patent "is stronger, because there is no law which requires the applicant for a reissue to take any oath at all on the subject of the invalidity of his original patent."—*Ib.*

19. The existence, in an application filed for a patent, of an oath made by the applicant's attorney, when the statute requires the inventor to make oath, is not evidence that the inventor never properly made the oath required by statute. Furthermore, in an action for infringement of the patent granted on such application, the sufficiency of the oath cannot be inquired into collaterally. A recital in a patent that the required oath was properly taken is conclusive evidence of the taking of the oath. *Hancock Inspirator Co. v. Jenks*, 21 Fed. Rep. 911.—BROWN, 1884.

20. "Showing what were the contents of the file wrapper" at a former date, "or what are its contents now, or what was the practice of the Patent Office in regard to preserving papers filed in applications for patents, and letters to and from the office, and in regard to the record of the proceedings and filing of papers, and of receiving and sending communications, and the scope and functions of a file wrapper and contents, is not sufficient to rebut the presumption that the Commissioner required and received a proper preliminary oath. . . . The affirmative probative force of a paper in a file wrapper, to show the existence of its contents, is one thing, but its negative probative force, to show that a paper or a fact not shown by anything in its contents did not exist, is quite a different thing. The fact that papers known to have existed, and which properly belonged in a file wrapper, are missing therefrom is a fact of such frequent occurrence in patent suits as to have become a matter of judicial cognizance." *Hoe et al. v. Kahler*, 23 Blatch. 354.—BLATCHFORD, 1885.

## PARTIES.

### "PARTIES" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 4. *And be it further enacted*, That if any person or persons shall devise, make, construct, use, employ, or vend, within these United States, any art, manufacture, engine, machine, or device, or any invention or improvement upon or in any art, manufacture, engine, machine, or device, the sole and exclusive right of which shall be so as aforesaid granted by patent to any person or persons, by virtue and in pursuance of this act, without the consent of the patentee or patentees, their executors, administrators, or assigns, first had and obtained in writing, every person so offending shall forfeit and pay to the patentee or patentees, his, her, or their executors, administrators, or as-

signs, such damages as shall be assessed by a jury, and moreover shall forfeit to the person aggrieved the thing or things so devised, made, or constructed, used, employed, or vended, contrary to the true intent of this act, which may be recovered in an action on the case founded on this act.

SEC. 6. Provides for actions for infringement "to be brought by such patentee or patentees, his, her, or their executors, administrators, or assigns." [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 5. *And be it further enacted*, That if any person shall make, devise, and use, or sell the thing so invented, the exclusive right of which shall, as aforesaid, have been secured to any person by patent, without the consent of the patentee, his executors, administrators, or assigns, first obtained in writing, every person so offending shall forfeit and pay to the patentee a sum that shall be at least equal to three times the price for which the patentee has usually sold or licensed, to other persons, the use of the said invention, which may be recovered in an action on the case founded on this act, in the Circuit Court of the United States, or any other court having competent jurisdiction. [Repealed July 4th, 1836.]

Act approved April 17th, 1800.

SEC. 3. *And be it further enacted*, That where any patent shall be or shall have been granted pursuant to this or the above-mentioned act, and any person, without the consent of the patentee, his, or her executors, administrators, or assigns, first obtained in writing, shall make, devise, use, or sell the thing whereof the exclusive right is secured to the said patentee by such patent, such person so offending shall forfeit and pay to the said patentee, his executors, administrators, or assigns, a sum equal to three times the actual damage sustained by such patentee, his executors, administrators, or assigns, from or by reason of such offence, which sum shall and may be recovered, by action on the case founded on this and the above-mentioned act, in the Circuit Court of the United States, having jurisdiction thereon. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 14. Provides for actions to recover damages for infringement "to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States." [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 59. Provides for recovery of damages for

infringement, by action on the case, "in the name of the party interested, either as patentee, assignee, or grantee."

SEC. 60. Provides for filing disclaimers, and proceeds: "Every such patentee, his executors, administrators, and assigns, whether of the whole or any substantial interest in the patent, may maintain a suit at law or in equity for the infringement of any part thereof," etc. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

"SEC. 4919. Damages for the infringement of any patent may be recovered by action on the case, in the nature of the party interested, either as patentee, assignee, or grantee. . ."

SEC. 4922. Provides for filing disclaimers, and proceeds: "Every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity for the infringement of any part thereof," etc.

#### CASES.

1. Infringement of patent is a tort. Torts are several as well as joint. In a suit against two persons, recovery may be had against one only. *Reutgen v. Kanours et al.*, 1 Wash. 168.—WASH. 1804.

2. Owners of less than the whole patent cannot, under the statute, maintain an action for infringement. *Tyler et al. v. Tuel*, 6 Cranch, 324.—SUP. CT. 1810.

3. An agreement to assign, no assignment having been made, does not prevent the owner, who has thus agreed, from maintaining an action for infringement in his own name. *Park v. Little et al.*, 3 Wash. 196.—WASH. 1813.

4. Action for infringement can be maintained jointly by the patentee and assignee of a part interest, they together holding the whole title; also by joint patentees; also by one of joint patentees and the administrator of the other. *Wuittemore v. Cutter*, 1 Gall. 429.—STORY, 1813.

5. Action for infringement will lie against a corporation. *Kneass v. Schuykill Bank*, 4 Wash. 9.—WASH. 1820.

6. After assignment, the assignee must sue in his own name. *Herbert v. Adams*, 4 Mason, 15.—STORY, 1825.

7. The assignee of a territorial right "may support a suit in equity to enjoin third persons from infringing the patent," and for an account. *Ogle et al. v. Ege*, 4 Wash. 584.—WASH. 1826.

8. Under the patent act of 1793, chapter 55, Section 4, an assignment must be recorded before the assignee can bring suit. *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

9. For an example of a conveyance under a patent, seemingly a license, which was held to give the licensees the power to bring suit for infringement in their own right; see —. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

10. "There are strong reasons why the interest of the principal should, by an action at law, and also by a bill in Chancery, be reached through his agent." *Boyd v. McAlpin*, 3 McLean, 427.—MCLEAN, 1844.

11. Foundry men who cast an infringing article, as employes of another party, may be held as infringers. *Bryce v. Dorr et al.*, 3 McLean, 582.—MCLEAN, 1845.

12. An assignee of an exclusive right to use a certain part of a machine within a certain town has such a right as will enable him to maintain an action for infringement of the patent within that town. *Wilson v. Rosseau et al.*, 4 Howard, 646.—SUP. CT. 1846.

13. It is doubtful whether a misjoinder of parties as plaintiffs can defeat a prayer for an injunction against a use of a patented machine. *Woodworth et al. v. Hall et al.*, 1 W. & M. 248.—WOODBURY, 1846.

14. A licensee as to a particular district, under a patent, may be properly joined with the owner of the patent in bringing suit for infringement occurring within said district. *Woodworth v. Wilson*, 4 Howard, 712.—SUP. CT. 1846.

15. He who is selling the patented articles without right, as the agent of another, may be enjoined. *Buck v. Cobb et al.*, 9 Law Rep. [O. S.] 545.—CONKLING, 1846.

16. In bringing suit for infringement of patent in a certain district it is an immaterial fact that the person who is an owner of the patent outside of that district is joined as complainant.—*Id.*

17. A license to use a patent in the manufacture of a particular kind of goods does not give an interest on which suit may be maintained. *Suydam v. Day*, 2 Blatch. 20.—NELSON, 1846.

18. A petition for leave to file a supplemental bill, bringing in a new party, is sufficiently denied by charging that such other party has become connected with the subject-matter of the suit since the original bill was filed, and is in that connection doing acts which the court has by injunction restrained the original party from doing; and that is, in substance, sufficient to authorize the plaintiff to bring suit against the new party. *Parkhurst v. Kinsman et al.*, 2 Blatch. 72.—BETTS, 1848.

19. A corporation may hold a patent and re-

issue the same in its own name. *Blanchard Gunstock Turning Factory v. Warner*, 1 Blatch. 258.—NELSON, 1848.

20. Blanchard brought suit in his own name, at law, for damages for infringement of a patent he had obtained for turning every kind of irregular forms. He had conveyed to one Carter "the full and exclusive license, right, and permission to have, hold, use, and enjoy Blanchard's patent for turning irregular forms, etc., so far as said improvement is or may be used for turning shoe-last, boot and shoe trees, and hat blocks, etc. To have and to hold the right and license exclusive of all others, except such persons who have received grants or licenses before the date hereof," etc. The infringing act was the making of shoe-last. It was held that Blanchard properly brought the suit in his own name. *Blanchard v. Eldridge*, 1 Wallace Jr. 337.—SUP. CT. 1849.

21. The plaintiffs were a corporation at a time when the patent stood in the name of a person who was the agent and principal stockholder of the company. That person gave a license to defendants, and the complainants, who held the equitable title, were held bound by the same. *Troy Iron & Nail Factory v. Corning et al.*, 1 Blatch. 467.—NELSON, 1849.

22. Under Section 10 of the act of March 3d, 1839, amending and enlarging Section 16 of the act of July 4th, 1836, the assignee of a patent to be issued on an application which stands rejected may bring suit in equity in his own name asking for the patent, and for the annulling of an interfering patent. *Gay v. Cornell*, 1 Blatch. 506.—NELSON, 1849.

23. "The patentee may assign his exclusive right within and throughout a specified part of the United States, and upon such assignment the assignee may sue in his own name for an infringement of his rights. But in order to enable him to sue, the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself as well as others. And any assignment short of this is a mere license." *Gayler et al. v. Wilder*, 10 Howard, 477.—SUP. CT. 1850.

24. A grantee under a patent may and must sue in his own name, and not in that of the patentee.—*Id.*

25. Although the whole beneficial interest in the patent in suit was in the patentee's assignee, it was held that the patentee was properly joined with the assignee in bringing suit, because "it was perhaps necessary to make him a party to the suit in order to take advantage of the breach

of condition." *Woodworth et al. v. Cook*, 2 Blatch. 151.—NELSON, 1850.

26. Although a grantor may reserve the right to bring suits for infringement in the territory granted, yet, if he afterward divests himself of all interest in the territory covered by the grant, he need not be joined as a complainant in a suit for infringement. *Bicknell et al. v. Todd et al.*, 5 McLean, 237.—McLEAN, 1851.

27. A conveyance under a patent carried the right "to construct and use, and vend to others to construct and use [during the term of said patent] ten planing, tonguing, and grooving machines, upon the principles and description of the renewed patent and amended specification." The instrument further declared: "It is the effect of this covenant that said Van Hook shall enjoy during said extended term an exclusive right to the said patent, within the said territory, limited to ten machines, reserving to Wilson the right to prosecute for all infringements of the patent within that territory, and all damages recovered therefor." It was held that the plaintiffs could not maintain suit for infringement with this title in Van Hook outstanding. *Ritter et al. v. Terrill et al.*, 2 Blatch. 379.—BETTS, 1852.

28. "The owner of the legal title to the patent, and the party equitably entitled to the damages, as the person immediately injured by the infringement, being parties to the bill, it cannot be successfully objected to for want of proper parties," although there may be other parties interested in the profits. *Goodyear et al. v. Central Railroad of New Jersey*, 2 Wall. Jr. 356.—GRIER, 1853.

29. Although assignees and licensees may, in some cases, be necessary parties to an accounting, the same parties need not always be necessarily joined in a motion for a provisional injunction.—*Id.*

30. An objection on account of misjoinder of parties made, for the first time, after hearing and final decree, comes too late. *Livingstone et al. v. Woodworth et al.*, 15 Howard, 546.—SUP. CT. 1853.

31. Directors of an infringing corporation who participate in its management, and the agents of the corporation, are parties, and may be restrained from infringement by injunction. *Goodyear et al. v. Phelps et al.*, 3 Blatch. 91.—NELSON, 1853.

32. A railroad upon which a patent was infringed was held by a corporation chartered by the state of Pennsylvania, but the road was operated by a Maryland corporation. The Pennsylvania road was held liable for infringement.

*York & Maryland Line R. R. Co. v. Winans*, 17 Howard, 30.—SUP. CT. 1854.

33. Although the fire department of a city may be a distinct corporation, the city is liable for infringement committed by the fire department. *Ransom et al. v. New York*, 1 Fish. P. C. 252.—HALL, 1856.

34. An exclusive licensee under a patent cannot bring suit for infringement. *North et al. v. Kershaw et al.*, 4 Blatch. 70.—INGERSOLL, 1857.

35. A bill of complaint is not to be dismissed because complainant, after suit brought, parts with his patent. *Dean v. Mason et al.*, 20 Howard, 198.—SUP. CT. 1857.

36. Although a patentee may, after the expiration of his patent, convey away the right to whatever damages or profits are collectible for past infringement, the patentee may sue for such damages or profits in his own name. *Bell v. McCullough et al.*, 1 Bond, 194.—LEAVITT, 1858.

37. "When one in the employment of a corporation, in the business of his employment does an act for their benefit and which they adopt and practise and take advantage of, they will be deemed to have authorized the act, and will be as much bound by it as though expressly authorized." *Poppenhusen v. N. Y. Gutta Percha Comb Co.*, 2 Fish. P. C. 62.—INGERSOLL, 1858.

38. "Where one person has the legal title to the patent, and another person has an equitable right in the same, and a suit in equity is instituted complaining of an infringement, and seeking an injunction and an account, the person having the legal title and the one having an equitable right which has been violated should join as plaintiffs." *Stimpson v. Rogers et al.*, 4 Blatch. 333.—INGERSOLL, 1859.

39. A conveyance of an exclusive right to make and sell a patented article in a certain territory during the term of the patent is a license, and the licensee need not be joined in bringing a suit for infringement. *Hussey v. Whiteley et al.*, 1 Bond, 407.—LEAVITT, 1860.

40. Licensees under complainants' patent need not necessarily be joined with the complainants in bringing suit for infringement. *Grover & Baker Sewing Mach. Co. v. Sloat et al.*, 2 Fish. P. C. 112.—NELSON, 1860.

41. Those who hold the legal title to patents, as trustees, may properly bring suit thereon. *Potter et al. v. Wilson et al.*, 2 Fish. P. C. 102.—NELSON, 1860.

42. Where a suit is brought by the owner of a patent for the benefit of his licensees, it cannot be discontinued by the consent of such nominal complainant if the discontinuance is resisted by the real parties in interest, the licensees. *Good-*

*year v. Bishop et al.*, 4 Blatch. 438.—NELSON, 1860.

43. Different persons were charged in a bill of complaint with infringement under the terms "that the respondents are using," etc. This was held to be sufficient allegation that the defendants were acting in concert in their infringement. Defendants also claimed to be the servants of a corporation, and therefore not the proper parties. The court held otherwise. *Poppenhusen v. Falke et al.*, 4 Blatch. 493.—SHIPMAN, 1861.

44. An action on the case was brought against the Board of Commissioners of Hamilton County, O., for alleged infringement of plaintiff's patent for construction of jails. The statute law of Ohio, in its enumeration of matters in respect to which this board might sue, was silent as to actions of tort. The board was held not liable. *Jacobs v. Board of Commissioners of Hamilton County*, 1 Bond, 500.—LEAVITT, 1862.

45. Where a board of county commissioners was authorized by statute to erect a jail contract, and the contractor put in infringing devices, it was held that the contractor was liable for infringement, and not the board of county commissioners.—*Id.*

46. The unlicensed use of patented machinery by the warden of a United States penitentiary does not constitute such a taking of private property for public use as will make the Government responsible. *Pitcher v. United States*, 1 Nott & Huntington, 7.—CASEY, 1863.

47. All the executors of a party deceased need not necessarily be joined in bringing suit on the patent which was his. *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Clifford, 351.—CLIFFORD, 1864.

48. "Undoubtedly all persons commanding, procuring, aiding, or assisting in the commission of a trespass are principals in the transaction, and stand responsible to answer in damages to the injured party. Both the master who commands the doing and the servant who does the act of trespass may be made responsible as principals, and may be sued jointly or severally for damages, as the injured party may elect." *Lightner v. Brooks*, 2 Clifford, 287.—CLIFFORD, 1864.

49. The president of a railroad made a contract with another person to furnish certain cars containing a certain patented improvement. The cars were furnished provided with such improvement. The making thereof was held not to be an infringement of the patent by the president.—*Id.*

50. Although the president of a railroad com-

pany may be the agent of the railroad company for the purpose of contracting rolling stock, it does not follow that he is the general agent of the corporation.—*Id.*

51. Suit was brought upon two patents, the legal title to which was vested in different parties, who held both in trust for the use of the Dental Vulcanite Company. It was held that complainants were properly joined. *Goodyear et al. v. Hills*, 3 Fish. P. C. 134.—CARTTER, 1866.

52. "A licensee may proceed by a petition in equity to enjoin any party who has actually infringed his right under the license." *Brammer v. Jones et al.*, 2 Bond, 100.—LEAVITT, 1867.

53. A, being a patent owner, B agreed with him to pay the expenses of procuring an extension, and also other moneys. The extension was procured, but B did not fulfil his promise. A brought suit in equity against C for infringement. C contended that B should have been joined as complainant. The court held otherwise. *Aiken v. Dolan*, 3 Fish. P. C. 197.—CADWALADER, 1867.

54. "It is proper, in a suit in equity on a patent, to join as plaintiff, with the owner of the legal title to the patent, the party who is immediately injured by the infringement, and who is equitably entitled to the fruits of the recovery in the suit." *Goodyear et al. v. Allyn et al.*, 6 Blatch. 33.—BLATCHFORD, 1868.

55. The president of a transportation company which is made up of various railroad companies is not liable as an infringer for the acts committed by the various railroad companies. *Lightner v. Kimball*, 1 Lowell, 211.—LOWELL, 1868.

56. "Under Equity Rule 47, the want of proper parties is not a fatal defect, if the parties are out of the jurisdiction of the court; and it is quite clear that, in order to constitute the fact of a want of parties a good defence, it should be shown by the plea that the persons alleged to be necessary parties are alive and within the jurisdiction of the court." *Goodyear v. Toby*, 6 Blatch. 130.—HALL, 1868.

57. "It may be well doubted whether, in the case of a bill for an account for an infringement of a patent, the plaintiff is bound to make all joint wrong-doers parties to his bill; for if they are liable severally, as well as jointly, in equity, as they clearly are at law, the plaintiff may proceed against any one of them alone under Equity Rule 51."—*Id.*

58. "Subsequent sale and transfer of the exclusive right are no bar to an action to recover damages for an infringement committed before

such sale and transfer." *Moore v. Marsh*, 7 Wall. 515.—SUP. CT. 1868.

59. Among the parties joined as complainants in an equity suit was one who claimed as heir at law of the deceased inventor. It was held that he was not properly a party. *Hodge et al. v. North Missouri R. R.*, 1 Dillon, 104.—TREAT, 1869.

60. The question whether the joinder of an unnecessary party as complainant in a bill in equity can be taken advantage of by demurrer is well settled in the affirmative.—*Id.*

61. The president of an infringing corporation may properly be made a party. *Nichols v. Pearce et al.*, 7 Blatch. 5.—BLATCHFORD, 1869.

62. Where parties are joined as plaintiffs who do not hold a legal title nor interest in the result, their joinder may be treated as surplusage. *Dibble v. Augur*, 7 Blatch. 86.—BLATCHFORD, 1869.

63. Where, in a suit in the Circuit Court, complainant has bought in the patents under which suit was defended, the defendant has become owner with complainant, and there is no real litigation, the Supreme Court will not proceed with the case. *Wood Paper Co. v. Heft*, 4 Wall. 333.—SUP. CT. 1869.

64. "Damages for the infringement of letters-patent may be recovered by the patentee, or by his assignee of the whole interest, or by his grantee of his exclusive right within and throughout any specified district, by a suit in equity, or by an action on the case, at the election of the holder of the legal title." *Blanchard v. Putnam*, 8 Wallace, 420.—SUP. CT. 1869.

65. A suit in equity was brought against one Osgood and others in the Southern District of New York. Osgood was simply president and director of a New Jersey corporation which actually committed the alleged infringement acts. The court held that, in order to make Osgood properly a defendant, complainant should have shown either that he could control the operations of the company, or at least should have joined with him a majority of the directors. *Jones v. Osgood et al.*, 6 Blatch. 435.—BLATCHFORD, 1869.

66. "It is well settled that neither the act of Congress of 1839 nor Rule 47 of the court enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and that the objection may be taken at any time upon the hearing or in the appellate court." *Florence Sewing Mach. Co. v. Singer M'fg Co.*, 8 Blatch. 113.—WOODRUFF, 1870.

67. Three parties jointly made a license to a

fourth upon a certain condition. Said licensee, the complainant, and one of the licensors were within the territorial jurisdiction of the court, but the other two of the licensors were not. *Held*, that the court could not proceed.—*Id.*

68. "An interest in the net proceeds of collections under a patent does not necessarily amount to legal ownership of the patent itself." *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

69. A, owner of a patent, conveyed to B the entire interest in this patent except the right to manufacture the patented machines in certain counties. *Held*, that B was the proper party to bring suit for infringement. *Chambers v. Smith et al.*, 5 Fish. P. C. 12.—MCKENNAN, 1870.

70. A conveyance under a patent contained a provision that the maker did "assign and transfer to the said firm of Treadwell & Perry all the right, title, and interest which the said Littlefield possessed, and which he might thereafter possess, to the aforesaid invention, improvement or patent, or the patent or patents that might be granted for said invention or any improvements therein, and in the extension or extensions thereof, within and throughout the district and territory embraced within the states of New York and Connecticut, for and during the term for which the aforesaid patents were granted, and the terms for which any patent for the aforesaid improvement, and any other improvement or improvements thereof, or for any extensions of either thereof, might be granted, either to the said party of the first part or his heirs, executors, administrators, or assigns, to manufacture and sell the same within the states of New York and Connecticut." It was held that the grantee might bring suit in his own name. *Perry v. Corning et al.*, 7 Blatch. 195.—WOODRUFF, 1870.

71. In the suit for the annulment of a patent, "the fact that the suit is instituted on the behalf of the United States by the person who is district attorney, and that he acts as such in instituting the suit on behalf of the United States, must appear by the face of the bill or declaration, or the pleading will be held bad." *United States v. Dougherty*, 7 Blatch. 424.—BLATCHFORD, 1870.

72. The seats complained of as infringements were put into the public schools of the city of Brooklyn by direction of the Board of Education. *Held*, that suit would not lie against the city, but would lie against the Board of Education. *Allen v. City of Brooklyn*, 8 Blatch. 535.—BENEDICT, 1871.

73. The act of the Legislature of New York,

passed March 27th, 1862, Section 39, did not relieve the city of Brooklyn from liability for infringement of a patent. *Bliss v. City of Brooklyn*, 8 Blatch. 533.—BENEDICT, 1871.

74. "Want of parties not . . . set up or suggested in the defendants' answer cannot avail, unless the case is one in which the court cannot proceed to a decree between the parties before the court, without prejudice to the rights of those who are proper to be made parties, but who are not brought into the court." *Wallace et al. v. Holmes et al.*, 9 Blatch. 65.—WOODRUFF, 1871.

75. "No one but the Government, either in its own name or the name of its appropriate officer, or in some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the Government has issued to an individual, except in cases provided for in Section 16 of the act of July 4th, 1836." *Mowry v. Whitney*, 14 Wall. 434.—SUP. CT. 1871.

76. "Section 16 of the patent act of 1836 seems to have in view the same distinction made by the common law in regard to annulling patents, for while it authorizes individuals claiming under conflicting patents, covered by a patent already issued, to try the conflicting claim in Chancery, and authorizes the court to annul or set aside a patent so far as may be found necessary to protect the right, the suit by individuals is limited to that class of cases. And it is provided that the decree shall be of no validity except between parties to the suit. The general public is left to the protection of the Government and its officers."—*Ib.*

77. The complainants and patent owners had, previous to the present suit, conveyed to third parties all their interest in the patent in suit, in and for the state of Massachusetts, except the right to build the patented machines. Defendants contended that the proper parties were not before the court as complainants. The bill charged that defendants had made the patented machines in violation of complainants' rights under the patent. *Held*, that the bill could be maintained for that infringement, even if it were necessary to join other parties as complainants in a bill alleging infringement only by vending and using. *Sanford et al. v. Messer et al.*, 1 Holmes, 149.—SHEPLEY, 1872.

78. "Unquestionably a contract for a purchase of a portion of the patent right may be good between the parties as a license, and enforced as such in the courts of justice; but the legal right in the monopoly remains in the patentee, and he

alone can maintain an action against a third party who commits an infringement upon it."—*Ib.*

79. In equity the general rule has always been that all parties materially interested in the subject-matter of the suit must be made parties to the bill. *Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co. et al.*, 110 Mass. 1.—CHAPMAN, 1872.

80. A licensee in Massachusetts sought relief, by equity suit, in a Massachusetts state court, against a corporation. Two other organizations located outside of Massachusetts were the licensors; the court held that the suit might proceed, although the two corporations located outside of Massachusetts were not served with process.—*Ib.*

81. Where two parties have been jointly infringing, and one of them has a release, such release does not discharge the other infringer. *Ingels v. Mast*, 6 Fish. P. C. 415.—SWING, 1873.

82. "It cannot be admitted that one party to a suit can pay the fees of counsel on both sides, both in the court below and on appeal, without being held to have such control over both the preparation and argument of the cause as to make the suit merely collusive in both courts. It can make no difference that the counsel fees were charged to the party apparently though not really liable to pay them, and payment from the other party procured through him. This, indeed, is a circumstance against the party who pays the fees, rather than in his favor." *Gardner v. Goodyear Dental Vulcanite Co. et al.*, 6 Fish. P. C. 329.—SUP. CT. 1873.

83. A conveyance under a patent for printing-presses conveyed "the exclusive right to use, rent, and vend said presses in the county of Worcester, and in the state of Rhode Island." Thereof the court said: "Such a contract clearly gives the licensee no right of action for an infringement of the patent." *Hill et al. v. Whitcomb et al.*, 1 Holmes, 317.—SHEPLEY, 1874.

84. "To enable the purchaser to sue, the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself as well as others. Any assignment short of this is a mere license, and the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it."—*Ib.*

85. Where, pending a suit against a copartnership for infringement, one partner dies, his death is to be suggested on the record and the suit proceed against the survivors, it not being necessary to cite in the administrator or executor

of the deceased. *Troy Iron & Nail Factory v. Winslow et al.*, 11 Blatch. 513.—WOODRUFF, 1874.

86. "An exclusive license to manufacture for a special use or purpose is not an assignment of the patent, which renders the joinder of the patentees in a suit for infringement improper. It is not within the definition of an assignment in the statute. It does not convey the patent, or any specified territory within which the licensee has the exclusive right to make, vend, or use, and is not within any case which it has been held even that the licensee could sue without joining the person in whom the legal title to the patent is vested, still less with any case holding that the latter may not join in the suit in equity; and, in general, one who has granted an exclusive license has an interest in sustaining the right and protecting his license. Presumptively his own rights would be affected by an adverse adjudication, if called on by the licensee to defend his license." *Dorsey Revolving Harvester Rake Co. et al. v. Bradley M'f'g Co.*, 12 Blatch. 202.—WOODRUFF, 1874.

87. Where respondents are sued as a partnership, it may be doubtful whether it would be competent for the court to enter a decree against them as a corporation, but such a pleading may be cured by an amendment. *Needham v. Washburn et al.*, 4 Cliff. 254.—CLIFFORD, 1874.

88. A licensee may maintain a suit for infringement against his licensor. *Littlefield v. Perry*, 21 Wallace, 205.—SUP. CT. 1874.

89. The "power of assignment has been so construed by the courts as to confine it to the transfer of an entire patent, an undivided part thereof, or the entire interest of the patentee, or undivided part thereof, within and throughout a certain specified portion of the United States. One holding such an assignment is an assignee within the meaning of the statute, and may prosecute in the Circuit Court any action that may be necessary for the protection of his rights under the patent."—*Id.*

90. "A mere licensee cannot sue strangers who infringe. In such case redress is obtained through of in the name of the patentee or his assignees."—*Id.*

91. A bill for infringement may be properly brought by the assignor and the owner of a patent, joining with him an assignee who is beneficially interested therein. *Anthony et al. v. Carroll*, 2 Bann. & Ard. 195.—SHEPLEY, 1875.

92. "An assignment of past profits and damages for the infringement of a patent, when made in connection with the transfer of the title of the patent itself, courts of equity will uphold,

and the modern doctrine in courts of equity is that if the assignment be absolute and unconditional, and there is no remaining title or interest in the assignor to be affected by the decree, the assignor is not a necessary party." *Henry v. Francetown Soapstone Stove Co.*, 2 Bann. & Ard. 221.—SHEPLEY, 1876.

93. A bill for a discovery will not lie against a corporation, although, in order to compel a discovery on oath, the officers of the corporation must be made parties; otherwise the answer is put in under the common seal. *Vaughan v. East Tenn., Va. & Ga. R. R. Co.*, 1 Flippin, 621.—BROWN, 1877.

94. Where there are different parties upon the same side in a suit, and all are called upon to make answer, some properly and some improperly, those who are called upon must answer. *Brandon M'f'g Co. v. Prime et al.*, 14 Blatch. 371.—WHEELER, 1871.

95. In an original bill, as it was framed, certain parties did not appear to be necessary parties, but, when the facts set up in the cross-bill appeared, they became so. The court said: "When the orator in the cross-bill resorts to it for defence and relief, and makes it appear that they are not only proper but necessary parties to the litigation, the orator not only might but ought to make them parties."—*Id.*

96. "A court of equity will not entertain a bill of the assignee of a strictly legal right merely upon the ground that he cannot bring his suit in his own name, unless it appears that the assignor prohibits or prevents such action from being brought in his own name; or that the action, if brought, would not afford the assignee an equitable remedy." *Walker et al. v. Brooks et al.*, 125 Mass. 241.—GRAY, 1878.

97. In equity the bankruptcy of a party and the appointment of an assignee does not abate pending suit, but calls for a supplementary bill, citing in the assignee. This can be avoided by a reconveyance to the complainant in suit. *Gear v. Fitch*, 3 Bann. & Ard. 573.—LOWELL, 1878.

98. A licensee may maintain a suit against his licensor, and all parties claiming under the licensor, to prevent infringement of the patent. *Perry v. Littlefield et al.*, 17 Blatch. 272.—BLATCHFORD, 1879.

99. The Board of Education of the city of New York bought and used infringing school seats. The city was held liable. *Allen v. City of New York et al.*, 17 Blatch. 350.—WHEELER, 1879.

100. "One principal ground of a suit in equity for the infringement of a patent is, to compel an account of the gains or profits accrued to those



proceeded against by means of the infringement. Obviously, the proper party to proceed against is the one that has received the profits or to whom the gains have accrued."—*Ib.*

101. "The initial litigation, for the purpose of asserting and sustaining the validity of a patent, should be between the patentee and infringing manufacturers. After a patent has been judicially sustained in a suit, then the patentee should have the full aid of the courts to suppress the sales of infringing goods." *Irwin et al. v. McRoberts et al.*, 4 Bann. & Ard. 411.—BLDGGETT, 1879.

102. Where a patent issues to a party he is to be taken to be the owner unless the contrary is made to appear. *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 17 Blatch. 208.—WHEELER, 1879.

103. Where a complainant owns but half of the patent in suit, and there is no objection made because of non-joinder, complainant's title is sufficient to maintain the suit for the protection of its interest.—*Ib.*

104. "Can an exclusive licensee maintain a bill in equity for infringement without joining the patentee? And can the patentee maintain one without joining the licensee?" The court answered both these questions in the negative. *Hammond v. Hunt et al.*, 4 Bann. & Ard. 111.—LOWELL, 1879.

105. A licensee cannot sue in equity without joining with him, as plaintiff, the owner of the legal title. *Nelson v. McMann et al.*, 16 Blatch. 139.—BLATCHFORD, 1879.

106. Complainant held a *process* patent for manufacturing flour, and sold to another party "the exclusive right to manufacture and sell rolls for crushing grain or middlings, . . . which right or process to manufacture and sell rolls is secured to me by said patent." Held, that complainant had the right to sue in his own name for infringement. *Downton v. Yaeger Milling Co.*, 3 McCrary, 414.—DILLON, 1879.

107. Serious doubt expressed whether a court has power to vacate or modify a decree at the instance of a stranger to the suit. Motion to such effect was denied. *Washburn & Moen M'fg Co. v. Coldwell Steel Barb Fence Co. et al.*, 1 Fed. Rep. 225.—SHIPMAN, 1880.

108. "In all cases where the assignment does not pass the legal title, and is not absolute and unconditional, or there are remaining rights or liabilities of the assignor which may be affected by the decree, he is a necessary party." *Cook et al. v. Bidwell*, 20 O. G. 1083.—ACHESON, 1879.

109. "The party in interest must bring the

suit, whether at law or in equity, in his own name, and cannot delegate the right to another person, when the suit is not for the benefit in any way of such other person. It is a question of public policy." *Goldsmitt et al. v. Am. Paper Collar Co.*, 18 Blatch. 82.—BLATCHFORD, 1880.

110. "It is the province of the court to take proofs and render decisions only between parties litigant before it, and in respect to claims brought against parties, and to issues actually raised." A decree will not be modified at the instance of third parties. *Page et al. v. Holmes B. A. T. Co.*, 18 Blatch. 118.—BLATCHFORD, 1880.

111. "Conveyances *pendente lite* do not at all affect a litigation between the parties to an original controversy, unless there are special statutes or circumstances to control; but courts of justice, even courts of law and especially courts of equity, often protect the rights of the real owners to the fruits of a recovery as against those who are nominal but not real owners, wherever their rights may have been acquired." *Campbell v. James et al.*, 18 Blatch. 92.—WHEELER, 1880.

112. "It is not important in equity proceedings, for every purpose, that all the parties to the controversy should be upon opposite sides in the formal proceedings. It is sufficient that there are citizens of different states on opposite sides of the dispute, although not on opposite sides in the pleadings, for the removal of the cause to the federal courts."—*Ib.*

113. In the United States Circuit Court for the Southern District of New York [the laws of New York permitting a married woman to hold property of all sorts the same as an unmarried woman], a married woman may bring suit in equity for infringement of her patent without joining her husband. *Lorrillard v. Standard Oil Co.*, 18 Blatch. 199.—BLATCHFORD, 1880.

114. A licensor having granted a single license under a patent to five persons, three of the licensees, by agreement with the licensor, surrendered their interests therein to the licensors. Held, that this was permissible by law, and further that said releasors need not be joined as plaintiffs in an action under the license against the licensor. *Schneider v. Thill*, 18 Blatch. 241.—BENEDICT, 1880.

115. A city is liable in its corporate capacity for infringement. *Munson v. Mayor of N. Y.*, 18 Blatch. 237.—WHEELER, 1880.

116. A postmaster is not an "officer of the revenue" within the meaning of Section 989 of the revised statutes, and not entitled to receive the certificate provided for in that section making the Government responsible for the payment

of a recovery [for infringement of patent] had against the postmaster. *Campbell v. James et al.*, 18 Blatch. 196.—BLATCHFORD, 1880.

117. Where the owner of an undivided interest in a patent, refusing to join in a suit with a co-owner, he may be formally made a party defendant. *Onderdonk v. Fanning et al.*, 4 Fed. Rep. 148.—BENEDICT, 1880.

118. Campbell, having brought suit for infringement against James and recovered therein, Secombe, as administrator, brought bill of complaint against Campbell and James, on the ground that Secombe's intestate was the legal or equitable owner of what Campbell had recovered. Bill was demurred to, as to James, and the demurrer was sustained on the ground that complainant had no such title to the patent sued on as would entitle him to have a claim against James. *Secombe, Adm'r, v. Campbell et al.*, 5 Fed. Rep. 804.—WHEELER, 1880.

119. Infringement by the corporate fire department of a city is infringement by the city. *Brickill et al. v. New York*, 18 Blatch. 273.—WHEELER, 1880.

120. A corporate Board of Education of New York City was sued for infringement; the Legislature provided a successor to the board under a new name, and then another; meanwhile the cause proceeded to hearing on merits and decree. Then the final successor filed an answer, as if it were a new party. The answer was ordered off the files. *Allen v. New York*, 18 Blatch. 239.—WHEELER, 1880.

121. The former owner of the patent, now sued on, sued certain parties other than the present for infringement, who justified as licensees under another patent and prevailed, the owner of the said other patent voluntarily paying the expenses of said former suit. The parties now sued were also licensees under said other patent. Held, that the parties in the present suit were not bound by said former adjudication. *U. S. Stamping Co. v. Jewett et al.*, 18 Blatch. 469.—BLATCHFORD, 1880.

122. A third party, having an interest in the event of the suit, having filed a disclaimer of his interest, it was held that he need not be joined as a complainant. *Graham v. Geneva Lake Crawford M'fg Co.*, 1 Fed. Rep. 138.—DYER, 1880. *Graham v. McCormick et al.*, 10 Bissell, 39.—DRUMMOND, 1880.

123. Where parties combine to defend a suit for infringement of patent against one of their number, and contribute to the expenses of that defence, they are all bound by the decision in that suit. *Miller et al. v. Liggett & Myers Tobacco Co.*, 2 McCrary, 375.—MCCRARY, 1881.

124. Example of joinder of a new party as complainant at a late stage of the case. *Patterson et al. v. Stapler*, 7 Fed. Rep. 210.—NIXON, 1881.

125. Where a patentee has sold the exclusive right to the use of the patent, for a term of years less than the term of the patent, reserving shop-rights to the patentee, the latter has an interest in the patent which enables him to proceed against an infringer. *Still et al. v. Reading et al.*, 4 Woods, 345.—TURNER, 1881.

126. "The granting of the reissue to the plaintiff is sufficient proof of his title to sue." *Wooster v. Clark et al.*, 9 Fed. Rep. 854.—BLATCHFORD, 1881.

127. "The mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute." *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1881.

128. Doubtful that a suit for infringement of patent can be sustained against a public officer who has acted "only for and in behalf of the Government."—*Ib.*

129. A patent owner having assigned the patent to others in trust, he need not be joined as co-complainant in a suit for infringement of the patent. *Wescott et al. v. Wayne Agricultural Works et al.*, 11 Fed. Rep. 298.—GRESHAM, 1882.

130. "The right to recover for infringement of a patent, like other choses in action, is assignable in equity, and the real owner of the right is entitled to maintain a suit upon it in equity in his own name." *Shaw v. Colwell Lead Co.*, 20 Blatch. 417.—WHEELER, 1882.

131. Where an assignment carries with it the right to recover for past infringements, the assignee may maintain an action for such past infringements. *Consolidated Oil Well Packer Co. v. Eaton, Cole & Burnham Co.*, 12 Fed. Rep. 865.—SHIPMAN, 1882.

132. A conveyance on which complainant's right to sue rested conveyed to certain parties "and their legal representatives the exclusive right to manufacture and sell my invention in the United States, to the full end of the term for which said letters-patent were granted." It was held that this passed a title upon which complainant might sue in equity. *Nellis v. Pennock M'fg Co.*, 22 O. G. 1131.—MCKENNAN, 1882.

133. When the parties to a conveyance have, by their acts, put a construction upon the conveyance, it is out of place for an entire stranger to the contract to seek to circumscribe its scope by a technical limitation of the spirit and sense

which the parties impress upon the contract.—*Id.*

134. By the court: "I am of opinion that the only persons who can be held for damages are those who should have taken a license, and that they are those who own or have some interest in the business of making, using, or selling the thing which is an infringement; and that an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement." *United Nickel Co. et al. v. Worthington et al.*, 13 Fed. Rep. 392.—LOWELL, 1882.

135. Application for mandamus to compel a patent to issue should not run against the Commissioner of Patents, but against the Secretary of the Interior. *United States v. Comm'r of Patents*, 22 O. G. 1365.—CARTTER, 1882.

136. While an assignee of a claim for damages for infringement of a patent cannot, perhaps, at common law, maintain a suit in his own name for such damages, he can do so under the statutes. *Spring et al. v. Domestic Sewing Mach. Co.*, 13 Fed. Rep. 446.—NIXON, 1882.

137. By the court: "Any person to whom a part of a patent has been assigned may maintain the suit alone for the protection of his own interest. The right of the partial owner will not be disputed; subject nevertheless to a limitation that in such a case he must make his co-partners in the ownership defendants in the suit."—*Id.*

138. Members of a partnership can be sued as infringers individually. *Tyler v. Galloway et al.*, 21 Blatch. 66.—BLATCHFORD, 1882.

139. The secretary of a voluntary association in the nature of a copartnership who is not a shareholder in the association is not individually liable for an infringement committed by the partnership.—*Id.*

140. By the court: "The motion of complainant to amend his bill by alleging that the defendants were severally president, secretary, and directors of the association, is denied. If intended to aid the suit as one against the defendants individually it is unnecessary. If intended to make the suit one against the association as a whole, the complainant cannot now be allowed to put this suit into that shape."—*Id.*

141. "The rule is unquestioned that where one person has the legal title to the patent and another an equitable right therein, both must be made parties to the suit in action in equity to restrain infringement." *Gamewell F. Alarm Tel. Co. v. Brooklyn*, 22 O. G. 1978.—WALLACE, 1882.

142. Complainant's title was a conveyance

which vested it with the exclusive right to make, use, and vend the patented invention, for building and operating telegraph wires and instruments for fire alarm and police and other municipal intelligence, within any city or village in the United States. It was held that this title was not sufficient to permit complainant to sue for infringement of patent.—*Id.*

142. The allegation in the bill being that "the patentee, for a valuable consideration, entered into a written agreement with the complainant, whereby the patentee granted unto said complainant the sole and exclusive right to sell said patented articles within a certain specified territory," it was held that complainant did not have a title allowing him to sue for infringement. *Ingalls et al. v. Tice*, 22 O. G. 2160.—WALLACE, 1882.

144. A decree of infringement procured by collusion will be vacated at the instance of an interested third party. *Barker v. Todd*, 15 Fed. Rep. 265.—WALLACE, 1882.

145. The assignee of a patentee's claim for infringement brought suit in equity, in his own name, after the expiration of the patent, to collect the damages. The court said: "The single question remains whether the assignee of a chose in action may proceed by bill in equity to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name? . . . In the present case the complainant had a plain and adequate remedy at law by an action in the name of Allen, whose willingness to permit his name to be so used, in accordance with his agreement to that effect, is manifest from the fact that in the original bill he was named as one of the complainants." Bill dismissed. *Hayward v. Andrews et al.*, 106 U. S. 272.—SUP. CT. 1883.

146. The president of a corporation may be sued as party defendant with the corporation, and held as such. *Lewis v. Standard Steam Laundry Mach. Co. et al.*, 21 Blatch. 184.—WHEELER, 1883.

147. Where it was sought to charge the parties who rented the premises to the actual manufacturers as infringers, the rent being a percentage of the net sales, the court said: "The fact that they receive ten per cent of the net sales by way of rent does not give them such an interest in the try-squares or in the business that they are responsible for the profits of the manufacturer." *Starrett v. Athol Mach. Co. et al.*, 14 Fed. Rep. 910.—LOWELL, 1883.

148. Complainant was licensed by the patentees to manufacture the patented article for the term of ten years, and to sell the same. *Held*,

on demurrer, that such a licensee cannot sue for infringement in his own name in the absence of a showing that he is unable to have the patentee join in the suit. *Wilson v. Chickering et al.*, 14 Fed. Rep. 917.—LOWELL, 1883.

149. By the court: "I do not definitely understand that *Campbell v. James*, 104 U. S. 356, definitely decided that a bill in equity will not lie against an officer of the United States for his unauthorized use of a patent solely in the service of the Government." *Forehand et al. v. Porter*, 15 Fed. Rep. 256.—SHIPMAN, 1883.

150. Where a corporation is the real defendant, and an account of profits and an injunction against the further use of the patented invention is wanted, the suit must run against the corporation in its corporate capacity, and not against a part only of its stockholders and directors individually. *Ambler v. Choteau et al.*, 107 U. S. 586.—SUP. CT. 1883.

151. The devisee or legatee of a deceased person does not take any title to a patent which the deceased held as administratrix. *Pelham v. Edelmeyer*, 21 Blatch. 188.—WALLACE, 1883.

152. When the evidence discloses that the complainant has no interest in the patent, the bill will be dismissed therefor, at the hearing on the merits.—*Ib.*

153. The appearance of a solicitor for the defendant generally is of itself only an appearance for those defendants who have in some manner been served with process. *Smith v. Standard Laundry Mach. Co.*, 25 O. G. 393.—WHEELER, 1883.

154. If a party named as defendant makes answer to the bill he becomes a party in fact, though not properly served with process.—*Ib.*

155. When a party named as defendant in the bill is the owner of the whole stock in a corporation also named as defendant in the bill, the pretext that he is "doing business in the name of the corporation is too flimsy to shield him from accounting."—*Ib.*

156. Where a defendant is personally named in a bill and specially interrogated, he is made personally responsible, even though the bill names a corporation as another party, and names said defendant as president of said corporation.—*Ib.*

157. By the court: "No objection having been taken by demurrer, or the answer, to the non-joinder of the other two owners of this license, such non-joinder cannot now be insisted to defeat a decree." *Adams et al. v. Howard et al.*, 22 Blatch. 47.—WALLACE, 1884.

158. In a case where the complainants of

record own but a part of the patent sued on, the recovery of damages and profits must be limited to such part.—*Ib.*

159. The right of a party to prosecute an equity suit for infringement survives to his legal representatives. *Ill. Cent. R. R. Co. v. Turrill*, 4 Sup. Ct. Rep. 5.—SUP. CT. 1884. 110 U.S.

160. For a case wherein complainant was owner of only an undivided interest in the patent in suit, and made his co-owners defendants with the real defendant, see —. *Gibbs v. Hoefner et al.*, 22 Blatch. 36.—COXE, 1884.

161. In an action for infringement of patent against a company and two of its officers, if the officers have participated in the infringement they are liable as infringers, though acting simply as officers of the company in doing it. *Nat'l Car B. Shoe Co. v. Terre Haute Car & M'fg Co. et al.*, 19 Fed. Rep. 514.—WOODS, 1884.

162. "A licensee of a patent cannot bring a suit in his own name at law or in equity for its infringement by a stranger. An action at law for the benefit of the licensee must be brought in the name of the patentee alone; a suit in equity may be brought by the patentee and licensee together." *Birdsell et al. v. Shaliol et al.*, 112 U. S. 485.—SUP. CT. 1884.

163. "In a suit in equity, brought by the patentee alone, if the defendants seasonably objected to the non-joinder of the licensee, the court might . . . order him to be joined. But when a suit in equity has been brought and prosecuted in the name of the patentee alone, with the licensee's consent and concurrence, to final judgment, from which, if for too small a sum, an appeal might have been taken in the name of the patentee, we should hesitate to say that the licensee, merely because he was not a formal plaintiff in that suit, could bring a new suit to recover damages against the same defendant for the same infringement."—*Ib.*

164. Where a bill of complaint is brought for the infringement of a patent, and fewer parties are named as complainants than ought to have been, and an objection to the non-joinder is not taken by the answer, and the case proceeds to a final decision, and it is possible to save and preserve the rights of the non-joined parties, the case will not be interfered with by reason of an objection to the non-joinder not made until the hearing is reached. *Adams et al. v. Howard et al.*, 23 Blatch. 27.—WALLACE, 1884.

165. A suit was brought against Joel Whitney and Arthur E. Whitney, doing business under the name and style of Arthur E. Whitney. The son, Arthur E. Whitney, was shown to be simply an employé, and the case was dismissed

as to him. *McDonald v. Whitney et al.*, 24 Fed. Rep. 600.—COLT, 1885.

166. A bill of complaint disclosed that a corporation was owner of one half of the patent in suit. The suit was brought in the name of the receiver. It was held that he had no title to maintain an action in his own name. *Dick et al., Rec'r, etc., v. Struthers et al.*, 25 Fed. Rep. 103.—ACHESON, 1885.

167. Where an assignment includes, in terms, all claim for prior infringements, the assignee may sue therefor in his own name. *Adams v. Belaire Stamping Co.*, 33 O. G. 623.—SAGE, 1885.

168. Under Section 4915 of the revised statutes, where there is an opposing party, it is not needful to make the Commissioner of Patents a party. *Graham v. Teter*, 33 O. G. 758.—BRADLEY, 1885.

169. In a proceeding under Section 4915 of the revised statutes, where the inventor has assigned an interest, the assignee should be joined with him.—*Id.*

170. Where it is sought to recover a penalty for improperly stamping an article as patented, it must be proved that the marks were affixed for the purpose of deceiving the public. The acts and beliefs of the officers of a corporation are the acts and beliefs of the corporation. *Tompkins v. Butterfield et al.*, 33 O. G. 758.—NELSON, 1885.

171. A, patentee and owner of his patent, assigned it to B. B subsequently reconveyed to A all of B's right "to apply the invention for the purpose of lighting gas-jets." A subsequently conveyed to C all his right. C brought suit for infringement. It was held that C was a mere licensee, and unable to maintain a suit in his own name. *Bogart et al. v. Hinds*, 33 O. G. 1268.—COXE, 1885.

172. Where a person has simply a license to use a patent for a specific purpose, he, alone, cannot maintain action for infringement. *Cottle v. Kremenz et al.*, 25 Fed. Rep. 494.—COXE, 1885.

173. The owner of a patent conveyed it to the complainant, reserving the right to himself to use and to license others to use the process patented, "to mash an aggregate of four thousand bushels of grain in each and every twenty-four hours, and convert the same into distilled spirits," and also to license proprietors of certain specified distilleries to use the patented process. It was held that complainant's right was in the nature of a license, and that suit could not be maintained in the complainant's name. *Frankfort Whiskey Process Co. v. Pepper et al.*, 26 Fed. Rep. 336.—WALLACE, 1885.

174. Where a party has a possible reversionary right in a patent, that party may properly be joined as a complainant. *Otis Bros. M'fg Co. et al. v. Crane Bros. M'fg Co.*, 27 Fed. Rep. 550.—BLODGETT, 1886.

175. Complainant had an assignment of a patent from the administrators of his father, the patentee. This assignment stated that the patent had been set off to the widow under state exemption laws, but it also stated that she had assigned it to complainant, and that assignment was produced. Complainant was held to have a good title. *Donoughe v. Hubbard et al.*, 35 O. G. 1561.—BRADLEY, 1886.

176. In a bill against the Commissioner of Patents to cause him to issue a patent, the Secretary of the Interior need not be joined. *Kirk v. Commissioner of Patents et al.*, 37 O. G. 451.—MERRICK, 1886.

177. A patent owner conveyed to a firm, of which she was a member, the exclusive right to make, use, and vend, under the patent, covenanting to prosecute all infringers, but not reserving any right to the damages recovered. The court was of the opinion that under the circumstances suit for infringement should be brought in the name of the firm. *Hermann v. Hermann*, 37 O. G. 892.—BROWN, 1886.

178. "If a corporation is engaged, without license, in the manufacture of an article protected by letters-patent, its acts in that behalf are unlawful, and its managing officers cannot shield themselves from individual liability to an injunction upon the plea that what they have done was done as officers or agents of the corporation, and not in their own behalf as principals." *Iowa Barbed Steel Wire Co. v. Southern Barbed Wire Co.*, 30 Fed. Rep. 123.—THAYER, 1887.

179. Counties in Kentucky are liable for infringements of patents. *May et al. v. Mercer Co.*, 30 Fed. Rep. 246.—BARR, 1887.

180. There is no principle of law, in the absence of any statutory provision, by virtue of which a county in Wisconsin can be held for the infringement of a patent, in an action for a trespass. *May v. Juneau Co.*, 30 Fed. Rep. 241.—BUNN, 1887.

181. "Under the Ohio Code of Procedure, an assignee of a chose in action, being the real party in interest, may sue in his or her own name without joining the assignor." *May v. Logan Co.*, 30 Fed. Rep. 250.—JACKSON, 1887.

182. Counties in Ohio are liable to be sued for infringements of patents.—*Id.*

183. A suit being brought in a state court against A, B, and C, the party C made no con-

test, and suffered a decree *pro confesso*. The parties A and B being beaten, appealed to the Supreme Court of the state; from thence they took writ of error to the United States Supreme Court. A then sought to become a party to the suit. He was held not to have that right. *Marsh v. Nichols*, 120 U. S. 698.—SUP. CT. 1887.

184. A county in Michigan is liable to suit for infringement of a patent. *May v. Saginaw Co.*, 32 Fed. Rep. 629.—BROWN, 1887.

## PATENTS AS PROPERTY.

### CASES.

1. When a patent is void through fraud in its procurement, a promissory note given for an interest therein is void. *Bliss v. Negus*, 8 Mass. 45.—SEDGWICK, 1811.

2. For a patentee to sell an interest in his patent, which he knows to be void, is a fraud for which action will lie. *Bull v. Pratt*, 1 Conn. 342.—SWIFT, 1815.

3. When a patent is void, that avoids a contract to pay money for an interest therein. *Belas v. Hayes*, 5 Serg. & Rawle, 427.—GIBSON, 1819.

4. When a patentee knows his patent to be void and sells a right therein, that fact will avoid a promise to pay money for the sale. *Turner v. Johnson et al.*, 2 Cranch C. C. 287.—CRANCH, 1822.

5. A lack of utility in a patented improvement may avoid a promissory note given for a conveyance of an interest in the patent. *Burnham v. Brewster*, 1 Vt. 87.—HUTCHINSON, 1828.

6. A partial failure in the utility of a patented thing will not avoid a promise to pay money for a conveyance of interest in the patent. *Williams v. Hicks*, 2 Vt. 36.—PADDOCK, 1829.

7. Entire lack of utility in a patented device will avoid a promise to pay money for an interest in the patent. *Dickinson v. Hall*, 14 Pick. 217.—SHAW, 1833.

8. If a patented thing be wholly useless, that will avoid a promise to pay money for an interest in the patent. *Fallis v. Griffith*, Wright, 303.—WRIGHT, 1833.

9. Public use of an afterward patented thing [acts of 1793 and 1800] avoids the patent, and avoids a promise to pay money for an interest therein. *Earl v. Page*, 6 N. H. 477.—UPHAM, 1834.

10. Failure of title in the assignor of a patent right avoids a promise to pay money for the conveyance. *Kernodle v. Hunt*, 4 Blatch. 57.—STEVENS, 1835.

11. When it is shown that a patent is void for lack of novelty, that avoids a promise to pay money for an interest therein. *Cross v. Huntley*, 13 Wend. N. Y. 385.—NELSON, 1835.

12. The sale of a patent imports no warranty of title, and, in the absence of expressions guaranteeing the novelty of the patent, furnishes no basis for a refusal to pay money agreed to be paid for the transfer of the patent. *Hiatt v. Twomy*, 1 De. & B. Eq. 315.—DANIEL, 1836.

13. Recording is essential to the validity of an assignment, and an assignment given by an assignee whose assignment is not recorded is worthless and will not support a promise to pay money therefor. *Higgins v. Strong*, 4 Blackford, 182.—DEWEY, 1836.

14. In an action to recover on a promissory note given for a patent right which the patentee of the note guarantees to be valid, if the patent prove invalid, the consideration for the note fails. *Davis v. Bell et al.*, 8 New Hampshire, 500.—RICHARDSON, 1837.

15. Where promissory notes have been given for an interest in a patent, and have been voluntarily paid with knowledge of all material facts, the payer cannot afterward recover back the money for any failure of consideration. *Stevens v. Head*, 9 Vt. 174.—WILLIAMS, 1837.

16. A void patent is a worthless consideration as a basis for a promissory note. *Head v. Stevens*, 19 Wend. 411.—WILLIAMS, 1837.

17. In an action on a note, where the right in a patent is the consideration therefor, the question of sufficiency of consideration is to be decided by the court and not by the jury. *Pottle v. Thomas*, 12 Conn. 565.—WILLIAMS, 1838.

18. If a patent covers a useful and valuable improvement at the time of its sale, the consideration of a promissory note given therefor is not impeached by showing that subsequent improvements have superseded the patented improvement. *Harmon v. Bird*, 22 Wend. 113.—BRONSON, 1839.

19. In an action to recover money due for an interest for a patent right, a plea which admits existence of the patent but denies its validity is bad. *Bennett v. Martin*, 6 Mo. 460.—TOMPKINS, 1840.

20. Notes given for a void patent right are without consideration and void. Money paid thereon may be recovered back, and equity will enjoin against the payment of such notes. *Darst v. Brockway*, 11 Ohio, 462.—BUCHARD, 1842.

21. A note given for a patent right, which is neither new nor useful, is without consideration and void. *Dunbar v. Marden*, 13 N. H. 311.—WOODS, 1842.

22. "If an assignment be not recorded in the office of the Secretary of State of the United States, a note given to the assignee for such right is invalid for the want of consideration." *McFall v. Wilson*, 8 Blackford, 260, *per curiam*, 1842.

23. A patent that lacks novelty and utility is not a good consideration for a promissory note. *Geiger v. Cook*, 3 Watts & Serg. 266.—SERGEANT, 1844.

24. Lack of utility in a patent will not avoid a promissory note given for an interest in it. *Mulliken v. Latchem*, 7 Blackf. 136.—SULLIVAN, 1844.

25. While a promise to pay money for a patent right may be wholly void by reason of the worthlessness of the patent, a mere lack of utility, in degree, cannot be held to affect such a promise to pay. *Vaughan v. Porter*, 16 Vt. 266.—REDFIELD, 1844.

26. The right to an extension is to be dealt with, after the decease of the patentee, the same as an interest in an original patent, and passes, with other rights of property belonging to him, to the personal representatives as a part of the effects of the estate. *Wilson v. Rousseau et al.*, 4 Howard, 646.—SUP. CT. 1846.

27. Where a patent owner sells his patent, practically guaranteeing its validity as against third parties, in a suit to recover the consideration, he who owes that consideration cannot set up the invalidity of the patent. *Ball v. Murry*, 10 Pa. 111.—ROGERS, 1848.

28. A sold B an interest in a patent, with the election on B's part to return that interest in a certain time, thereupon cancelling the purchase. A's title was defective at the time of making the sale, but he cured the defect within the time allowed B for avoiding the contract. B did not avoid the contract within the time last named, and was held as a purchaser. *Hotchkiss v. Oliver*, 5 Denio, 314.—MCKISSOCK, 1848.

29. Parol evidence is admissible to show that a patented device is worthless, and that therefore the consideration of a note given for an interest in the patent has wholly failed. *Scott v. Sweet et al.*, 2 G. Green, 224.—WILLIAMS, 1849.

30. A sold a machine to B, agreeing that if B had to pay a patent charge, it should be borne by A. A person demanded such charge of B, and B paid it without suit. This was held sufficient to put this charge upon A without B proving that the machine was within the patent. *Orr v. Burnell*, 7 Alabama, 278.—DORGAN, 1849.

31. "It is a mistake to suppose that there can be no right of property until application is made for a patent. There is no right which will give

the inventor an action for infringement of the invention; but the invention, if valuable, is property which may be sold in the market, the inventor undertaking to procure a patent." *Rathbone et al. v. Orr et al.*, 5 McLean, 131.—MCLEAN, 1850.

32. Lack of utility in a patented device will not avoid the payment of a promissory note given for an interest in the patent therefor. *Hardesty v. Smith*, 3 Ind. 39.—PERKINS, 1851.

33. A note given for a patent right is avoided by proving that the patent is void. *Holliday v. Rheem*, 18 Pa. St. 468.—BLACK, 1852.

34. A sold a patent to B, telling him it would be valuable in his business. A sued B for the consideration of the sale, and B set up that the patent was not valuable in his business. The plea was held bad. *Loudon v. Burt*, 4 Ind. 566.—PERKINS, 1853.

35. Where a party has purchased an interest in a patent and realized profit therefrom, and then brings suit to have the contract of sale rescinded and the consideration to be repaid to him, such rescission will not be ordered in the absence of an accounting of the profits made by the party who purchased the interest. *Edmunds v. Meyers et al.*, 16 Ill. 207.—SCATES, 1854.

36. Where A assigns an interest in a patent to B, and B assigns it to C, C cannot have any rescission of the contract between A and B on the ground of wrongdoing between A and B, unless C has been injured thereby. *Edmunds v. Hildreth*, 16 Ill. 214.—SCATES, 1854.

37. The fact that a patented improvement is of but little value will not avoid a promissory note given for an interest in the patent. *Myers et al. v. Turner et al.*, 17 Ill. 179.—CATON, 1855.

38. The sale of a patent without warranty imports no warranty. In order to make any untrue representation of the patent the ground of an action for fraud or deceit, the representation must have been known to be false by him who gave it. *Jolliffe v. Collins et al.*, 21 Missouri, 338.—SCOTT, 1855.

39. Where A has sold an interest in a patent to B, and B has sold an interest in the same patent to C, B cannot set up the failure of the patent to avoid his promise to pay money to A for his interest in the patent. *Thomas et al. v. Quintard*, 5 Duer, 80.—HOFFMAN, 1855.

40. In an action to recover money promised to be paid for an interest in a patent, the invalidity of the patent is not a defence. *Cansler v. Eaton*, 2 Jones' Eq. N. C. 499.—NASH, 1856.

41. Where an interest in a patent is conveyed under an instrument in writing, appurtenant

warranty may be proved by parol testimony. *McClure v. Jeffry*, 8 Ind. 79.—DAVISON, 1856.

42. A promise to pay money for a patent right, when no such patent right exists, is void. *Brown v. Wright*, 17 Ark. 9.—HANLY, 1856.

43. A promissory note given for a patent right, where the patent right proves to be worthless, is void. *Bierce v. Stocking*, 11 Gray, 174, *per curiam*, 1858.

44. In an action to recover money promised to be paid for an interest in a patent, it is competent to show, in bar of the action, that the invention is worthless and the patent void. *McDougal v. Fogg*, 2 Bosworth, 387.—PIERPONT, 1858.

45. Fraudulent representations in the sale of a patent will avoid the sale. *Pierce v. Wilson*, 34 Ala. 596.—RICE, 1859.

46. Where a person has paid money for an interest in a patent which is void of utility, he may recover it back again. *Foss v. Richardson et al.*, 21 Law Rep. 670.—HUNTINGTON, 1859.

47. "Section 10 of the patent act of July 4th, 1836," "recognizes a new and useful invention or discovery made by any one as property which, in case of the death of the inventor without a will, goes to his heirs at law, by a patent in the name of his administrator, as trustees for such heirs at law; and, in case of the death of the inventor leaving a will, goes to the person or persons to whom the same is given by the will, the exclusive right to use the invention being secured to the person or persons to whom such property is given by the will, by a patent in the name of the executor, who is to hold the legal title in trust for the person or persons to whom the property is given by the will." *Stimpson v. Rodgers et al.*, 4 Blatch. 333.—INGERSOLL, 1859.

48. Lack of novelty or utility in a patented device will avoid the payment of a note given for an interest in the patent. *Midkiff v. Boggess et al.*, 15 Ind. 210, *per curiam*, 1860.

49. If a person takes a deed of a patent right, not merely for the purpose of examination, but as a deed vesting the property in him, and having read it, or having appeared to read it, and proceeded to act under it, and made payments on account of it, he cannot recover back the consideration for which the deed stipulated merely because there had been a misunderstanding as to the meaning of the deed as to the extent of the rights conferred. *Foss v. Richardson*, 15 Gray, 303.—HOAR, 1860.

50. In the case of an insured machine destroyed by fire, the fact that such machine was patented is an immaterial fact. *Commonwealth*

*Insurance Co. v. Sennett*, 37 Pa. 208.—THOMPSON, 1860.

51. A partial lack of utility will not avoid the payment of a note given for an interest in the patent, but entire failure of utility will. *Cragin et al. v. Fowler et al.*, 34 Vt. 326.—PIERPONT, 1861.

52. Total failure in a patented thing will avoid a promise to pay money for an interest in the patent thereon. *Hawes v. Twogood*, 12 Iowa, 582.—WRIGHT, 1862.

53. Entire lack of utility in a patented device will avoid the payment of a note given for an interest in the patent. *Lester v. Palmer*, 4 Allen, 145.—DEWEY, 1862.

54. A useless patent right is void as a consideration for a promissory note. *Rowe v. Blanchard et al.*, 18 Wisconsin, 462.—DIXON, 1864.

55. A partial lack of utility in the patent will not avoid a sale of a right in the patent therefor. *Miller v. Young's Administrator*, 33 Ill. 354.—BECKWITH, 1864.

56. Entire lack of utility of the patented thing will not avoid the payment of a note given for an interest in the patent. *Clough v. Patrick*, 37 Vt. 421.—BARRETT, 1865.

57. Entire lack of utility in a patented device will not avoid the payment of a note given for an interest in the patent. *Cowan et al. v. Dodd et al.*, 3 Coldwell, 278.—DEADERICK, 1866.

58. Where, in the sale of a patent, the written instrument evidently contemplates the possibility of invalidity of the patent, such invalidity furnishes no defence to an action for the recovery of the consideration. *Johnson v. Willimantic Linen Co.*, 33 Conn. 436.—BUTLER, 1866.

59. A sold to B, for a certain consideration, a steam-engine with a cut-off which was patented; A had license to make the same. Subsequently B was enjoined against the use of the cut-off under a prior patent. It was held that the value of the cut-off should be deducted from the price of the engine as a whole. *Pacific Iron Works v. Newhall*, 34 Conn. 67.—HINMAN, 1867.

60. In an action on a note given for accrued royalties, the licensee cannot defend on the ground that some other party claims that the patent in question is void. *Davis v. Gray*, 17 Ohio St. 330.—BRINKERHOFF, 1867.

61. A sold to B an interest in an extended patent, B giving his note therefor. In an action on the note, B sought to introduce the Patent Office proceedings upon the application for the extension in order to show the invalidity of the patent, but was not permitted to do so. B also sought to show the invalidity of the patent by the testimony of experts. B was not permitted



to do so. *McMahon v. Tyng*, 14 Allen, 167.—WELLS, 1867.

62. Where a patent is the consideration for a promise to pay money, a lack of utility of the patented device will not avail as a defence. *Leavitt et al. v. Conn. Peat Co.*, 6 Blatchford, 139 —SHIPMAN, 1868.

63. "The titles to patents for inventions are regulated by acts of Congress. By those acts the interest of the patentee passes to the personal representative in the state of the domicile, and remains in him until assignment to the parties beneficially interested therein, or to the vendee thereof in case of sale in course of administration." *Hodge et al. v. North Missouri R. R.*, 1 Dillon, 104.—TREAT, 1869.

64. A false statement, by a patent seller to the buyer, that the invention of the patent he sells is not covered by any other patent, avoids the sale, and the buyer may recover back the money he pays. *David v. Park*, 103 Mass. 501.—GRAY, 1870.

65. In an action on a promissory note given as a part of the consideration for the purchase of a patent right, the defendant may plead in bar to the action that he made the purchase through the false or fraudulent representations of the patent owner, and this defence will avail, even though defendant, on discovering the fraud, did not offer to reassign the right. *Groff v. Housel*, 33 Maryland, 161.—MILLER, 1870.

66. The failure of novelty and utility in a patented article avoids the payment of a note given for an interest in the patent. *First National Bank v. Peck et al.*, 8 Kansas, 660.—BREWER, 1871.

67. Independently of the effect of particular state statutes, "it is not doubtful that a guardian of the person and estate of an infant, appointed by the Court of Probate, has, as incidental to his office and duties, the power to sell personal property of his ward," including the interest of the ward in letters-patent. *Wallace et al. v. Holmes et al.*, 9 Blatch. 65.—WOODRUFF, 1871.

68. Lack of utility or novelty in a patented article will avoid the payment of a note given for an interest in the patent. *Johnson v. McCabe et al.*, 37 Ind. 535.—BUSKIRK, 1871.

69. False and fraudulent representations of the value of the device of a patent will avoid a contract for the sale of an interest therein, and allow the buyer to recover back his money. *Page v. Dickerson*, 28 Wisconsin, 694.—COLE, 1871.

70. A sold to B an interest in a patent, upon payment of \$1,000 to be made within one year, and, in default thereof, B to reassign the inter-

est. The \$1000 was not paid within the year, and shortly afterward B offered to reassign. It was held that B offered to do all he had agreed to do. *Manville v. Holdredge*, 45 N. Y. 151.—ALLEN, 1871.

71. In an action on a promissory note, the maker of the note sought to prove the invalidity of the patent as a defence. It was held that, in order to make this defence effectual, he must prove the prior existence and known use of a machine having the same parts and producing the same result. *Butch v. Boyer*, 8 Philadelphia, 57.—LYND, 1871.

72. "The rights conferred by the patent law, being property, have the incidents of property, and are capable of being transmitted by descent or devise, or assigned by a grant." *Carew v. Boston Elastic Fabric Co.*, 1 Holmes, 45.—SHEP-LEY, 1871.

73. Where a note has been given for an interest in a patent right, the use of the patent is conclusive evidence of value and utility, and payment of the note cannot be avoided. *Cowan et al. v. Mitchell*, 11 Heiskel, 87.—FREEMAN, 1872.

74. The purchasers of a patent right, in the absence of a sample of the patented thing, have a right to rely upon the representations made to them by the seller as to what is covered by the patent. *Rose et al. v. Hurley*, 39 Ind. 77.—DOWNLY, 1872.

75. Entire failure of utility in a patented article will avoid the payment of a note given for an interest in the patent therefor. *Elkins v. Kenyon et al.*, 34 Wisconsin, 93.—COLE, 1874.

76. A license upon royalty given under a worthless patent is without consideration and void. *Jenkins v. Abbott*, 54 N. H. 447.—SMITH, 1874.

77. If a patent is invalid, a promise to pay money for an interest therein is without consideration and void. *Rice v. Garnhart*, 34 Wisconsin, 453.—LYON, 1874.

78. A license upon royalty is avoided by a judicial finding that the patent is void. *Marr-ton v. Swett et al.*, 4 Hun, 153.—LEARNED, 1875.

79. Where a patent owner sells a patent upon a royalty, guaranteeing its validity, and the patent turns out to be invalid, the patent owner cannot recover the royalty. *Hawkes v. Swett et al.*, 4 Hun, 146.—LEARNED, 1875.

80. An inventor, A, applied for a patent, and, pending application, assigned one half thereof to B. B subsequently reassigned to A, pending the application, receiving from A a promissory note. Subsequently the patent issued to B without the approval of the inventor. A thereupon sought to escape the payment of his note. It

was held that he could not. *Clark v. Smith*, 21 Minnesota, 539.—BERRY, 1875.

81. A patent right can be reached for the benefit of a creditor by a creditor's bill, and the same result may be accomplished by proceedings under the code of New York state. *Barnes v. Morgan*, 3 Hun, 703.—BRADY, 1875.

82. Where A, a patent owner, sold to B one fourth of his interest in his patent for \$1000, conditioned that if B did not realize from sales thereunder the said \$1000 within three years, then A would repay the \$1000 upon a reconveyance of B's interest, it was held that B must make reasonable efforts to make sales. *Berger et al. v. Peterson*, 78 Ill. 633.—SMITH, 1875.

83. A mortgage note was given as a consideration for a license under a patent. When the patent expired, the note had not been paid. It was held that the mortgage was valid and might be foreclosed. *Avery v. Bushnell*, 123 Mass. 349.—COLT, 1877.

84. On motion a court may compel a judgment debtor to execute the order of his receiver and make assignment of his letters-patent. *Clan Randal v. Wyckoff*, 41 N. Y. Superior, 527.—FREEDMAN, 1877.

85. A subscribed for shares in B's patent without being held to payment therefor, the real consideration being that the subscription by A would induce others to purchase shares in the patent. Another did purchase shares in the patent, and gave his notes therefor. The notes came into the hands of A. It was held that they were good in the hands of A. *Lane v. Smith*, 68 Me. 178.—DICKERSON, 1878.

86. Where a patent is void, a promise to pay money for an interest therein is void. *Harlow v. Putnam et al.*, 124 Mass. 553.—SOULE, 1878.

87. A patent right cannot be, by law, levied upon and sold under execution. *Campbell v. James et al.*, 18 Blatch. 92.—WHEELER, 1880.

88. "The incorporeal and intangible right of an inventor or an author in a patent or copyright may not be taken on execution at law; and a general assignment of his property, under a bankrupt or insolvent act, will either by its own effect pass his right to the assignee in bankruptcy or insolvency, or will at least entitle the latter by proper procedure to assign the same." *Carver v. Peck*, 131 Mass. 291.—GRAY, 1881.

89. "Patent rights of a bankrupt pass by act and operation of law to his assignees in bankruptcy for the benefit of creditors."—*Id.*

90. The rights of a patentee in his patent may be sold under a decree of a court and the proceeds applied to the payment of his debts; an injunction may be granted to restrain the pat-

entee from selling or assigning the patent during the pendency of the suit, and the patentee may be compelled to execute such assignment of the patent to the purchaser as may be necessary to vest the title in conformity with the patent laws of the United States. *Murray v. Ager et al.*, 20 O. G. 1311.—HAGNER, 1881.

91. "A patent right may be ordered by a court of equity to be sold and the proceeds applied to the payment of a judgment debt of the patentee." *Ager et al. v. Murray*, 105 U. S. 126.—SUP. CT. 1882.

92. Complainant sought by bill in equity to have defendant's patent applied to the payment of a debt due from defendant to complainant. Both were citizens of the same state, and bill was dismissed for want of jurisdiction. *Ryan v. Lee*, 10 Fed. Rep. 917.—TREAT, 1882.

93. By the court: "Whatever right to use the patented machine a defendant, in an execution, may have, passes with the machine when sold by the sheriff to his vendee." *Wilder v. Kent et al.*, 23 O. G. 831.—ACHESON, 1882.

94. The devisee and legatee of a deceased person does not take any title to a patent which the deceased person had as administratrix. *Pelham v. Edelmeyer*, 21 Blatch. 188.—WALLACE, 1883.

95. "A patent right, like any other personal property, is understood by Congress to vest in the executor and administrator of the patentee, if he has died without having assigned it." *Shaw Relief Valve Co. v. New Bedford*, 19 Fed. Rep. 753.—LOWELL, 1884.

96. On the death of a patentee, his patent becomes the property of his heirs, to be disposed of by the administrator or executor. *Bradley et al. v. Dull et al.*, 19 Fed. Rep. 913.—ACHESON, 1884.

97. Ownership and interest in a patent descends to the administrator and not to the heirs, and is to be administered as is all other personalty of the deceased. *Hewitt et al. v. Pa. Steel Co.*, 31 O. G. 1687.—BUTLER, 1885.

98. A bill in equity was brought to subject a patent right to the payment of complainant's judgment debt. Subsequent to the rendition of the judgment for the debt, the defendant, Dixon, assigned the patent in question to his daughter, under circumstances tending to show that the transfer was simply a cover. The patent was held for the debt, in the daughter's hands. *Gorrell v. Dickson et al.*, 26 Fed. Rep. 454.—ACHESON, 1886.

99. "A patentee's right of action for an infringement of his patent survives to his personal representatives; and it is well settled that his executor or administrator may not only sue on

such cause of action, but may assign or transfer the same to another. A patent right, with all the incidents arising from infringements thereof, is personal property, and goes, upon the death of the patentee, assignee, or grantee, to his executor or administrator." *May v. Logan Co.*, 30 Fed. Rep. 250.—JACKSON, 1887.

# PATENT OFFICE EMPLOYEE.

## "PATENT OFFICE EMPLOYEE" IN THE PATENT ACTS.

Act approved July 4th, 1836.

SECTION 2. *And be it further enacted*, . . .

"Said Commissioner, clerks, and every other person appointed and employed in said office, shall be disqualified and interdicted from acquiring or taking, except by inheritance, during the period for which they shall hold their appointments, respectively, any right or interest, directly or indirectly, in any patent for an invention or discovery which has been, or may hereafter be granted." [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 16. *And be it further enacted*, That all officers and employes of the Patent Office shall be incapable, during the period for which they shall hold their appointments, to acquire or take, directly or indirectly, except by inheritance or bequest, any right or interest in any patent issued by said office. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 480. All officers and employes of the Patent Office shall be incapable, during the period for which they hold their appointments, to acquire or take, directly or indirectly, except by inheritance or bequest, any right or interest in any patent issued by the office.

## CASES.

1. He who makes an invention while in the employ of the Patent Office may properly patent it after he leaves that employment. *Foot v. Frost et al.*, 3 Bann. & Ard. 607.—LOWELL, 1878.

2. As soon as employment in the Patent Office ceases, the ex-employé "is in the same position," as to procuring patents for any of his inventions, "as if he had never been in such employment." *Page et al. v. Holmes Burglar Alarm Tel. Co.*, 17 Blatch. 484.—BLATCHFORD, 1880.

# PATENTABLE SUBJECT-MATTER.

## "PATENTABLE SUBJECT-MATTER" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 1. This section makes patentable

"any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used," etc. [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 1. This section makes patentable "any new and useful art, machine, manufacture, or composition of matter," etc. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 6. This section makes patentable "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter," etc. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 24. This section makes patentable "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof," etc. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4886. This section makes patentable "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof," etc.

## CASES.

1. "A patent can in no case be for an effect only, but only for an effect produced in a given manner, or by a peculiar operation." *Whittemore et al. v. Cutter*, 1 Gall. 478.—STORY, 1813.

2. "Principles" means not elementary principles of motion [wheels, etc.] but *modus operandi*, the peculiar device or manner of producing any given effect.—*Id.*

3. A mere abstract principle is unsusceptible of appropriation by patent. *Evans v. Eaton*, 1 Peters's C. C. 322.—WASH. 1816.

4. A discovery of some new principle, theory, or elementary truth, abstracted from its practical application, is not an invention. The discovery must be embodied in something visible, tangible, vendible. *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON and BALDWIN, 1831.

5. "A patent may be for a mode or method of doing a thing."—*Id.*

6. A claim which concludes all modes of doing anything, when the patentee has invented but one mode, is a claim for an abstract principle and is void. *Stone v. Sprague et al.*, 1 Story, 270.—STORY, 1840.

7. A specification said: "It is claimed as new to cut ice of uniform size by means of an apparatus worked by any other power than human." "Such a claim is unobtainable in

"point of law. It is a claim for an act or principle in the abstract." *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

8. "A party may claim to have discovered some new part of a machine which is useful, or some new combination, or, in other words, new arrangement of old parts which is useful. Either is patentable." *Hovey v. Stevens*, 3 W. & M. 17.—WOODBURY, 1846.

9. If from the nature and character of ingredients used, they are not capable of such exact description "as enables the making of the compound to be understood," the inventor is not entitled to a patent. *Wood v. Underhill et al.*, 5 Howard, 1.—SUP. CR. 1847.

10. "The propulsive effect of vertical motion of water in a reacting wheel, operating by its centrifugal force—and so directed by mechanism as to operate in the appropriate direction— . . . is a valid subject of claim, and properly to be secured by letters-patent." *Parker v. Hulme*, 7 West. L. J. 417.—KANE, 1849.

11. "All machines may be regarded as merely devices by the instrumentality of which the laws of nature are made applicable and operative to the production of a particular result. He who first discovers that a law of nature can be so applied, and, having devised machinery to make it operative, introduces it in a practical form to the knowledge of his fellow men, is a discoverer and inventor of the highest grade—not merely of mechanism—the combination of iron, brass, and wood in the form of levers, screws, or pulleys—but of the force which operates through the mechanical medium—the principle, or, to use the synonym given for this term in the act of 1793—the character of the machine, and this title as a discoverer he may lawfully assert and secure to himself by letters-patent; thus establishing his property, not only in the formal device for which mechanical ingenuity can at once, as soon as the principle is known, imagine a thousand substitutes—some as good, others better, perhaps all dissimilar, yet all illustrative of the same principle, and depending on it, but in the essential principle which his machine was the first to embody, to exemplify, to illustrate, to make operative, and to announce to mankind.

"This is not . . . to patent an abstraction, in the sense which this expression has been used in the arguments on the subject. It is rather to patent the invention as the inventor has given it to the world in its full dimensions and extent; nothing less, but nothing more. It is to patent the invention in the broad and general terms that properly express it, and to secure to the party who has made it, the exclusive right, for a limited

time, to precisely that discovery which he has imparted to the public, and which, when that limited time expires, the public will enjoy as the fruit of his mind."—*Id.*

12. "A principle is not patentable. And 'the motive power of the galvanic current, however developed to produce a given result,' can no more be patented than the motive power of steam to propel boats, however applied. The discovery or application of a power in physics can give no monopoly of that power. Electricity and steam were long known as powerful agents in nature before the application of either as a motive power. And neither can be exclusively appropriated, except through the instrumentality of mechanical inventions or combinations which produce a certain result." *Smith v. Ely et al.*, 5 McLean, 76.—MCLEAN, 1849.

13. "There cannot be a patent for a principle nor for the application of a principle, nor for an effect. Two persons may use the same principle, and produce the same effect by different means without interference or infringement, and each would be entitled to a patent for his own invention." *Bain v. Morse*, 6 West. L. J. 372.—CRANCH, 1849.

14. "An invention in mechanics consists not in the discovery of new principles, but in new combinations of old principles." *Tyler v. Deval*, 1 Am. L. T. (N. S.) 248.—MCCALEB, 1848.

15. "What is to be protected is not an abstract or isolated principle, but the embodiment of a principle into a machine or manufacture, as described in the specification; and it is the invention, in conformity to that embodiment or representation of its working, which the acts of Congress will protect." *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

16. "The impropriety of claiming a patent for the invention or discovery of a new principle, however important it may be *per se*, rests on the idea that the exclusive use of the invention for a term of years, is given to the patentee, to reward his genius and expense in making his invention, and pointing out, in his specification, how it can be used beneficially, and the machine, if it be a machine, easily made by any mechanic for general employment. The patent is, in such cases, and must be, in order to possess validity, not for the principle, but for the mode, machine, or manufacture, to carry out the principle and to reduce it to practice."—*Id.*

17. A man may invent and patent an improvement upon a prior patented device, but he may not use his device without a license from the prior patentee.—*Id.*

18. "A principle is not patentable. A princi-

ple, in the abstract, is a fundamental truth ; an original cause ; a motive. These may not be patented, as no one can claim in either of them an exclusive right. Nor can an exclusive right exist to a new power, should one be discovered, in addition to those already known. Through the agency of machinery a new steam-power may be said to have been generated. But no one can appropriate this power exclusively to himself under the patent laws. The same may be said of electricity, and of any other power in nature which is alike open to all, and may be applied to useful purposes by the use of machinery.

"In all such cases the processes used to extract, modify, and concentrate natural agencies constitute the invention. The elements of the power exist ; the invention is not in discovering them, but in applying them to useful objects. Whether the machinery used be novel or consist of a new combination of parts known, the right of the inventor is secured against all who use the same mechanical power, or one that shall be substantially the same.

"A patent is not good for an effect, or for the result of a certain process, as that would prohibit all other persons from making the same thing by any means whatsoever. This, by creating monopolies, would discourage arts and manufactures against the avowed policy of the patent laws.

"A new property discovered in matter, when practically applied in the construction of a useful article of commerce or manufacture, is patentable." *Le Roy et al. v. Tatham et al.*, 14 Howard, 156.—*SUP. CT.* 1851.

19. The patent in suit was for improved lead pipe, and a claim thereof was : "What we claim as our invention, and desire to secure by letters-patent, is the combination of the following parts above described, to wit, the core and bridge or guide-piece, the chamber, and the die, when used to form pipes of metal, under heat and pressure in the manner set forth, or in any other manner substantially the same." This was held to cover patentable subject-matter.—*Id.*

20. The patent in suit was for making lead pipe, and a claim thereof was : "The combination of the following parts above described, to wit, the core and bridge or guide-piece, with the cylinder, the piston, the chamber, and die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other manner substantially the same." *Held*, to be a claim for a combination of mechanical parts ; otherwise not sustainable.—*Id.*

21. "There is no doubt that he who has dis-

covered some new element or property of matter may secure to himself the ownership of his discovery so soon as he has been able to illustrate it practically, and to demonstrate its value. His patent in such a case will be commensurate with the principles which it announces to the world, and may be as broad as the mental conception itself. But, then, the mental conception must have been susceptible of embodiment, and must have been, in fact, embodied in some mechanical device or some process of art. The abstract must have been resolved into the concrete. The patent must be for a thing, not for an idea merely." *Detmold v. Reeves et al.*, 4 Am. L. J. 188.—*KANE*, 1851.

22. "The act of Congress places 'a new and useful art' among the discoveries it proposes to protect, and assigns it to the first place on the list." *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—*KANE*, 1851.

23. "The party cannot get a patent until he perfects it in some sense of the word—that is, until he goes on and makes improvements to render it practical and useful—for it is one element of a machine, necessary to sustain a patent, that it is useful." *Colt v. Mass. Arms Co.*, 1 Fish. P. C. 108.—*WOODBURY*, 1851.

24. "Where a party has discovered a new application of some property in nature, never before known or in use, by which he has produced a new and useful result, the discovery is the subject of a patent, independently of any peculiar or new arrangement of machinery for the purpose of applying the new property in nature ; and hence the inventor has a right to use any means, old or new, in the application of the new property to produce the new and useful result, to the exclusion of all other means." *Foot v. Silsby et al.*, 2 Blatch. 260.—*NELSON*, 1851.

25. "It must be obvious . . . that there is not only a distinction, but a wide difference between one who merely invents a new method or process by which a well-known fabric, product, or manufacture is produced in a cheaper or better way, and the discovery of a new compound, substance, or manufacture having qualities never found to exist together in any other material. In the first case the inventor can patent nothing but his process, and not his composition of matter. In the latter both are new and original, and both patentable—not severally, but as one discovery or invention." *Goodyear et al. v. Central R. R. of New Jersey*, 2 Wall., Jr., 356.—*GRIER*, 1853.

26. The eighth claim in Morse's patent for his electric telegraph was : "I do not propose to limit myself to the specific machinery described

in the foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters, signs, or letters, at any distances, being a new application of that power of which I claim to be the first inventor or discoverer." Thereof the court said: "It is impossible to misunderstand the extent of this claim. He claims the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs, or letters at a distance." And the court held the claim invalid. *O'Reilly et al. v. Morse et al.*, 15 Howard, 62.—SUP. CT. 1853.

27. "Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so clear and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition or subtraction from them, produce precisely the same result he describes. And if this cannot be done by the means he describes the patent is void. And if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy known or unknown before his invention, or by machinery acting altogether upon mechanical principles. In either case, he must describe the manner and process as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end without infringing the patent if he uses means substantially different from those described." —*Id.*

28. "A process, *eo nomine*, is not made the subject of a patent in our act of Congress. It is included under the general term 'useful art.' An art may require one or more processes or machines in order to produce a certain result or manufacture. The term machine includes every mechanical device or combination of devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A

new process is usually the result of discovery; a machine of invention." *Corning et al. v. Burden*, 15 Howard, 252.—SUP. CT. 1853.

29. "The party applying for a patent must be the first and original inventor, and it must also be of such a character as to be capable of application to the advantage and benefit of mankind." *Ransom et al. v. New York*, 1 Fish. P. C. 252.—HALL, 1856.

30. "It is true that a patent cannot be sustained for a mere principle. For instance, Sir Isaac Newton's discovery of the principle of gravitation could not be the subject of a patent. But it is equally true, that a principle may be embodied and applied so as to afford some result of practical utility in the arts and manufactures, and that under such circumstances a principle may be the subject of a patent. It is, however, *the embodiment and the application of the principle which constitutes the grant of the patent*. And it has been justly said 'that the principle so embodied and applied, and the principle of such embodiment and application, are essentially distinct; the former being a truth, of exact science, or a rule of practice, the latter a practice founded upon such a truth, law, or rule.' " *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILSON, 1856.

31. "A patent cannot be supported by proof that the invention was new to the patentees themselves, but the evidence must be satisfactory that they were actually the first and original discoverers of the thing patented." *Carr v. Rice*, 1 Fish. P. C. 198.—BETTS, 1856.

32. "A well-known principle or truth of natural science, as well as a newly discovered one, is patentable to the first applicant of it in the useful arts." *Henry, G. G., in re*, 1 MacArthur's P. C. 467.—MERRICK, 1856.

33. An artificial but healthy compound having the taste and appearance of honey is patentable. *Corbin & Martlett, in re*, 1 MacArthur's P. C. 521.—MORSELL, 1857.

34. "Whoever discovers that a certain useful result will be produced in any art, machine, or composition of matter, by the use of certain means, is entitled to a patent for it." "And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination, or by the application of discoveries or principles in natural philosophy, known or unknown before his invention, or by machinery acting altogether on mechanical principles." *Burr et al. v. Couperthwait*, 4 Blatch. 163.—INGERSOLL, 1858.

35. "However brilliant the discovery of the new principle may be, to make it useful it must

be applied to some practical purpose. Short of this no patent can be granted." *Le Roy et al. v. Tatham et al.*, 22 Howard, 132.—*SUP. CT.* 1859.

36. "You cannot patent a principle; you cannot patent a result; you cannot patent the function of an instrument, but you can patent a machine or manufacture, and when you come to test the question of infringement, the question of principle comes up in this light, What is the mode of operation of the machine you have invented? Because if you find in the machine, which is alleged to be an infringement, the same mode of operation, it is substantially the same." *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—*GILES*, 1860.

37. "A principle is not patentable, but if you discover a principle, and discover a mode of operation, you have a right to your patent for the mode of carrying the principle into effect; and if anybody afterward comes along and takes your principle and takes your mode of operation, substantially, although he varies the form, he is an infringer."—*Ib.*

38. A claim for "imparting a coexisting movement to two reciprocating catch-pieces in the operation of trip cut-off valves," is in terms for an effect or function, and therefore not patentable. *Sickles v. Falls Co.*, 4 Blatch. 508.—*NELSON*, 1861.

39. "Very little light can be shed on our path by attempting to draw a practical distinction between the legal purport of the words 'discovery' and 'invention.' In its naked, ordinary sense, a discovery is not patentable. A discovery of a new principle, force, or law operating, or which can be made to operate, on matter, will not entitle the discoverer to a patent. It is only where the explorer has gone beyond the mere domain of discovery and has laid hold of the new principle, force, or law, and connected it with some particular medium or mechanical contrivance by which, or through which, it acts on the material world, that he can secure the exclusive control of it under the patent laws. He then controls his discovery through the means by which he has brought it into practical action, or their equivalents, and only through them. It is then an invention although it embraces a discovery. Sever the force or principle discovered from the means or mechanism through which he has brought it into the domain of invention, and it immediately falls out of that domain and eludes his grasp. It is then a naked discovery and not an invention." *Morton v. New York Eye Infirmary*, 5 Blatch. 116.—*SHIPMAN*, 1862.

40. "Discovery . . . may be the soul of an

invention, but it cannot be the subject of the exclusive control of the patentee or the patent law until it inhabits a body, no more than can a disembodied spirit be subjected to the control of human laws."—*Ib.*

41. The application of the inhalation of the vapor of ether for producing insensibility does not form proper subject-matter for a patent.—*Ib.*

42. "The beneficent and imposing character of the discovery cannot change the legal principles upon which the law of patents is founded, or abrogate the rules by which judicial construction must be governed. These principles and rules are fixed and influenced by shades and degrees of comparative merit. They secure to the inventor a monopoly in the manufacture, use, and sale of very humble contrivances of limited usefulness, the fruits of indifferent skill and trifling ingenuity, as well as those grander products of the genius which confer renown upon himself and extensive and lasting benefits upon society. But they are inadequate to the protection of every discovery by securing its exclusive control to the explorer to whose eye it may be first disclosed. A discovery may be brilliant and useful and not patentable. No matter through what long, solitary vigils, or by what importunate efforts the secret may have been wrung from the bosom of nature, or to what useful purpose it may be applied, something more is necessary. The new force or principle brought to light must be embodied and set to work, and can be patented only in connection or combination with the means by which, or the medium through which, it operates. Neither the natural functions of an animal upon which or through which it may be designed to operate, nor any of the useful purposes to which it may be applied, can form any essential parts of the combination, however they may illustrate and establish its usefulness."—*Ib.*

43. "It is well settled, and needs no citation of authorities to prove it, that the discovery of a new and abstract principle in the science of mechanics cannot be the subject of a patent." *Tilghman v. Werk*, 1 Bond, 511.—*LEAVITT*, 1862.

44. "Mere discovery of an improvement does not constitute it the subject-matter of a patent, although the ideas which it involves may be new; but the new set of ideas, in order to become patentable, must be embodied into working machinery and adapted to practical use." *White et al. v. Allen*, 2 Clifford, 224.—*CLIFFORD*, 1863.

45. "The intellectual conception of a possible

process, without a potential working of it out, is not patentable. If an inventor merely conceives a mechanical process in his mind, and then sets to work to construct a machine to work that process, and works it out in no other way, and the machine fails to work successfully, then his claim as the inventor of a process is as groundless as his claim as the inventor of a machine." *Union M'fg Co. v. Lounsbury et al.*, 2 Fish. P. C. 389.—SHIPMAN, 1863.

46. "The law requires that the specification 'should set forth the principle and the several modes in which he (the inventor) has contemplated the application of that principle or character by which it may be distinguished from other inventions, and shall particularly point out the part, improvement, or combination which he claims as his own invention or discovery.' We find here no authority to grant a patent for a 'principle,' or a 'mode of operation,' or an *idea*, or any other abstraction. A machine is a concrete thing, consisting of parts, or of certain devices and combinations of devices. The principle of a machine is properly defined to be its 'mode of operation,' or that peculiar combination of devices which distinguish it from other machines. A machine is not a principle or an idea." *Burr v. Duryee*, 1 Wallace, 531.—SUP. CT. 1863.

47. "Because the law requires a patentee to explain the mode of operation of his peculiar machine, which distinguishes it from others, it does not authorize a patent for a 'mode of operation as exhibited in a machine.'"—*Id.*

48. "Inventions pertaining to machines may . . . be divided into four classes: 1. Where the invention embraces the entire machine. . . . Such inventions are seldom made, but when made and duly patented any person is an infringer who, without license, makes or uses any portion of the machine. Under such a patent, the patentee holds the exclusive right to make and use, and to vend to others to be used, the entire machine; and if another, without license, makes, uses, or vends any portion of it, he invades the right of the patentee.

2. Second class of inventions referred to are those which embrace one or more elements of a machine, but not the entire machine, as the coulter of a plough or the divider of a reaping-machine. In patents of that class any person may make, use, or vend all other parts of the machine, and he may employ a coulter or divider in the machines mentioned, provided it be substantially different from that embraced in the patent.

3. Third class of machines to be mentioned are those which embrace both a new element and

a new combination of elements previously used and well known. Property of the patentee in such a case consists in the new element and in the new combination. No one can lawfully make, use, or vend a machine containing such new element or such new combinations. They may make, use, or vend the machine without the patented improvements, if it is capable of such use, but they cannot use either of those improvements without making themselves liable as infringers.

4. Fourth class of machines to be mentioned are those where all the elements of the machine are old, and where the invention consists in a new combination of those elements whereby a new and useful result is obtained. Most of the modern inventions are of this latter class, and many of them are of great utility and value. . . . In this class the invention consists solely in the new combination, and the rule is, that the property of an inventor, if duly secured by letters-patent, is in all cases exactly commensurate with his invention. Such an invention, however, is but an improvement on an old machine, and, consequently, the patentee cannot treat another person as an infringer who has also improved the original machine by the use of a substantially different combination, although the machine may produce the same result." *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

49. *Doubted*, whether an improvement in a jail is patentable subject-matter. *Jacobs v. Baker*, 7 Wall. 295.—SUP. CT. 1868.

50. "Patentable subjects, as defined by the patent law [act of 1836, Section 6], are 'any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter.' A machine can be new and the product or manufacture proceeding from it may be old. In that case the former would be patentable and the latter not. The machine may be substantially old and the product new. In that event the latter and not the former would be patentable. Both may be new or both may be old. In the former case, both would be patentable; in the latter, neither. The same remarks apply to processes and their results. Patentability may exist as to either, neither, or both, according to the fact of novelty or the opposite. The patentability, or the issuing of a patent as to one, in no wise affects the rights of the inventor or discoverer in respect to the other. They are wholly disconnected and independent facts." *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.



51. "It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect that a patent is granted, not for the result or effect itself." *Piper v. Brown et al.*, 1 Holmes, 20.—SHEPLEY, 1870.

52. The claim in a patent for a method of increasing the capacity of oil wells was: "The above-described method of increasing the productiveness of oil wells by causing an explosion of gunpowder, or its equivalent, substantially as described above." Defendant contended that the claim was void as being for a principle, but the court held otherwise and said that the claim was for "the employment of specified means, or their equivalents, for the accomplishment of a desired end—a novel adaptation of things, not themselves claimed as novel, to a novel and beneficial use." *Roberts v. Dickey*, 4 Brews. 260.—STRONG, 1871.

53. "It is not to be doubted that a novel process or method of operation, that amounts to a successful application of known things to a practical use, is patentable as an art."—*Ib.*

54. "Undeniably the mere function of a machine is not a patentable subject; but it is just as clear that a mechanical device, adapted to perform specific functions, is, whether its operative efficiency depends upon its combination with other mechanism or not. The novelty and utility of such device are the tests of its patentable merit. Its possession of these qualities entitles its inventor to the protection of the patent laws, and this can be as effectually secured by making it the subject of a separate claim in a patent for an auxiliary combination also, as by making it the sole subject of a distinct patent." *Parham v. Am. B. O. & Sewing-Mach. Co. et al.*, 1 Pa. Leg. G. Rep. 145.—MCKENNAN, 1871.

55. "A patent may be good for a product, although no patent has been obtained for the machine or process by which it is produced. So a patent may be good for a product, even though the inventor has received a patent for the machine or process, which by reason of imperfection in the specification and claim, fails to cover the whole invention. Where the patent for a product is accompanied by a specification which does, in fact, describe the machine and process, so as to fully satisfy the requirements of the law, and enable any one of proper skill in the arts to produce the article patented, by the means described, the patent for the product may be good, even though the same specification, annexed to a patent for the machine, might not fully secure the patentee against the use of his actual invention, because the claim was narrower than the

invention, or because the claim was too broad, or was otherwise imperfect and ineffectual. In such case the patent for the product might possibly be infringed, although no action could be maintained based on the patent for the machine." *Waterbury Brass Co. v. E. Miller et al.*, 9 Blatch. 77.—WOODRUFF, 1871.

56. The claim in complainants' patent for a machine for crushing and washing sand was: "1. The introduction of a stream or flow of water into the crushing-pan of a revolving sand, sand-rock, or sandstone crusher, to aid the crusher or crushers in disintegrating the rock, and to cleanse and discharge the pulverized sand, substantially in the manner and for the purposes hereinbefore set forth." Thereof the court said: "By the words of the specification the patentee purposes to employ only the co-operative agency of water, and the patent must therefore be construed to claim, not its abstract functions, but the special mode in which, in connecting with the mechanical devices described, its power is made available. In this view of the patent, the objection that the claim is for a subject not patentable, is clearly unfounded." *Smith et al. v. Frazer et al.*, 3 Pittsb. 397.—MCKENNAN, 1872.

57. A patent cannot be granted for a principle or an idea, or for any abstraction whatever. . . . But when the idea is applied to a material thing, so as to produce a new and useful effect or result, it ceases to be abstract, and becomes a proper subject to be covered by a patent." *McComb et al. v. Brodie*, 1 Woods, 153.—WOODS, 1871.

58. "A result . . . is not, *per se*, patentable." *Marsh v. Dodge & Stevenson M'f'g Co.*, 6 Fish. P. C. 562.—WOODRUFF, 1873.

59. Terms broad enough to cover any and every mode or means by which certain specified advantages can be secured, are too broad to be sustained.—*Ib.*

60. "It is competent for the Commissioner to grant a patent for the product and one for the process." *Jones et al. v. Sewall*, 3 Clifford, 563.—CLIFFORD, 1873.

61. "Improvements consisting of separate and distinct parts may, in certain cases, be secured by separate and distinct patents, but no more than one patent can be granted for the same invention."—*Ib.*

62. "Doubtless an invention may be good though the subject of it consists in the discovery of some principle of science or property of matter never before known or used, by which some new and useful result is obtained, and such an invention or discovery may be the subject of a

valid patent without including in the claim any new arrangement of machinery to accomplish the object, provided the inventor describes, as required by the patent law, the method, process, or the means of applying the invention to practical use and of obtaining the described new and useful result." *Mitchell v. Tilghman*, 19 Wall. 287.—SUP. CT. 1873.

63. "A patentee who has invented a new process in the arts, whereby an article of manufacture is produced, new in kind and not before known, may separately claim and patent both the art and the manufacture. He cannot properly combine them in one claim. Differing in that respect from the English law, which allows a patent for 'any number of new manufactures' (a term which includes process and product), our law distinguishes between a patent for an art and a patent for a manufacture." *Merrill v. Yeomans et al.*, 1 Holmes, 381.—SHEPLEY, 1874.

64. "Persons who invent or discover new and useful manufacture are as much entitled to patents as those who invent or discover new and useful arts, machinery, or compositions of matter." *Milligan & Higgins Glue Co. v. Upton*, 4 Cliff. 237.—CLIFFORD, 1874.

65. "A patentee who has invented a process in the arts, whereby an article of manufacture is produced, new in kind, and not before known, may separately claim and patent both the art and the manufacture, if both are new and useful in the sense of the patent law; and, it is doubtless true, if the thing be new, in and of itself, it is patentable as a new manufacture, and that the patent would be infringed by the unlicensed construction or use of the product, though produced by other means than those described in the specifications of the patent. Inventions of the kind are rare, as it much more frequently happens that the process is inseparable from the product, so that the patentee cannot claim the product, if produced by hand tools, or by other means substantially different from those employed by the inventor or discoverer. Patentees, in the former case, may claim the new product without qualification, but, in the latter, they should claim the product only, made by the described means or their equivalents, as the process inheres in the manufacture, and constitutes an element of the invention. Neither claim, however, would be valid unless supported by proof of invention or discovery."—*Id.*

66. "It is the settled law that a mere principle, or result, or mode of operation, is not patentable." *Union Paper Collar Co. v. White*, 2 Bann. & Ard. 60.—McKENNAN, 1875.

67. "Patentable inventions pertaining to machines may be divided into four classes: *First*, entire machines, as a car for a railway, or a sewing-machine; *second*, separate devices of a machine, as the coulter of a plough, or the divider of a reaping-machine; *third*, new devices of a machine in combination with old elements, all embraced in one claim, or with separate claims for what is new, together with a claim for the new combination of all the elements; *fourth*, devices or elements of a machine in combination, where all the devices or elements are old." *Sanford v. Merrimac Hat Co.*, 4 Cliff. 407.—CLIFFORD, 1876.

68. "One invention may include within it many others, and each and all may be valid at the same time. This only consequence follows, that each inventor is precluded from using inventions made and patented prior to his own except by license from the owners thereof. His invention and his patent are equally entitled to protection from infringement as if they were independent of any connection with them." *Cochrane et al. v. Deener et al.*, 94 U. S. 780.—SUP. CT. 1876.

69. "There can be no patent for a principle; but for a principle so far embodied and connected with corporeal substances as to be in a condition to act, and to produce effects, in any trade, mystery, or manual occupation, there may be a patent." *Andrews et al. v. Carman*, 13 Blatch. 307.—BENEDICT, 1876.

70. There may be patented products in which the process of making so inheres that the described product can only be made by the described process, and in that case the process is a substantive part of the invention. *Goodyear Dental Vulcanite Co. v. Davis*, 3 Bann. & Ard. 115.—SHEPLEY, 1877.

71. "An imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not, and, indeed, cannot be, patentable under our patent acts, since it is impossible, under such circumstances, to comply with the fundamental requisites of those acts." *Draper v. Potomska Mills Corporation*, 3 Bann. & Ard. 214.—SHEPLEY, 1878.

72. "Inventors of a new and useful composition of matter, duly secured by letters-patent, are entitled to the same protection for the property as the owners of a patent for a new and useful art, machine, or manufacture are entitled to receive, and the rules and regulations in suits for infringement are the same in all material re-

spects." *Cahill v. Brown*, 3 Bann. & Ard. 580.—CLIFFORD, 1878.

73. Bronzing iron in a new way makes it a new article of manufacture within the meaning of the patent law. *Tucker v. Burditt et al.*, 4 Bann. & Ard. 569.—LOWELL, 1879.

74. An "artificial alizarine" is patentable as a new article of manufacture. *Badische Anilin & Soda Fabrik v. Cummins*, 4 Bann. & Ard. 489.—LOWELL, 1879.

75. Alizarine was a natural dyestuff found in the root of the madder plant. Anthracine was a waste product of coal tar. Two joint inventors devised a method of producing chemically a substance having useful qualities of the said alizarine and it was held patentable. *Badische Anilin & Soda Fabrik v. Cochran et al.*, 16 Blatch. 155.—WHEELER, 1879.

76. "The statute entitles an inventor of any new and useful art, machine, manufacture, or composition of matter to a patent for it; . . . these terms in the statute are not understood to be placed there as stools betwixt which inventors may fall to the ground, but to cover the whole range of useful invention, to every piece of which some one of them, and to many, more than one of them will apply."—*Id.*

77. "Separate patents for severable parts of the same invention may be granted, although the whole invention is fully described in each of them to explain the purpose and mode of operation of the parts covered by the claims in such patents." *McMillin et al. v. Rees et al.*, 1 Fed. Rep. 722.—MCKENNAN, 1880.

78. "The connection or combination of a patented device or improvement with other devices may be the subject of a valid subsequent patent."—*Id.*

79. A claim cannot cover every means of accomplishing a proposed result.—*Id.*

80. Defendant may have a patent for a device to which complainant's patented device is simply an additional improvement. *Day v. Combination Rubber Co.*, 2 Fed. Rep. 570.—WHEELER, 1880.

81. By the court: "The plaintiff's invention is a book with a page or pages spaced for each bond and its coupons—of any series of coupon bonds—and with the spaces numbered and designated to show what bonds and coupons they are for, while any of them are outstanding, and for receiving them for safe keeping as vouchers or memoranda when any of them are taken up or paid." Such a book is proper subject-matter for a patent. *Munson v. Mayor of N. Y.*, 18 Blatch. 237.—WHEELER, 1880.

82. "Invention and infringement could con-

sist in joints of a particular form for parts of cans, as well *pro tanto*, as for the whole." *Banker v. Bostwick et al.*, 3 Fed. Rep. 517.—WHEELER, 1880.

83. By the court: "The first claim is not a claim to any mechanism; but, if not a claim to a function, is a claim to a mode of operation. It amounts to a claim to inserting a stopper through the mouth of a bottle, and then pressing it upward till it is closed tight against a seat inside. It seems to be intended to cover any form of stopper, and any form of mouth, and any means of pressure, and any arrangement of seat. As a claim thus broad it cannot be sustained. It must be limited to the mechanism described, having the mode of operation described." *Matthews v. Schoneberger et al.*, 18 Blatch. 357.—BLATCHFORD, 1880.

84. An "arrangement is none the less an invention because it brings into operation the laws of nature." *Hammerschlag v. Scamoni*, 7 Fed. Rep. 584.—BLATCHFORD, 1881.

85. A claim to a principle, irrespective of the means used, cannot be sustained. *Palmer v. Gatling Gun Co.*, 19 Blatch. 392.—SHIPMAN, 1881.

86. "That a patent can be granted for a process there can be no doubt. The patent law is not confined to new machines and new compositions of matter, but extends to any new and useful art or manufacture. A manufacturing process is clearly an art within the meaning of the law." *Tilghman v. Proctor et al.*, 102 U. S. 707.—SUP. CT. 1881.

87. "A machine is a thing. A process is an art or mode of acting. The one is visible to the eye—an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result. The mixture of certain substances together, or the heating of a substance to a certain temperature, is a process. If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough in the patent to point out the process to be performed without giving supererogatory directions as to the apparatus or method to be employed. If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is, then, a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to de-

scribe them all in order to secure himself the exclusive right to the process if he is really its inventor or discoverer."—*Id.*

88. "A patent for a device of minor consequence" . . . "is just as much entitled to protection as though it was for the most important piece of machinery ever devised." *Shannon v. Jones Stationery & Printing Co.*, 10 Bissell, 498.—BLOGGETT, 1881.

89. One claim of the patent in suit covered one function of a device, and another claim another function of the same device. Said the court: "I cannot see how these claims for the result or function of the joint can be deemed valid. It is the mechanism which is the subject-matter of the patent, and not the result of the mechanism." *Pattee et al. v. Moline Plough Co. et al.*, 10 Bissell, 377.—BLOGGETT, 1881.

90. By the court: "If he was the author of any other invention than that which he specially describes and claims, though he might have asked to have it patented at the same time and in the same patent, yet if he has not done so, and afterward desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent." *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1881.

91. Complainants had an expired patent for a machine for making shoes, and later patents for the product of such machines, and the process of making such products. *Held*, that after the machine had been made, the process and product did not present patentable subject-matter. *McKay et al. v. Jackman*, 20 Blatch. 466.—WHEELER, 1882.

92. By the court: "The plaintiff's present position—'that this process covers all methods of making waxed paper by machinery, and, therefore, whether defendants carry on the making of waxed paper by machinery by the complainant's particular method, or by a new mode devised by themselves, and which dispenses with some of the steps used by plaintiff in his particular mode, makes no difference whatever as regards infringement—cannot be adopted.'" *Hammerschlag v. Garrett et al.*, 21 O. G. 1199.—BUTLER, 1882.

93. By the court: "There can be no patent for a mere principle. The discoverer of a natural force or a scientific fact cannot have a patent for that; but if he invents for the first time a process by which a certain effect of one of the forces of nature is made useful to mankind, and fully describes and claims that process, and also describes a mode or apparatus by which it may be usefully applied, he is, within the meaning

and the very words of the patent law, 'a person who has invented or discovered a new and useful art,' and he is entitled to a patent for the process of which he is the first inventor, and is not restricted to the particular form of mechanism or apparatus by which he carries out that process." . . . "The opinion in Spencer's case clearly points out that Bell discovered a new art—that of transmitting speech by electricity—and has a right to hold the broadest claim for it which can be permitted in any case, and 'the invention is nothing less than the transfer to a wire of electrical vibrations like those which a sound has produced in the air,' and that his patent, while not covering the abstract principle, without regard to means of transmitting speech by electricity, yet is not limited to a particular form of apparatus, but includes the process or method [using the two words as equivalent], the essential elements of which are the production of what the patent calls 'undulatory vibrations of electricity to compound with those of the air,' and transmitting them to a receiving instrument capable of echoing therein. The evidence in this case clearly shows that Bell discovered that articulate sounds could be transmitted by undulatory vibrations of electricity, and invented the art or process of transmitting such sounds by means of such vibrations. If that art or process is [as the witnesses called by the defendant say it is] the only way by which speech can be transmitted by electricity, that fact does not lessen the merit of his invention or the protection which the law will give to it." *Am. Bell Tel. Co. v. Dolbear et al.*, 23 O. G. 535.—SUP. CT. 1883.

94. By the court: "Few legal rules have been oftener misunderstood than the maxim that you cannot patent a principle. But the confusion on the subject has been so effectually cleared up by the recent judgment of the Supreme Court, delivered by Mr. Justice Bradley, in *Tilghman v. Proctor*, that it will be sufficient for the purposes of the case to state the conclusions there announced. There can be no patent for a principle. The discoverer of a natural force or a scientific fact cannot have a patent for that. But if he invents, for the first time, a process by which a certain effect of the forces of nature is made useful to mankind, and fully describes and claims that process, and also describes a mode or apparatus by which it may be usefully applied, he is, within the meaning and very words of the patent law 'a person who has invented or discovered any new and useful art;' and he is entitled to a patent for the process of which he is the first inventor, and is not restricted to the

particular form of mechanism or apparatus by which he carries out that process. Another person, who afterward invents an improved form of the apparatus, embodying the same process, may, indeed, obtain a patent for his improvement, but he has no right to use the process, in his own or any other form of apparatus, without the consent of the first inventor of the process."—*Ib.*

95. The claim in issue was: "The electroplating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact." Claim *sustained* and held to cover the product irrespective of the process used. *United Nickel Co. v. Pendleton*, 21 Blatch. 226. —BLATCHFORD, 1883.

96. By the court: "The argument that a machine must be automatic in order to be patentable is not sound. A piano is not automatic, nor is any tool or implement intended for use by hand, but improvements in any such tool used in an art or industry are patentable." *Coupe et al. v. Weatherhead et al.*, 23 O. G. 1927. —LOWELL, 1883.

97. "A process is patentable provided that it is new and useful. By process is meant the application or operation of some element or power of nature to one subject or another. As examples of patentable processes, the art of dyeing small ores and the like may be mentioned. In this and in other similar cases the merit of the invention consisted not in the discovery of any new law of nature, or principles of science or natural philosophy, but in the application of old and well-known principles to new and useful purposes." *Boyd v. Cherry*, 4 McCrary, 70. —MCCRARY, 1883.

98. A claim to a mechanism which covers the method by which the mechanism works, independently of the means used, is a claim to a principle, and void. *Yale Lock Mfg Co. et al. v. Berkshire Nat'l Bank et al.*, 17 Fed. Rep. 531. —LOWELL, 1883.

99. By the court: "The fifth claim is merely for feeding the blanks under the table which supports the gun-box, instead of over it. The machinery described, some of which is the subject of other claims, does feed the blanks under the table. . . The claim is merely for that function or mode of operation of that machinery. As such, this function or mode of operation does not seem to be patentable apart from that machinery." *Child v. B. & F. H. Iron Works*, 19 Fed. Rep. 258. —LOWELL, 1884.

100. By the court: "No principle is better settled than that a mere abstract idea is not the subject of a patent, but that principle has little application here, for the reason that the inventor has put his idea into tangible shape and given it substance." *Worswick Mfg Co. et al. v. City of Buffalo et al.*, 22 Blatch. 157. —COXE, 1884.

101. "An inventor cannot patent the principle of sewing buttons to a fabric automatically, any more than the idea of nailing boxes by machinery, when previously nails had been driven by hand, could be patented. He could only patent the particular contrivance to make the idea practically useful as the Supreme Court held it in the nail case." Nor in that case, where there is mechanism consisting of three groups of instrumentalities, could he cover every other button-sewing machine adopting the use of three groups of instrumentalities in combination, without regard to the specific mechanism employed. His "patent secures to him the exclusive right to the use of the mechanism described therein. It does not give him the exclusive right to a principle, or to groups of instrumentalities independent of the mechanism employed." *Morley Sewing-Machine Co. et al. v. Lancaster*, 23 Fed. Rep. 344. —COLT, 1884.

102. "The patent law recognizes as patentable an improvement in any art or mechanical construction or combination which is useful to the public, and not before known. To be patentable, a thing must not only be new and useful, but must amount to an invention or discovery." *May v. County of Fon du Lac*, 27 Fed. Rep. 691. —DYER, 1886.

103. "That a process may be patentable, irrespective of the particular form of instrumentalities used, cannot be disputed." *Eastern Paper Bag Co. et al. v. Standard Paper Bag Co. et al.*, 30 Fed. Rep. 63. —COLT, 1887.

104. "A patent may be valid for a process, and another be valid for means of carrying it on." *Phillips v. Kochert et al.*, 31 Fed. Rep. 39. —WHEELER, 1887.

105. "The use of one old material in place of another, when the substituted material performs no new function and is an improvement because it is more durable, does not appear to amount to patentable invention." *J. L. Mott Iron Works v. Cassidy et al.*, 31 Fed. Rep. 47. —WHEELER, 1887.

106. "Under the patent laws, a process may be patented as well as a machine or device; and when so patented gives the inventor the benefit thereof in the same way as a machine or device, and equally protects him from infringers during the life of his patent." *Byerly v. Cleveland*

*Linseed Oil Works*, 31 Fed. Rep. 73.—WELKER, 1887.

107. Bell was the discoverer of the new art of transmitting speech by electricity, and his claim should receive the broadest interpretation so as to secure to the inventor not the abstract right of sending sounds by telegraph without regard to means, but all means and processes described which are essential to the application of his principle. *Am. Bell Tel. Co. v. Globe Tel. Co. et al.*, 31 Fed. Rep. 729.—WALLACE, 1887.

108. A process claim which is merely a claim to an inevitable function of a machine is not patentable. *Chicopee Folding Box Co. v. Rogers*, 32 Fed. Rep. 695.—WALLACE, 1887.

## PLEADING.

### "PLEADING" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 6. *And be it further enacted*, That in all actions to be brought by such patentee or patentees, his, her, or their executors, administrators, or assigns, for any penalty incurred by virtue of this act, the said patents or specifications shall be *prima facie* evidence that the said patentee or patentees was or were the first and true inventor or inventors, discoverer or discoverers, of the thing so specified; but that, nevertheless, the defendant or defendants may plead the general issue, and give this act, and any special matter whereof notice in writing shall have been given to the plaintiff or his attorney, thirty days before the trial, in evidence, tending to prove that the specification filed by the plaintiff does not contain the whole of the truth concerning his invention or discovery; or that it contains more than is necessary to produce the effect described; and if the concealment of part, or the addition of more than is necessary, shall appear to have been intended to mislead, or shall actually mislead the public, so as the effect described cannot be produced by the means specified, then, and in such cases, the verdict and judgment shall be for the defendant. [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 6. *Provided always, and be it further enacted*, That the defendant in such action shall be permitted to plead the general issue, and give this act, and any special matter, of which notice in writing may have been given to the plaintiff or his attorney, thirty days before trial, in evidence, tending to prove that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains

more than is necessary to produce the desired effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing thus secured by patent was not originally discovered by the patentee, but had been used, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person; in either of which cases judgment shall be rendered for the defendant, with costs, and the patent shall be declared void. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 15. *And be it further enacted*, That the defendant in any such action shall be permitted to plead the general issue, and to give this act and any special matter in evidence, of which notice in writing may have been given to the plaintiff or his attorney, thirty days before trial, tending to prove that the description and specification filed by the plaintiff does not contain the whole truth relative to his invention or discovery, or that it contains more than is necessary; to produce the described effect; which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the patentee was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery thereof by the patentee, or had been in public use or on sale with the consent and allowance of the patentee before his application for a patent, or that he had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same; or that the patentee, if an alien at the time the patent was granted, had failed or neglected, for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent issued; in either of which cases judgment shall be rendered for the defendant with costs. And whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or the use of the thing patented, he shall state, in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used: *Provided, however*, That whenever it shall satisfactorily appear that the patentee, at the time of making his ap-

plication for the patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery or any part thereof having been before known or used in any foreign country, it not appearing that the same or any substantial part thereof had before been patented or described in any printed publication. *And provided also*, That whenever the plaintiff shall fail to sustain his action on the ground that, in his specification of claim is embraced more than that of which he was the first inventor, if it shall appear that the defendant had used or violated any part of the invention justly and truly specified and claimed as new, it shall be in the power of the court to adjudge and award as to costs, as may appear to be just and equitable. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 61. *And be it further enacted*, That in any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters :

First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office, was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect ; or,

Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same ; or,

Third. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof ; or,

Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented ; or,

Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and when and by whom it had been used ; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like

defences may be pleaded in any suit in equity for relief against an alleged infringement ; and proofs of the same may be given upon like notice in the answer of the defendant. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4920. In any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters :

First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect ; or,

Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same ; or,

Third. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof ; or,

Fourth. That he was not the original and first inventor or discoverer of any material or substantial part of the thing patented ; or,

Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and when and by whom it had been used ; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defences may be pleaded in any suit in equity for relief against an alleged infringement ; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect.

#### CASES.

1. "*Contra formam*, etc., is a matter of form in a declaration. The omission thereof does not warrant non-suit." *Tryon v. White*, 1 Peters's C. C. 96. — WASHINGTON, 1815.

2. It is sufficient to state the substance of the grant in a declaration ; but, if the declaration

professes to give the tenor, the slightest variance is fatal.—*Ib.*

3. In pleading prior use, the special facts [names of prior users and place of use] need not be set out, either in special pleading or under the general issue with notice. *Evans v. Kremer*, 1 Peters's C. C. 215.—WASHINGTON, 1816.

4. In pleading prior use it is not necessary to specify the user and the place of use. (Section 6, act of 1793.) *Evans v. Eaton*, 1 Peters's C. C. 322.—WASHINGTON, 1816.

5. Whether the objection of want of utility may be put in evidence under the general issue, may well be doubted. *Gray et al. v. James et al.*, 1 Peters's C. C. 394.—WASHINGTON, 1817.

6. The declaration need not set out the substance of the specification. *Gray et al. v. James et al.*, 1 Peters's C. C. 476.—WASHINGTON, 1817.

7. The declaration need not state the taking of the steps preliminary to the granting of the patent, but it must aver the issue of the patent to the patentee, signed and sealed as the law directs. *Cutting et al. v. Myers*, 4 Washington, 220.—WASHINGTON, 1818.

8. The declaration need not set out the specification either verbatim or substantially. A mention of the title used in the patent is sufficient.—*Ib.*

9. The allegation of infringement may be in general terms.—*Ib.*

10. "It is not believed that a plea would be defective which did not state the mills in which the machinery alleged to be previously used was placed." *Evans v. Eaton*, 3 Wheaton, 454.—SUP. CT. 1818.

11. Under the general issue, without notice of special matter, defendant may give the patent act in evidence, also alienage, also a license, also that the patent has no specification, also that the specification is insufficient in description, also that the patent covers more than the invention, also that the invention is not defined and pointed out, also that the suggestions of the petition are not recited in the patent; but not the defences enumerated in Section 6 of the act (referring to act of February 21st, 1793). *Kneass v. Schuyllkill Bank*, 4 Wash. 9.—WASH. 1820.

12. An allegation of prior use in the United States does not warrant evidence of prior use abroad. *Dixon v. Meyer*, 4 Wash. 68.—WASH. 1821.

13. The bill must be accompanied by affidavits of the complainant's present belief that the patentee was the original inventor. *Sullivan v. Redfield et al.*, 1 Paine, 441.—THOMPSON, 1825.

14. On bill filed and injunction moved for,

complainant was required to make a special affidavit as to his allegations, that he believed himself the first inventor, and that there had been no prior use or publication. Provisional injunction granted, and issue at law directed. *Rogers v. Abbott*, 4 Wash. 514.—WASH. 1825.

15. If the declaration fail to state the record of an assignment to the plaintiff, the verdict of the jury for the plaintiff cures the defect. *Dobson v. Campbell*, 1 Sum. 319.—STORY, 1833.

16. The plaintiff, in an action on a contract for royalties, averred that he sold to the defendant the right of making and vending a stove for which he claimed a patent, but did not aver that he obtained the patent or had the exclusive right. Held, that the objection would have been fatal on demurrer but was cured by verdict, *Stanley v. Whipple*, 2 McLean, 35.—MCLEAN, 1839.

17. Where a defendant would show prior use in evidence, it must in pleading set up the witnesses having knowledge. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Peters's C. C. 448.—SUP. CT. 1840.

18. The court cannot consider defences not raised by the pleadings. *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

19. The court will notice an objection appearing upon the face of the bill though not otherwise raised in the pleadings.—*Ib.*

20. In an action to recover money due for an interest in a patent right, a plea which admits existence of the patent but denies its validity is bad. *Bennett v. Martin*, 6 Mo. 460.—THOMPSON, 1840.

21. A charge in a bill of complaint requiring the defendants to answer it "as to their knowledge, remembrance, information, and belief" must be so answered; it is not sufficient for the defendants to answer as to their knowledge; they must answer also as to their information and belief. *Parks v. Byam et al.*, 1 Story, 296.—STORY, 1840.

22. Complainants' patentee, in his patent for a cooking-stove, did not claim the cooking-stove as an entirety, "but an improvement on such stove." It was not stated in the declaration what this improvement was. To so state held to be an essential part of the complainants' case, and the failure to so state was held demurrable. *Peterson et al. v. Wooden*, 3 McLean, 248.—MCLEAN, 1843.

23. "The profert of the letters-patent (of which the specification constitutes a part) makes the letters-patent, when produced, a part of the declaration, and so gives all the certainty, as to the invention and improvement patented, which



is required by law." *Pitts v. Whitman*, 2 Story, 609.—STORY, 1843.

24. "There must be in the bill allegations broad enough to cover any evidence offered before it becomes admissible." *Nesmith et al. v. Calvert et al.*, 1 Woodbury & Minot, 34.—WOODBURY, 1845.

25. In making the defence of prior use, in an equity answer, the names, residences and places of the prior users should be stated. *Orr v. Merrill*, 1 Woodbury & Minot, 376.—WOODBURY, 1846.

26. When an abandonment is relied on it should be stated in the plea, and also the facts on which the pleader relies as showing abandonment. *Root v. Ball et al.*, 4 McLean, 177.—MCLEAN, 1846.

27. Where there is no notice or plea authorizing defendants to show a want of novelty in the invention, evidence given under that head will be disregarded.—*Id.*

28. Where defendant in his answer attempts to justify under a license, and complainants hold that the license has been abandoned or forfeited, the facts upon which complainants rely must be pleaded in the bill. The proper issue cannot be raised simply by filing a replication. *Brooks et al. v. Stolley*, 4 McLean, 275.—MCLEAN, 1846.

29. "Variance between the declaration and writ cannot . . . be taken advantage of on general demurrer." *Wilderv. McCormick*, 2 Blatch. 31.—BETTS, 1846.

30. A declaration need not aver the time at which the patentee made the invention.—*Id.*

31. A declaration need not aver that the application for patent was in writing, nor that the Commissioner of Patents had authority to grant the patent.—*Id.*

32. "The grant of the patent is itself sufficient evidence that all the preliminary steps required by law were properly taken. And, as the plaintiff may make his patent the direct and efficient proof in the first instance of his right to the grant, so, *a fortiori*, it would seem to be unnecessary for him to plead any of the particulars which conduced to the grant. It is sufficient to set forth the grant in substance."—*Id.*

33. "The question of the regularity of the proceedings in petitioning for and obtaining the patent, and that of the correctness of the judgment of the office in awarding it, are not material, and cannot be inquired into."—*Id.*

34. A declaration averred the patent and specification to be "in language of the import and to the effect following." It was alleged as cause for demurrer that "tenor" should

have been used in the place of "import. The declaration was held sufficient.—*Id.*

35. A declaration read, "as by the said letters-patent and specification all in due form of law, ready in court to be produced, will fully appear." This was held to be a proper profert.—*Id.*

36. "A reiteration of infringement of a patent like a repetition of torts of any other kind, which are of the same nature, may be sued for and recompensed in one action. There is no known doctrine of the law that requires a plaintiff to split up into separate actions, grievances of that character."—*Id.*

37. Where a declaration, though not formal in its frame, embodies all that is essential to enable the plaintiff to give evidence of his right, and of its violation by the defendant, and affords to the defendant the opportunity to interpose every defence allowed him by law, the court will not encourage objections merely critical and will seek to sustain the declaration.—*Id.*

38. By the court: "The practice here is, usually, for the complainant to make oath to his bill where it is signed, but this is not imperative nor uniform. It is not then done if he is absent or indisposed, though it should be done probably before the hearing, unless it be a bill for a corporation, or unless an answer under oath is not asked, or unless an oath to the bill is waived, or its absence is not objected by the respondents when first heard. And if the principal is not in a situation to swear to it, the oath may be made by an agent." *Woodworth et al. v. Edwards et al.*, 3 Woodbury & Minot, 120.—WOODBURY, 1847.

39. An original bill for relief, which calls upon the defendant to answer, must contain interrogatories or the defendant need not answer. *Wilson v. Stolley*, 4 McLean, 273.—MCLEAN, 1847.

40. Where the defence of prior use is pleaded, nothing more specific is required than the names and residences of the persons who possess the prior knowledge of the thing patented, and the name of the place at which it had been used. It would be unreasonable to extend the language of the act, unless it clearly required the court so to do, to the names and residences of all the witnesses whom the defendant meant to summon. *Wilton v. The Railroads*, 1 Wallace, 192.—SUP. CT. 1847.

41. A petition for leave to file a supplemental bill need not embrace the averments thereof, but need only advise the opposite party and the court of the ground on which the relief is applied for. *Parkhurst v. Kinsman et al.*, 2 Blatch. 72.—BETTS, 1848.

42. A petition for leave to file a supplemental bill bringing in a new party, is sufficiently defined in charging that such other party has become connected with the subject-matter of the suit since the original bill was filed, and is, in that connection, doing acts which the court has by injunction restrained the original party from doing; and that is, in substance, sufficient to authorize the plaintiff to bring in the new party.—*Id.*

43. A declaration averred "that before the expiration of the term for which the original patent was granted, to wit, October 4th, 1843, it was in due form of law extended for the term of seven years from and after October 19th, 1843." Being demurred to, it was held sufficient in form. *Phelps v. Combstock*, 4 McLean, 353.—McLEAN, 1848.

44. It is not necessary to aver in a declaration that the act complained of is contrary to the statute. *Parker v. Howorth*, 4 McLean, 370.—McLEAN, 1848.

45. The right given by the statute to plead the general issue, and give notice of special defence, is an enlargement of the defendant's mode of defence, and does not take away his right to plead specially. But such a plea must be put in thirty days before the term or the plaintiff will be entitled to a continuance. *Phillips v. Combstock*, 4 McLean, 525.—McLEAN, 1849.

46. In pleading a book as a prior publication the notice should specify the page or heading. *Footo v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

47. A plea in bar alleged that the patentee was not the inventor of the thing claimed, and that a certain foreigner was. The plea was held defective in not alleging knowledge of the foreign invention on the part of the plaintiff. *Smith v. Ely et al.*, 5 McLean, 76.—McLEAN, 1849.

48. "A plea in bar must contain a full defence against the right of the plaintiff, and if it fall short of this it is bad on demurrer."—*Id.*

49. Subsequent to the act of 1839 a plea in bar alleged that the patented improvement was in public use at the time of the application for patent. Plea held defective because the law permitted such use for two years.—*Id.*

50. "Oyer of letters-patent is not demandable, as of a deed. But, being matter of record, it is accessible to the defendants and should have been stated in the plea, as it is not necessarily a part of the declaration, so as to enable the court to act upon the face of the plea."—*Id.*

51. "Craving oyer does (not) make the specification a part of the plea."—*Id.*

52. Complainant had a patent for a certain

invention and a subsequent patent for a further improvement thereon. The declaration, which included both patents, was held not to be multifarious. *Case v. Redfield et al.*, 4 McLean, 526.—HUNTINGTON 1840.

53. A declaration is not demurrable because it does not allege the recording of assignments.—*Id.*

54. An allegation in a declaration that the defendants made, constructed, and vended the invention to sundry persons, is a sufficient statement of infringement.—*Id.*

55. The defences which the statute permits to be made under the general issue with special notice cannot be set up in special pleas. They will be stricken out with costs. *Wilder v. Gayler et al.*, 1 Blatch. 597.—NELSON, 1850.

56. Upon a motion for provisional injunction, where a prior adjudication is relied upon, the bill of complaint must make averment thereof. The averment may be added by amendment. *Parker v. Brant et al.*, 1 Fish. P. C. 58.—GRIER, 1850.

57. "It is essential to a valid bill of discovery that it set forth a title in the party which is sufficient to support or defend a suit, and that it pray a discovery pertinent to that title and nothing beyond." *Young et al. v. Colt*, 2 Blatch. 373.—BETTS, 1852.

58. He who infringes should satisfy himself of his right beforehand, not infringe first and look up defences afterward, and the statutory reference to the pleading of defences is to be construed in this light. *Silsby et al. v. Footo*, 14 Howard, 218.—SUP. CT. 1852.

59. A replication may be special and set up matters in avoidance of the plea or answer. *Goodyear v. McBurney*, 3 Blatch. 32.—NELSON, 1853.

60. "Defences such as 'a license' or 'alienage' must be specially pleaded." *Minie's Assignees v. Adams*, 3 Wall., Jr., 20.—GRIER, 1854.

61. A demurrer made to cover a number of pleas, some of which pleas are good and some bad, will be overruled. *Brown v. Duchesne*, 2 Curtis's C. C. 97.—CURTIS, 1854.

62. "In actions at law for the infringement of patent rights, a defendant is not limited, in his defence, to the plea of the general issue allowed by the statute, even if his defence rests upon matters which the statute authorizes to be given in evidence under the general issue, but . . . he may, at his option, plead those particulars specially." *Day v. New England Car-Spring Co.*, 3 Blatch. 179.—BETTS, 1854.

63. There "are instances in which a defend-

ant has his election to rely upon the general issue, or to plead his defences specially."—*Id.*

64. "If the patentee seeks for an injunction on the ground of an infringement, and states nothing about the contract which authorized the use, and such a contract by the answer appears, he must, by the rules and decisions of the Supreme Court of the United States, amend his bill before he can be allowed to impeach the contract, or go out of court." *Day v. Harts-horn*, 3 Fish. P. C. 32.—PITMAN, 1855.

65. In suing for infringement, it is not necessary to aver the residence of complainants or defendants. *Teese et al. v. Phelps et al.*, 1 McAllister, 17.—MCALLISTER, 1855.

66. In actions in equity as well as in actions at law, the notices of the defence must be set up in defendants' pleadings. *Pitts v. Edmonds et al.*, 1 Bissell, U. S. C. 168.—MCLEAN, 1857.

67. Notice of prior use which, as regards location, only gives the county, is defective and insufficient. *Hayes et al. v. Sulsor et al.*, 1 Bond, 279.—LEAVITT, 1859.

68. A defendant pleaded the general issue and gave notice of special defences. He also filed special pleas within less than thirty days before trial. On motion the special pleas were struck out. *Latta v. Shawk*, 1 Bond, 259.—LEAVITT, 1859.

69. In giving notice of prior use under the general issue, the residences of persons and places of use must be given more specifically than by simple mention of cities.—*Id.*

70. "The act of Congress requires . . . that notice of the special matter to be offered in evidence at the trial shall be in writing, and be given to the plaintiff or his attorney more than thirty days before the trial. . . .

"Compliance with this provision on the part of the defendant being a condition precedent to his right to introduce such special matter under the general issue, it necessarily follows that he may give the requisite notice without any leave or order from the court; and, for the same reason, if he afterward discovers that the first notice served is defective, or not sufficiently comprehensive to admit his defence, he may give another, to remedy the defect or supply the deficiency, subject to the same condition, that it must be in writing, served more than thirty days before the trial.

"Having given the notice as required by the act of Congress, the defendant at the trial may proceed to prove the facts therein set forth by any legal and competent testimony. For that purpose he may call and examine witnesses on the stand, or he may introduce any deposition

that has been legally taken in the cause. Under those circumstances, depositions taken before the notice was served as well as those taken afterward, are equally admissible, provided the statements of the deponents are applicable to the matters thus put in issue between the parties." *Teese et al. v. Huntington et al.*, 23 Howard, 2.—SUP. CT. 1859.

71. It seems that in an interference proceeding in court, the bill must allege that the patentee has surreptitiously or unjustly obtained his patent for that which was in fact invented or discovered by the complainant, who was using reasonable diligence in adapting and perfecting the same. *Ellithorpe v. Robertson et al.*, 4 Blatch. 307.—INGERSOLL, 1859.

72. Where a bill of complaint is brought upon a plurality of patents, and the bill charges that the machine made and used by the defendant, contains all the improvements made in the several patents, the bill is not bad for multifariousness. *Nourse et al. v. Allen*, 4 Blatch. 376.—NELSON, 1859.

73. The simple averment that the title of the patents in suit is invested in the complainants is sufficient.—*Id.*

74. Where a complainant would take advantage of a forfeiture of a license in suing for infringement, that allegation must be set up in the bill. *Bloomer v. Gilpin et al.*, 4 Fish. P. C. 50.—LEAVITT, 1859.

75. The defendant, in pleading prior use, pleaded it as of a certain date, and the court below refused to allow the defendant to give evidence of prior use of a prior date. It was held that evidence of prior use at a prior date was admissible. *Phillips v. Page*, 24 Howard, 164.—SUP. CT. 1860.

76. Different persons were charged in a bill of complaint with infringement under the terms "that the respondents are using," etc: This was held to be sufficient allegation that the defendants were acting in concert in their infringement. *Poppenhusen v. Falke et al.*, 4 Blatch. 493.—SHIPMAN, 1861.

77. The defence of unreasonable neglect or delay in filing a disclaimer must be specifically set up in defendants' pleading. *Burden v. Corning et al.*, 2 Fish. P. C. 477.—NELSON and HALL, 1864.

78. The defence of insufficiency of specification must be set up in defendants' pleading. *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Clifford, 351.—CLIFFORD, 1864.

79. In a suit in equity, filing notice of special matter is wholly irregular. The issue must be raised by the allegations in the bill, in answer,

and whenever either the bill or answer is defective the defect must be cured by amendment and cannot be cured by filing special notice. *Doughty v. West et al.*, 2 Fish. P. C. 553.—SHIPMAN, 1865.

80. The defence that a complainant is not really the joint stock corporation that it claims to be, must be pleaded in abatement, for it cannot be pleaded in bar nor given in evidence under the general issue. *Dental Vulcanite Co. v. Wetherbee*, 2 Clifford, 555.—CLIFFORD, 1866.

81. "It is clear . . . that the defendant may specially plead that the plaintiffs are not the original inventors of the thing patented as alleged in the declaration." *Read et al. v. Miller et al.*, 2 Bissell, 12.—MCDONALD, 1867.

82. The same defence cannot be set up both by a special plea and also under the general issue with notice.—*Ib.*

83. The complainant need not set out in his bill the details of his invention or of defendant's manufacture. As regards the question of infringement a general allegation suffices. *Turrell v. Cammerer*, 3 Fish. P. C. 463.—LEAVITT, 1868.

84. A bill of complaint need not contain a special prayer for a provisional injunction in order to enable the complainants to have one. *Goodyear et al. v. Mullee et al.*, 3 Fish. P. C. 420.—GRIER, 1868.

85. It is not necessary for complainants to allege that they properly stamp the date of the patent on goods sold. *Goodyear et al. v. Allyn et al.*, 6 Blatch. 33.—BLATCH, 1868.

86. Where the owner of a patent and the injured licensee, a corporation, join as complainants, the bill may be verified by the oath of the president of the corporation.—*Ib.*

87. An allegation in the answer that the invention, at the time the application was filed, and for a long time before, had been on sale and in public use, is not a good defence against the charge of infringement. *Agawam Co. v. Jordan*, 7 Wall. 583.—SUP. CT. 1868.

88. Where a patent is extended by virtue of a special act of Congress the act need not be recited.—*Ib.*

89. In a suit for infringement of an extended patent, an allegation by defendant that his machine was in use before the patent in suit was granted, is not the pleading of a good defence.—*Ib.*

90. "Conditional denials . . . are not regular, but if the respondent intends to contest the novelty of the invention, his denial in that behalf should be explicit and unqualified.

"Pleadings in equity, as well as in actions at

law, should be single, clear, and free of evasion. More than one defence may be presented in the answer, but each should be separately and clearly alleged, without any conditions or undefined qualifications." *Graham et al. v. Mason*, 4 Clifford, 88.—CLIFFORD, 1869.

91. "Persons charged as infringers may set up the defence that the patentee was not the original and first inventor of the alleged improvement, but in that event they must allege in the answer, if the suit is in equity, the names and places of residence of those whom they intend to prove to have possessed a prior knowledge of the thing, and where the same had been used."—*Ib.*

92. "An objection to ambiguous pleadings in an answer ought not generally to be taken by exceptions, as they are proper subjects of amendment under special orders."—*Ib.*

93. The question whether the joinder of an unnecessary party as complainant in a bill in equity can be taken advantage of by demurrer, is well settled in the affirmative. *Hodge et al. v. North Missouri Railroad*, 1 Dillon, 104.—TREAT, 1869.

94. "Whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, 'he shall state, in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used,' and if he does not comply with that requirement no such evidence can be received under the general issue." *Blanchard v. Putnam*, 8 Wallace, 420.—SUP. CT. 1869.

95. "The plea of not guilty puts in the issue the novelty of the invention as well as the charge of infringement."—*Ib.*

96. "Defendant pleaded the general issue, and also gave notice that the invention claimed was well known and in general use before the patentee professed to have invented it, and he specified Utica, Rochester, Buffalo, Albany, New York City, and Brooklyn, in the State of New York, as the places where it had so been used, and gave the names of witnesses in each of those places by whom he expected to prove that fact; but he did not specify the mills in which the supposed prior use had been made." This pleading was held sufficient. *Wis3 v. Allis*, 9 Wall. 737.—SUP. CT. 1869.

97. If the right of the executor to bring suit on the testator's patent is questioned, it must be done by pleading in the answer. *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

98. If complainants would have a former suit

operate as an estoppel it must be set up in the pleadings. *Blandy et al. v. Griffith et al.*, 3 Fish. P. C. 609.—SWAYNE, 1869.

99. The defence of insufficiency of specification cannot be entertained if it is not pleaded in the answer.—*Ib.*

100. "A cross-bill is brought to obtain a discovery in aid of a defence to the original suit, or to obtain a complete relief to all the parties as to matters charged in the original bill. It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency, though it may have a connection with the same general subject." *Rubber Co. v. Goodyear*, 9 Wall. 807.—SUP. CT. 1869.

101. Pleadings may be made to conform to the evidence even after final hearing. *Brown v. Hall et al.*, 6 Blatch. 401.—BLATCH. 1869.

102. Where jurisdiction depends upon citizenship, the necessary averment of citizenship, to confer jurisdiction, must appear on the face of the bill. *Meserole et al. v. Union Paper Collar Co.*, 6 Blatch. 356.—BLATCH. 1869.

103. "Rule 60, of the rules of equity prescribed by the Supreme Court, provides that after a replication is put in, the answer shall not be amended in any material matters, as by adding new facts or defences, except by special leave of the court or a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit. . . . In administering Rule 60, it is undoubtedly a proper construction of it, in analogy to the requirements of Rule 29, that good cause for allowing an amendment of an answer, so as to set up a new defence, ought not to be regarded as being shown when it appears that the matter of the proposed amendment could, with reasonable diligence, have been sooner introduced into the answer." *India Rubber Comb Co. v. Phelps*, 8 Blatch. 85.—BLATCH. 1870.

104. "There being no question made that the plaintiff's patentee was the original and first inventor, and the prior use relied upon being a prior use only by the inventor himself, or under his license, it is not necessary, in the statutory notice, to give the names of the persons using, or the places where used." *Am. H. & L. S. & D. M. Co. v. Am. T. & M. Co. et al.*, 1 Holmes, 503.—SHEPLEY, 1870.

105. "When a party gives notice of special matter of defence under the general issue, and in that notice sets up priority of invention and of use by others, for the purpose of showing that the patentee was not the original and first inventor, he must in his notice specify the names of the persons using, and the place where used ;

but if the prior use relied on be a use by the inventor, or by persons with his consent or allowance, then it is not necessary to notify him of the names of the persons using the invention, or of the place where used."—*Ib.*

106. "Defences not set up in the answer will not be examined." *Howes v. Nute*, 4 Clifford, 173.—CLIFFORD, 1870.

107. "A patentee who complains of an infringement, has a right, when his patent is to be assailed for want of novelty in the invention, to be informed distinctly by the answer to his bill, if he proceeds in equity, that such a ground of defence will be taken." *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

108. "Parties defendants, sued as infringers, are not allowed in an action at law to set up the defence of a previous invention, knowledge, or use of the thing patented, unless they have given notice of such a defence thirty days before the trial, and have stated in the notice 'the names and places of residence of those whom they intend to prove to have possessed a prior knowledge of the thing, and where the same had been used ;' and the settled practice in equity is to require the respondent, as a condition precedent to such defence, to give the complainant substantially the same information in his answer." *Seymour v. Osborne*, 11 Wall. 516.—SUP. CT. 1870.

109. In a suit for the annulment of a patent "the fact that the suit is instituted on the behalf of the United States by the person who is District Attorney, and that he acts as such, instituting the suit on behalf of the United States, must appear by the face of the bill or declaration, or the pleading will be held bad." *United States v. Doughty*, 7 Blatchford, 424.—BLATCHFORD, 1870.

110. Prior notice in the answer of a special defence permitted by statute is required as the condition precedent to the right to introduce proofs to support such a defence ; "but it is an abuse of the privilege to give such notices without some reason to suppose that such a defence can be successfully made, and that the proofs, if required, can be obtained, as it exposes the complainant to unnecessary expense and trouble in preparing his case for trial."—*Ib.*

111. By the Supreme Court : "Prior to the act of Congress allowing several patents to be issued for distinct and separate parts of the thing patented, it is not probable that a bill of complaint joining five several patents in the same charge of infringement would have escaped objection from the respondent, but it will be noticed that all the claims appertain to the same general

subject, and that it requires all the inventions in question to constitute a complete self-raking harvester or reaping-machine, and that they are all embodied in the machines which the complainants make and furnish to the public. Viewed in that light, the court is of the opinion that the objection, if it had been made, could not have been sustained."—*Ib.*

112. Where the respondents are entitled to an equitable title in the patent of which complainant owns the legal title, a cross-bill is a proper mode of establishing respondents' title. *Brandson M'fg Co. v. Prime et al.*, 14 Blatch. 371.—WHEELER, 1871.

113. By setting down a plea for argument, complainant admits the facts therein alleged; the sufficiency of the plea as a defence is the question to be considered. *Wheeler v. McCormick*, 8 Blatch. 267.—WOODRUFF, 1871.

114. Where a plea makes reference to an annexed paper, the plea is to be considered as though the papers were incorporated with the plea.—*Ib.*

115. It is irregular to file two pleas without special leave, and both are liable to be overruled as improperly interposed.—*Ib.*

116. Where complainant's answer does not fully and unequivocally deny a plain charge of infringement in the bill, the infringement is to be taken as admitted. *Jordan v. Wallace et al.*, 1 Pa. Leg. Gaz. Rep. 354.—MCKENNAN, 1871.

117. A prior patent cannot be used to anticipate a later patent, in suit, in the absence of proper allegation in the answer. *American Saddle Co. v. Hogg*, 1 Holmes, 133.—SHEPLEY, 1872.

118. "No notice is necessary in order to justify the admission of evidence, for the purpose of showing the state of the art in respect to improvements existing at the date of the plaintiff's invention in the class of articles to which it belongs."—*Ib.*

119. "An allegation in the bill of making or using would be bad pleading, and . . . an allegation of making and using is proved, to all intents and purposes, by proof of using alone." *Locomotive Engine Safety Truck Co. v. Erie Railway Co.*, 10 Blatch. 292.—BLATCHFORD, 1872.

120. The averment in an answer was of "prior knowledge of the invention claimed, and of its use at the works of the Walnut Grove Mining Company, of the Louisa Mining Company, and of the Slate Hill Mining Company, all in Louisa County, Va., and at the works of the Vancieuse Mining Company, near Fredericksburg, Va., was possessed by Charles E. Seidel, residing in the City of Pittsburgh." This was

held to be proper pleading of the defence of prior use. *Smith et al. v. Frazer et al.*, 3 Pittsb. 397.—MCKENNAN, 1872.

121. In an equity suit upon letters-patent, it is not necessary to specifically allege how many claims a patent has or what particular claims are infringed. *Haven et al. v. Brown et al.*, 6 Fish. P. C. 413.—SWAYNE, 1873.

122. "It is undoubtedly irregular to swear a person in a suit before the bill has been filed. The irregularity consists in having the affidavit sworn to under the title of a suit in which no bill has been filed. If the title had been omitted, there would have been no irregularity." *Baldwin v. Bernard et al.*, 5 Fish. P. C. 442.—BLATCHFORD, 1872.

123. The defence of two years' public use and that of abandonment ought to be kept distinct and not blended in pleading. *Jones et al. v. Sewall*, 3 Cliff. 563.—CLIFFORD, 1873.

124. The bill of complaint need not specifically pray for damages in order to have damages allowed. The general prayer for grant of gains of profits and other relief is sufficient. *Emerson et al. v. Simm et al.*, 6 Fish. P. C. 281.—NIXON, 1873.

125. Defendants' plea set up "that long prior to said pretended invention, the same was fully described and shown in the following letters patent, to wit: Letters-patent of the United States, No. 17,864, granted George S. Avery, July 28th, 1857, for 'improvement in segmental truss for bridges,' " and the pleading was held sufficient. *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

126. Defendants served notice of a prior patent upon plaintiff, August 25th, 1873. The first day of the term was September 15th, but the trial of the case did not begin till October 7th. On offering the patent in evidence, plaintiff's counsel objected that the notice was not given thirty days before the first day of the term, and the court sustained the objection.—*Ib.*

127. Equity action was brought for infringement of three different patents, the infringing article being a hay-fork. Demurrer for multifariousness was filed, the court thereof saying: "There is not explicit averment here that the forks, made and sold by the defendants, contain all the improvements embraced in the complainants' patents, and the interrogatories clearly indicate that a discovery is sought touching only the several infringements of each patent;" the court sustained the demurrer. *Nellis et al. v. McLanahan et al.*, 6 Fish. P. C. 286.—MCKENNAN, 1873.

128. The defence that a patented improvement

is not patentable subject-matter may be reached by a general denial of patentable novelty in the answer. *Guidet v. Barber*, 5 O. G. 149.—NIXON, 1873.

129. An answer, in the names of three defendants, was put in as their joint and several answer, but was sworn to by only two of them. It was held to be irregular, but that complainant might have accepted the answer, replied to it, and thereby waived the irregularity. *Bailey Washing-Machine Co. v. Young et al.*, 1 Banning & Arden, 362.—WOODRUFF, 1874.

130. "An order granting leave to answer without oath or signature is necessary, and, if circumstances render it proper, would be granted."—*Ib.*

131. "The complainant has a right to require that whatever answer is put in be authenticated by the defendants who profess or purport to answer."—*Ib.*

132. An answer filed as the joint and several answer of three defendants and sworn to by only two of them, should be taken from the files, with leave to the defendants who have answered to erase the name of the other defendant, and file the answer as their own only.—*Ib.*

133. Two patents were set up in a bill of complaint, and it appeared generally, though not specifically alleged, that the same article of defendant's infringed both patents. Complainant held his title to the territory where the infringement was committed, and where suit was brought, under different assignments covering different territory. The bill was held not to be multifarious for either of these reasons. *Gillespie v. Cummings*, 3 Sawyer, 259.—SAWYER, 1874.

134. A bill addressed to the "Circuit Court, etc., in chancery sitting" is sufficiently addressed. *Sterrick v. Pugsley et al.*, 1 Flippin, 350.—LONGYEAR, 1874.

135. To entitle a bill in the name of the cause until the bill is filed, is irregular, and may be rejected as surplusage.—*Ib.*

136. Affidavits sworn to before a United States circuit court commissioner should have a venue as follows: "United States of America, District of —."—*Ib.*

137. Affidavits taken before a suit is commenced are not to be entitled in any suit, and where they are so entitled, it is a good cause for their rejection.—*Ib.*

138. Prior publications cannot be offered in evidence by defendants without proper allegation in the answer. *Earle v. Dexter et al.*, 1 Holmes, 412.—SHEPLEY, 1874.

139. Where the bill of complaint charges the

defendants with joint infringement, and the proof is that it is several, the objection that two or more distinct subjects cannot be embraced in the same suit does not apply where there is a privity or connection between the two defendants with reference to the object or subject-matter of the action. *Wells v. Jacques et al.*, 1 Banning & Arden, 60.—MCKENNAN and NIXON, 1874.

140. Where a bill of complaint does not allege that the matter in question had ever been before litigated, or acquiesced in by the public, the bill is defective on a motion for provisional injunction. *Gutta Percha & Rubber M'fg Co. v. Goodyear Rubber Co. et al.*, 3 Sawyer, 542.—SAWYER, 1875.

141. A bill of complaint that does not state where the complainant corporation is located, nor where the business is, and that is not sworn to, is not defective. *Nat. Hay Rake Co. v. Harbut*, 2 Weekly Notes, 100; *per curiam*, 1875.

142. In an action at law, for infringement of patent, ordered by the court during an equity suit, an allegation in the pleadings referring to the equity proceedings and order is proper and relevant. *Knob et al. v. Great Western Quicksilver Mining Co.*, 3 Sawyer, 422.—FIELD, 1875.

143. A bill of complaint was filed for infringement of a patent. Defendants put in a plea embracing three distinct defences, to wit: (1) That the patent in suit was void because not limited to expire with a certain foreign patent. (2) That the reissue was void for undue expansion. (3) That for the purpose of deceiving the public the specification was insufficiently descriptive. The plea was set down for argument, and complainants contended that the same was bad duplicity. The court said, as to these three defences, that "each is an independent defence, having no relation to the other, and that, although included in one plea, their allowance involves all the consequences of three separate and distinct pleas."

The court ordered that the pleas as filed might be set down as an answer to the option of defendants, otherwise defendants might elect which defence to stand on, and thereupon the other defences would be overruled. *Reissner et al. v. Anness et al.*, 3 Banning & Arden, 148.—NIXON, 1877.

144. "The office of a plea, in equity practice, is to present to the court a *single point* of defence. The rule is not a harsh one for the defendant, because, when he desires to avail himself of more than one matter of defence, he can resort to an answer, which affords him ample opportunity; whereas in common law proceed-

ings double pleas are allowed, for the reason that the defendant has no other mode of presenting his various defences to the court.

"The use of a plea, and the reasons for its allowance, are, that it saves time, trouble, and expense, but if parties are permitted to multiply pleas, setting up different facts in avoidance of the plaintiffs' claim, nothing is gained in these respects, and an answer is the proper course of proceeding.

"The general rule is, that a plea must not contain more defence than one. It is not limited to one fact. It may embrace various facts; but they must all conduce to a single point on which the defendant rests his defence."—*Ib.*

145. "A bill purely of discovery, in aid of the jurisdiction of a court of law, must allege that the facts are material to the plaintiff's case, and that the discovery of them by the defendant is indispensable as proof." *Vaughan v. Central Pacific R. R. Co.*, 4 Sawyer, 280.—SAWYER, 1877.

146. Defendant had granted to complainant a license under certain conditions. Complainant sued defendant for infringement of his own patent. Defendant objected that the bill did not affirmatively aver that complainant had fulfilled the conditions of the license. The court held that the conditions were conditions subsequent, and that such averment was not necessary. *Stanley Rule & Level Co. v. Bailey*, 14 Blatch. 510.—SHIPMAN, 1878.

147. The defence of prior patent cannot be made at the hearing unless set up in the answer. *Odiorne v. Denney*, 3 Banning & Arden, 287.—NIXON, 1878.

148. "It is not necessary to show, in a proper cross-bill, that the relief sought by it is cognizable in equity." *Brandon M'fg Co. v. Prime et al.*, 14 Blatch. 371.—WHEELER, 1871.

149. "A cross-bill is like an original bill, except that it must rest on what is necessary to the defence of an original bill."—*Ib.*

150. In a bill of complaint it is not necessary to specify the particular claim infringed. "A statement of the complainant's patent, and a general allegation that the defendant has infringed, is deemed sufficient to put the defendant upon his answer." *Thatcher Heating Co. v. Carbon Stove Co.*, 4 Banning & Arden, 68.—NIXON, 1878.

151. The defence of insufficiency of specification, not set up in the answer, cannot be considered at the hearing. *Wonson v. Peterson et al.*, 3 Banning & Arden, 249.—SHEPLEY, 1878.

152. "A defendant is permitted to plead that he does not sustain the character which he is alleged to bear in the bill, or that he has no in-

terest in the subject of the suit." *Williams et al. v. Empire Transportation Co. et al.*, 3 Banning & Arden, 533.—NIXON, 1878.

153. To plead in an answer that so much of the invention as is claimed in a certain claim was in public use and on sale more than two years prior to the subsequent invention is not properly pleading the defence of two years' public use.—*Ib.*

154. An application for leave to amend an answer is addressed to the favor of the court. *Pentlarge v. Beeston et al.*, 4 Banning & Arden, 23.—BENEDICT, 1878.

155. Where more than one patent is involved in a suit, separate answers to each patent may be filed by respondent, or he may state all his defences in one answer, without waiving any right. *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

156. Where a replication has, in addition to the regular matter, other matter, it is not void, and the other matter may be treated as surplusage. *Wren v. Spencer Optical M'fg Co. et al.*, 5 Banning & Arden, 61.—WHEELER, 1879.

157. "After notice of the name and residence of the inventor, and of the place of use, and of the name of some one who has used it (the invention), has been given or waived, all other witnesses may be examined without notice." *Woodbury Patent Planing Mach. Co. v. Keith*, 4 Banning & Arden, 100.—LOWELL, 1879.

158. A bill of complaint, after describing two separate patents owned by complainant, charged "That the defendants are using registering machines, some of them containing, in one and the same register or apparatus, the inventions, or substantial and material parts of the inventions, described and secured in and by each of the said reissued letters-patent." The court held that, "In the absence of any other fact, the circumstance that the two transactions complained of are use, in a single fare-registering machine, of the two patented devices connected with the mechanism of the machine, warrants the inference that no prejudice will result to the defendant from the joinder of the two transactions." *Horman Patent M'fg Co. v. The Brooklyn City Railroad Co.*, 15 Blatch. 444.—BENEDICT, 1879.

159. No discovery need to be prayed for in a bill of complaint in order to establish plaintiff's right to a decree for an accounting; that is established otherwise. *Gordon v. Anthony et al.*, 16 Blatch. 234.—BLATCHFORD, 1879.

160. "The statute does not declare that the names of the witnesses, who may be called to testify to . . . prior invention or use, shall be stated in the answer. It is only the names and



residences of the persons alleged to have invented, or to have had prior knowledge of the thing patented, that are required." *Woodbury Patent Planing Machine Co. v. Keith*, 4 Bann. & Ard. 101.—LOWELL, 1879.

161. "Only the names of those who had invented or used the anticipating machine or improvement, and not the names of those who are to testify of its invention or use, are required to be pleaded."—*Ib.*

162. Complainant alleged that defendant's structure infringed each one of complainant's five patents. Defendant filed a plea instead of an answer, pleading that its structure did not infringe each of said patents, and, in evidence, tried to show that two of the patents were not infringed. The replication was the general one substituting "plea" for "answer." *Held*, that complainant could recover if but one patent was infringed. Defendant was allowed to make answer within twenty days on payment of costs. *Matthews v. Lalance & Grosjean M'fg Co.*, 18 Blatch. 84.—BLATCHFORD, 1880.

163. A bill of complaint set forth the infringement of a patent while it was owned by complainant's assignor, set out the assignment from said assignor to complainant of "all right, interest, and claim for and to the past use of said invention and improvements under said letters-patent," and, besides praying for an injunction and for an increase of damages "in addition to the profits and gains to be accounted for by the defendant," had a prayer for "such other and further relief as shall be agreeable to equity." *Held*, sufficient to allow complainant to recover for infringement occurring while the patent was owned by complainant's assignor. *Campbell v. James et al.*, 18 Blatch. 92.—WHEELER, 1880.

164. Defendants pleaded that they were *bona fide* purchasers of certain letters-patent for a "good and valuable consideration, to wit, a certain sum of money then advanced and paid by them to her." Plea was overruled because the amount of alleged consideration was not stated. *Secombe v. Campbell et al.*, 18 Blatch. 108.—WHEELER, 1880.

165. Defendants answered complainant's bill by saying that they were operating under a patent of later date than complainant's, and denied infringement. In evidence defendants showed that their later patent had been in various litigations, and that the date of the invention embodied therein had been, by different judges, found to antedate complainant's patent. *Held*, that defendants could not under the pleadings avail themselves of such prior findings, the present

complainant not having been a party or privy to any of the prior suits. *Day v. Combination Rubber Co. et al.*, 2 Fed. Rep. 570.—WHEELER, 1880.

166. Defences which deny the validity of a patent need not be specially set up in an answer, unless they are required to be by statute. *Eagleston M'fg Co. v. West, Bradley & Carey M'fg Co. et al.*, 18 Blatch. 218.—WHEELER, 1880.

167. When, in equity, a defendant files a plea (in distinction from an answer) and the complainant takes issue by filing a replication, "the complainant's replication is an admission by him of the sufficiency of the plea as a defence, if the facts which it alleges are established by the evidence." *Theberath v. Rubber & Celluloid Harness Trimming Co.*, 3 Fed. Rep. 151.—NIXON, July, 1880.

168. Defendant had taken a license from complainants, which provided for returns, payments, etc., and for written revocation if defendant failed to keep his agreement. Complainants proceeded against defendant, by bill of complaint, as an infringer, without averring the written revocation. Bill was demurred to and demurrer sustained. *White et al. v. Lee*, 3 Fed. Rep. 222.—LOWELL, July, 1880.

169. While a *bona fide* motion to strike an answer from the files is pending, the suit will not be dismissed on the motion of defendant, for lack of a replication. *Allis et al. v. Stowell*, 10 Bissell, 57.—DYER, 1880.

170. Motion to strike an answer from the files is a proper mode of objecting thereto, as much as the filing of exceptions thereto.—*Ib.*

171. Where an amended answer has been filed, preparatory to a rehearing, upon special leave of the court, exceptions to such an answer cannot be filed without leave of the court, but a motion to strike the answer from the files may be made without special leave.—*Ib.*

172. Averments in an answer that a decree in a former suit was made "without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein; the court, as these defendants are advised and believe, without taking time to consider, deciding said cause and granting said decree even before counsel had completed the argument and presentation of the same," do not contain any imputation on the court and are neither impertinent nor scandalous. *Miller et al. v. Buchanan et al.*, 5 Fed. Rep. 366.—BLATCHFORD, 1880.

173. The determination of the issues sought to be raised by a plea in bar required the patents, specified in the bill, to be examined, and passed upon by the court. An answer was ordered.

*White et al. v. Lee*, 4 Fed. Rep. 916.—LOWELL, 1880.

174. Evidence of prior use not set up in defendants' answer will be stricken out. *Marks v. Fox et al.*, 18 Blatch. 502.—BLATCHFORD, 1880.

175. "A bill is multifarious when it improperly unites in one bill, against one defendant, several matters of a perfectly distinct and independent nature." *Hayes v. Dayton*, 18 Blatch. 420.—BLATCHFORD, 1880.

176. There is no "positive inflexible rule as to what, in the sense of courts of equity, constitutes a fatal multifariousness or demurrer."—*Ib.*

177. For a *résumé* of court decisions on the question of multifariousness in a bill of complaint for infringement of patents, see —. *Ib.*

178. A suit being for infringement of thirty-eight claims contained in six different patents, and the bill showing no connection between the patents, the bill was held bad for multifariousness, on demurrer.—*Ib.*

179. By the court: "The plaintiff contends that the putting in of an answer to the whole bill is a waiver of the demurrer. Rule 32 in equity permits a demurrer to a part of a bill, a plea to a part, and an answer as to the residue. If, impliedly, that rule forbids a demurrer to the whole bill, and at the same time, an answer to the whole bill, the plaintiff's remedy is by moving to strike out either the answer or the demurrer, or to compel the defendant to elect which he will abide by. By going to argument on the demurrer, the plaintiff waived the benefit of the objection now taken, if otherwise he would have it. Moreover, Rule 37, in equity, provides that no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."—*Ib.*

180. A replication filed after the allowed time, and testimony taken by complainant more than three months thereafter, may stand as regular, if the court so order. *Fischer v. Hayes*, 19 Blatch. 26.—BLATCHFORD, 1881.

181. Proceedings for attachment for contempt against a party to a suit, wherein the contempt occurred, may be and usually are entitled the same as the original suit, though it is not irregular to entitle them in the name of "*The People*" on the relation of the person prosecuting the attachment. In such proceedings against a witness, or a person not a party to the suit, the practice is to entitle the proceedings in the name of "*The People*" on the relation, etc.—*Ib.*

182. Defendants, in their answer, set out a

release, under seal of all actions for infringement, if it had committed any, and prayed to have the same benefit of these facts as if they had been pleaded in bar. Complainants excepted to the answer on the ground that said release was not sufficient in law to bar the suit. Exceptions were overruled on the ground that exceptions will not lie to such allegations in an answer. *Adams et al. v. Bridgewater Iron Co. et al.*, 6 Fed. Rep. 179.—LOWELL, 1881.

183. "A substantive defence not responsive to the plaintiff's inquiry, in his bill, is not the subject of exception. That form of objection applies only to an insufficient discovery, or to scandal and impertinence."—*Ib.*

184. "In equity a defendant may make a plea part of his answer, and, if he does so, he shall not be compellable to answer more or otherwise than if he had filed a regular plea."—*Ib.*

185. The defence of the statute of limitations may be made by answer, plea, or demurrer.—*Ib.*

186. "There is no regular, authorized mode of pleading, like a demurrer, to test the legal validity of part of an answer; but, possibly, on motion, some order might be taken to dispose of part of a case in the first instance, if it should be found that great delay and expense might be avoided."—*Ib.*

187. Complainant having filed a bill setting forth the existence of complainant's and respondent's patents, and their interference, and praying that respondent's patent be declared void, etc., respondent filed an answer denying the validity of complainant's patent, and praying that it be declared void. Respondent also filed a cross-bill to the same effect as the answer. Cross-bill was dismissed on the ground that the court had full power in the premises without the cross-bill. No costs allowed. *Lockwood v. Cleveland*, 6 Fed. Rep. 721.—NIXON, 1881.

188. It seems that a bill of complaint which alleges both joint and separate infringements by defendants is demurrable. *Putnam et al. v. Hollender et al.*, 19 Blatch. 48.—BLATCHFORD, 1881.

189. The rule of pleading as to multifariousness forbids the joining of distinct and independent matters in one bill. Whether this rule applies to any particular bill or not is a question of fact. The test of multifariousness is, What is the burden imposed upon the defendant? To what defence is he forced? Can he make one defence to the whole bill? *Gamerwell Fire Alarm Tel. Co. v. City of Chillicothe*, 7 Fed. Rep. 351.—SWING, 1881.

190. "A demurrer for multifariousness will

not lie to a bill founded on several letters-patent when all the inventions are set out as constituting one cause of action, and the prayer relates singly, as to discovery and remedy, to a machine constructed according to and containing all said inventions."—*Ib.*

191. "Where the discovery is prayed for under special interrogations as to each letters-patent, in a manner so particular as to each invention, that it is evident on the face of the bill that the relief sought is for infringement of each and every invention, and not for an injury arising from the making one machine constructed according to such letters-patent, the bill is demurrable."—*Ib.*

192. "To escape the objection of multifariousness . . . a bill should aver that "the different "inventions are capable of conjoint as well as separate use, and are, in fact, so used by defendant."—*Ib.*

193. "In equity a defendant has the right to set up as many defences as he may have, providing they are not inconsistent." To answer that defendant has a license, and also that the patent is invalid, is not inconsistent. *Nat. M'fg Co. v. Meyers*, 7 Fed. Rep. 355.—IRVING, 1881.

194. When a plea is overruled, the defendants may have leave to answer. *Wooster v. Blake et al.*, 7 Fed. Rep. 816.—BLATCHFORD, 1881.

195. Defendant can take no benefit from having a patent for the thing complained of, unless the patent is set up in the answer. *Zinn et al. v. Weiss*, 7 Fed. Rep. 914.—BENEDICT, 1881.

196. By the court: "As the demurrer is to the whole bill, and not to any particular discovery or relief asked, and as a foundation is laid in the bill for at least some of the discovery and relief asked, the demurrer must be overruled." *Buerk v. Imhaeuser et al.*, 8 Fed. Rep. 457.—BLATCHFORD, 1881.

197. By the court: "The defendant, . . . being liable for each one of the amounts decreed in the one suit, is not in a position to raise the objection of multifariousness, as he is in no worse position by having only one suit against him than if there were three."—*Ib.*

198. "The clear purport of Section 4920 is," that the defence that "the invention was patented or described in a printed publication prior to its supposed invention by the patentee, must, in a suit in equity, be set up in an answer and not in a technical plea." *Carnrick et al. v. McKesson et al.*, 19 Blatch. 369.—BLATCHFORD, 1881.

199. "The statute (Rev. St. Section 4920) does not require the names of witnesses to be given, but only the names of those who knew

of the thing, and where they can be found, and where and by whom the thing was used." *Sutro et al. v. Moll*, 19 Blatch. 89.—BLATCHFORD, 1881.

200. "The rule to be applied is that the pleadings will be construed most strongly against the pleader." *Still et al. v. Reading et al.*, 4 Woods, 345.—TURNER, 1881.

201. A patentee brought his bill of complaint against an alleged infringer, without alleging that the defendants had not derived right from a licensee who had power to give such right. Bill was held demurrable.—*Ib.*

202. The defence that the device described in the patent is not operative, must be set up in defendant's answer in order to be available. *McKesson et al. v. Carnrick*, 19 Blatch. 158.—BLATCHFORD, 1881.

203. Defendants cannot (under Equity Rule 32) demur to the whole bill and make answer to the whole bill at the same time. "Putting in such an answer is a waiver of such a demurrer. The defendants must elect between their demurrer and their answer; and, to guard against misunderstanding, if they should elect their demurrer, and it should be overruled on argument, they would be held, probably, to have waived what, ordinarily and otherwise, would be, under Rule 34 their right to answer." *Adams et al. v. Howard et al.*, 20 Blatch. 38.—BLATCHFORD, 1881.

204. The single defence of non-infringement cannot be made by a plea. *Sharp v. Reissner et al.*, 20 Blatch. 10.—BLATCHFORD, 1881.

205. In pleading the defence of prior use, the place where the prior knowledge or use was had must be stated. *Searls v. Bouton et al.*, 20 Blatch. 426.—WHEELER, 1881.

206. Query. May defendants avail themselves of insufficiency of complainant's specification without setting up such defence in their answer? *Webster Loom Co. v. Higgins et al.*, 105 U. S. 580.—SUP. CT. 1882.

207. It seems that the defence of prior invention must be specifically pleaded in the answer.—*Ib.*

208. By the court: "The motion of complainant to amend his bill by alleging that the defendants were severally, president, secretary, and directors of the association, is denied, if intended to aid the suit as one against the defendants individually. If intended to make the suit one against the association as a whole, the complainant cannot now be allowed to put this suit into that shape." *Tyler v. Galloway et al.*, 21 Blatch. 66.—BLATCHFORD, 1882.

209. "Only the names of those who had in-

vented or used the anticipating machine or improvement, and not of those who are to testify touching its invention or use, are required to be set forth." *Allis v. Buckstaff et al.*, 22 O. G. 1705.—DYER, 1882.

210. "Argument can hardly be needed to show that the question of the infringement of a patent is not a proper subject of a special plea. As Judge Blatchford says in his opinion, the question of the infringement of a patent, depends very much on the construction of its claims, and that depends very much on prior devices on the same subject; and if such prior devices are to be put in, they ought to be set up in an answer and to be put in once for all." *Hubbell et al. v. De Land*, 11 Bissell, 382.—DYER, 1882.

211. A variance between an original patent and defendant's reissue may be availed of by a plea in bar, which sets out the original and reissued patents and also pertinent intermediate patents.—*Id.*

212. By the court: "Upon overruling the plea, the defendant, it is true, would be assigned to answer the bill; but it does not follow that the matter litigated under the plea may be renewed in a defence made by answer. If the plea shall be sustained that will be an end of the suit; and whatever shows that there is no right which can be made the subject of suit, or whatever is a complete and perpetual bar to the right sued for, may constitute the subject of a plea in bar; or, as it is expressed in a work on pleadings at law, whatever destroys the complainants' suit and disables them from recovery may be pleaded in bar." 2 Daniel's Chancery Practice, 754.—*Id.*

213. When a motion for an attachment for contempt is dismissed without prejudice to the right to the complainant to file a supplemental bill, a demurrer to such a supplemental bill, on the ground of adequate relief in the former case, will not lie. *Allis v. Stowell*, 15 Fed. Rep. 242.—DYER, 1883.

214. As to mode of taking advantage of formal defects in a bill, see —. *Pelham v. Edelmeyer*, 21 Blatch. 188.—WALLACE, 1883.

215. Defendants' special plea alleged that they had settled the damages. In complainant's replication an effort was made to add another and different cause of action. *Held*, demurrable. *Burdell v. Deing et al.*, 15 Fed. Rep. 397.—BAXTER, 1883.

216. By the court: "Complainant fails to show by his bill that the two inventions alleged to have been infringed are capable of conjoined use, or that they have, in fact, been so used by defendant. For the want of this averment it is insisted that the bill is multifarious, etc. . . . I

am inclined to think that the demurrer is well taken." *Pope Mfg Co. v. Marqua et al.*, 15 Fed. Rep. 400.—BAXTER, 1883.

217. By the court: "When the bill alleges infringement of several patents, for different inventions, to escape the objection of multifariousness, it must aver that the inventions are capable of conjoined use, and are, in fact, so used by the defendant." *Barney v. Peck et al.*, 16 Fed. Rep. 413.—WALLACE, 1883.

218. "If letters-patent are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground whether the defence be made or not." *Stawson v. Grand St. P. & F. R. Co.*, 107 U. S. 649.—SUP. CT. 1883.

219. Where complainant makes an allegation against defendants in the bill of complaint, and does not expressly waive an answer under oath, and defendants deny the allegation in their answer, the allegation must stand as not proved. *Slessinger v. Buckingham et al.*, 8 Sawyer, 469.—SAWYER, 1883.

220. If an objection urged to a bill involves only a question of pleading, and the bill is not defective in a matter of substance, such objection will not be available at a hearing on the merits. Such objections must be taken by demurrer. And even where there is a defect of parties appearing upon the face of the bill, the defendant must resort to a demurrer or the court is at liberty to make a decree saving the rights of the parties. *Pelham v. Edelmeyer*, 21 Blatch. 188.—WALLACE, 1883.

221. "A bill is not necessarily obnoxious to the charge of multifariousness, because the suit is brought upon more than one patent; . . . but in such cases the bill of complaint, in order to be maintainable, must allege, and the proofs must show that the inventions embraced in the several patents are capable of conjoint use, and are so used by the defendant." *Lilliendahl et al. v. Detwiler et al.*, 18 Fed. Rep. 176.—NIXON, 1883.

222. "Adjudged cases and text-books permit the averments of the bill, in general terms, as to the invention, reciting the title of the patent merely, and making profert of the letters-patent." *McMillin et al. v. St. Louis & Miss. Valley Transp. Co.*, 5 McCrary, 561.—TREAT, 1883.

223. "A bill which, under Section 4918 of the Revised Statutes, upon proper averment, prays an adjudication concerning conflicting patents, and also alleges an infringement of the plaintiff's patent by the defendant, by reason of the manufacture and sale by the latter of articles constructed under his letters, and prays an accounting and damages, is not demurrable for mis-

joinder of causes of action." *Leach v. Chandler et al.*, 18 Fed. Rep. 262.—WOODS, 1883.

224. Where a bill of complaint does not show in the complainant a right to profits and damages accruing before the complainant took his assignment of the patent, the decree cannot cover profits and damages accruing before such assignment. *N. Y. Grape Sugar Co. v. Buffalo G. Sugar Co. et al.*, 21 Blatch. 519.—SHIPMAN, 1883.

225. A state law requiring a verification of defendants' plea by oath, applies, under Section 914 of the Revised Statutes, to pleas both general and special in a suit at law, on a patent, in a United States court. *Cottier et al. v. Stimson et al.*, 9 Sawyer, 435.—DEADY, 1883.

226. General issue "with notice" and special pleas may be joined.—*Id.*

227. By the court: "No objection having been taken by demurrer or the answer to the non-joinder of the other two owners of this license, such non-joinder cannot now be insisted on to defeat a decree." *Adams et al. v. Howard et al.*, 22 Blatch. 47.—WALLACE, 1884.

228. It seems that in action at law for the recovery of damages, for the infringement of a patent, distinct and several pleas of the statute of limitations covering different periods of time, may be pleaded. *Hayden v. Oriental Mills*, 22 Fed. Rep. 103.—COLT, 1884.

229. The court may dismiss the bill on the ground of want of patentability without looking into the answer, and to that end may read complainants' patent in view of the state of the art. *Nicodemus et al. v. Frazier*, 19 Fed. Rep. 260.—MORRIS, 1884.

230. Where the plaintiff brought suit for the United States as well as himself, to recover the penalty given by the statute which forbids the stamping of unpatented articles as patented, and pleaded some special damage, this last was held to be irrelevant, and subject to be stricken out on motion under the New York code of procedure, which regulates the practice in common law actions in the district where the suit is brought; this pleading was not, however, held objectionable on demurrer. *Winne v. Snow*, 19 Fed. Rep. 507.—BROWN, 1884.

231. In an action on the statute which forbids the stamping of unpatented articles as patented, the complainant need not allege that the articles are patentable.—*Id.*

232. "The object of a plea when there is some certain, single issue, requiring but little evidence, that will dispose of the whole case, if understood, is to try that issue without putting the parties to the expense of a trial of the case at

large, and pleas are limited to a single defence or issue, unless by permission of the court the defendants are allowed to plead double."

And when the effect of a plea would be to have the whole case tried piece-meal, it is not allowable. *Giant Powder Co. v. Safety Nitro-Powder Co. et al.*, 19 Fed. Rep. 509.—SAWYER, 1884.

233. A plea having been filed, and it having been stipulated that it should stand for an answer so far as it was available as a defence, and testimony having been taken, an attempt to introduce a new plea was disallowed.—*Id.*

234. It seems that the question whether two patents interfere with each other may be properly raised by demurrer to the bill. *Morris v. Kempshall M'fg Co.*, 20 Fed. Rep. 121.—SHIPMAN, 1884.

235. Where defendants' answer was irregular in its form, and complainant "did not move to have the answer taken off the file for irregularity, nor to have the bill taken *pro confesso* for want of an answer, as if the answer were void, nor except to the answer for insufficiency by reply to it, he admitted it to be sufficient, however imperfect it might be. The issue joined upon the answer by the traverse was upon its allegations and denials as they were, and the orator, by joining that issue, placed himself where he must overcome the denials and maintain his bill." *Wooster v. Muser et al.*, 20 Fed. Rep. 162.—WHEELER, 1884.

236. "An answer in equity is required for discovery and evidence as well as for grounds for defence, and evidence cannot be given by attorney; therefore, an answer cannot be made by an attorney," and an answer thus made is irregular.—*Id.*

237. Complainant's bill of complaint included five different patents, one for an electric lighting system, one for an improved regulator for electric lights, one for an improvement in electric lamps, one for an improvement in carbon for electric lights, and one for an improvement of carbons for electric lights. The bill was demurred to for multifariousness. The bill alleged that the patented inventions were capable of being used conjointly; that the orator made, used, and sold them conjointly, as parts of the same electric lighting system, each and all of said inventions in some essential and material parts thereof; and that the defendant was infringing each and all of these patents by making, selling, and using each and all of said inventions conjointly in a system of electric lighting, the same substantially as that of the orator. The demurrer was sustained and the bill adjudged

multifarious. *Consolidated Electric Light Co. v. Brush-Swan Electric Light Co.*, 22 Blatch. 206.—WHEELER, 1884.

238. After delivery of the court's opinion, but before the signing of the interlocutory decree, complainant moved to amend the bill by the insertion of averments to the effect that the assignment whereby complainant derived its title, conveyed to complainant the right of recovery for previous infringements. The amendment was allowed. *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 22 Blatch. 182.—SHIRMAN, 1884.

239. Complainant joined three patents in one suit. Thereof the court said: "The improvements covered by the four above specified claims are susceptible of conjoint use, and they are so used by the defendant in the machines complained of." *Stulz v. Armstrong & Son*, 28 O. G. 367.—ACHESON, 1884.

240. Where, in an action at law for infringement of a patent, the defendants plead the general issue, the special matters of defence allowed by the statute are to be set up in a notice, and that notice served on the defendants. But the notice is no part of the answer. "These matters might have been set up in special pleas without otherwise giving notice of them." *Cottier et al. v. Stimson et al.*, 20 Fed. Rep. 906.—DEADY, 1884.

241. Where defendants file a special plea setting up new matter, not making an issue with any allegation in the complainants, such special plea ought to conclude "and this the defendants are ready to verify."—*Id.*

242. "A plea of 'not guilty' puts in issue the alleged acts of the defendants, constituting the infringement of the letters-patent."—*Id.*

243. Complainant contended that defendant was estopped from contesting the validity of complainant's patent, because the maker of the articles used by defendant had confessed and acknowledged the validity of complainant's patents in a license. It would seem that in order to make such a contention available it must be suggested in the bill of complaint, and that it must be shown that respondent was a party to such a written agreement. *Baltimore Car Wheel Co. v. North Baltimore Passenger Railway Co.*, 21 Fed. Rep. 47.—MORRIS, 1884.

244. It is doubtful if the defence that a patentee has not properly stamped his articles with the date of his patent can be made available unless it is set up in the answer. *Sessions v. Romadka et al.*, 21 Fed. Rep. 124.—DYER, 1884.

245. "The defence of unreasonable neglect or delay in filing a disclaimer must be set up in

the answer before it can be considered by the court." *Worden et al. v. Searls*, 21 Fed. Rep. 406.—NIXON, 1884.

246. The question of laches on complainant's part can be raised by demurrer. *McLaughlin v. People's Railway Co.*, 21 Fed. Rep. 574.—BREWER, 1884.

247. Where, in an equity suit, defendant desires to avail himself of the defence that the patent is too near its expiration to warrant an injunction, a demurrer is the preferable mode of raising that question. *N. Y. Grape Sugar Co. v. Peoria Grape Sugar Co.*, 21 Fed. Rep. 878.—BLODGETT, 1884.

248. Mandamus is the proper form of action, proceeding from the Supreme Court of the District of Columbia and directed to the Commissioner of Patents, when it is sought to have the Commissioner perform a duty imposed by the statute. *Butterworth Com'r v. Hoe et al.*, 112 U. S. 50.—SUP. CT. 1884.

249. It seems that in an action at law for the recovery of damages for the infringement of a patent, distinct and several pleas of the statute of limitations, covering different periods of time, may be pleaded together. *Hayden v. Oriental Mills*, 22 Fed. Rep. 103.—COLT, 1884.

250. Where there is a plurality of patents set up in complainants' bill, and also a plurality of alleged infringers, the bill must allege that all the patents were susceptible of being, and were jointly used by the defendant. Or that they were susceptible of joint use, and that one or more of them was jointly used by the defendant. *Shickle et al. v. So. St. Louis Foundry Co.*, 22 Fed. Rep. 105.—TREAT, 1884.

251. Where a complainant, in moving for a provisional injunction, relies upon the effect of conditions contained in licenses taken of complainant by defendant, the court will not proceed to act upon such conditions where the licenses are not mentioned in the bill. "Preliminary relief will not be granted when upon the same proofs and allegations final relief would not be granted."

This is true, although copies of the licenses are annexed, and although enough may be spelled out from the affidavits of the defendant, and from the answer to the bill, to supply these omissions. "The court should not be asked to spend much time to find out whether the vital facts upon which the moving party relies, and which he has not taken the trouble to assert, can be exhumed from some other source." *Internat'l Tooth Crown Co. v. Mills Co.*, 22 Fed. Rep. 659.—WALLACE, 1884.

252. Where a complainant in his bill alleges

generally the surrender and reissue of his patent, "it is not necessary to aver specifically the ground on which the original patent was surrendered." *Spaeth v. Barney*, 22 Fed. Rep. 828.—COLT, 1885.

253. "Undoubtedly a corporation cannot be compelled to answer under oath to a bill in equity. It answers only under the seal of a corporation. It is for this reason the practice has obtained of making the officers of the corporation parties to the bill, and requiring them to answer the interrogatories. This, however, does not excuse a corporation from answering, and the complainant is entitled to an answer from a corporation as well as from an individual, although the answer may not be worth the expense of the experiment. Although no officer or agent is made a party to the bill, it is still the duty of the corporation to cause diligent examination to be made, and give in its answer all the information derived from such examination; and if it alleges ignorance without excuse, a disposition on its part to defeat and obstruct the course of justice may be inferred, which will justify the court in charging it with the costs of the suit." *Colgate v. Compagnie Française du Telegraph, etc.*, 23 Fed. Rep. 82.—WALLACE, 1885.

254. Where a bill for infringement of a patent is brought against a corporation and its assignee, and defendants set up by demurrer that the causes of action against the corporation and against the assignee are distinct and different in their nature, the demurrer is not good, because of the privity of action between the corporation and the assignee. *Gordon et al. v. St. Paul Harvester Works et al.*, 23 Fed. Rep. 147.—NELSON, 1885.

255. A bill of complaint alleged that all the claims of all the patents were infringed in one structure. This was denied in the answer and shown to be untrue by the proofs. All the claims which were held to be valid and infringed were infringed by one structure, and the bill was therefore held not to be multifarious. *Hayes v. Bickelhaupt*, 23 Fed. Rep. 183.—WHEELER, 1885.

256. A bill of complaint is not indefinite and uncertain because it does not set out a contract on which defendant relies for defence, and which, if it had been set out, would make the bill defective. *Johnson v. Wilcox & Gibbs Sewing-Mach. Co.*, 25 Fed. Rep. 373.—COXE, 1885.

257. Where a bill of complaint "sets out or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to enlarge and expand

the claims of the original, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, the question of laches is a question of law, arising on the face of the bill which avails as a defence upon a general demurrer, for want of equity." *Wolensack v. Reiher*, 115 U. S. 96.—SUP. CT. 1885.

258. Where different suits are brought for the infringement of different patents, and the alleged infringements are all embodied in one kind of machine, the suits may, upon motion, be consolidated. *Deering v. Winona Harvester Works et al.*, 24 Fed. Rep. 90.—NELSON, 1885.

259. "When profert is made of a paper in the complaint, it is for all purposes presented to the court as part of the pleading, and an objection thereto may be taken by demurrer." *Bogart et al. v. Hinds*, 33 O. G. 1268.—COXE, 1885.

260. "It is necessary that a bill in equity, for an injunction against the infringement of letters-patent for an invention, should contain such a description, as patented, as will apprise the court of its nature and character, and the particulars in which the improvement consists. This may be done by a full and accurate description, in the pleader's own language, of the patent, or by employing the language of the specification, or by a reference to and profert of the letters-patent." *Post et al. v. T. C. Richards' Hardware Co.*, 25 Fed. Rep. 905.—SHIPMAN, 1885.

261. "By taking issue upon the plea, the complainants admitted its sufficiency in point of form and substance." *Birdseye et al. v. Heilner et al.*, 26 Fed. Rep. 147.—WALLACE, 1885.

262. Complainant's suit was brought for the infringement of five different patents, and in the bill of complaint the history of the different inventions was set out. Defendants took exception thereto, but the court sustained the pleading, saying: "The history of the invention is always a part of the controversy of the case. The state of the art or steps which have been taken, either by the inventor of the patent in question or by other inventors, is always a necessary part of the testimony in the case, and it seems to me a proper matter of averment in this bill." *Steam Gauge & Lantern Co. v. McRoberts et al.*, 26 Fed. Rep. 765.—BLODGETT, 1886.

263. It is proper to set out in a bill of complaint prior litigations had upon the patent in suit.—*Id.*

264. In an action at law, plaintiff's allegation was of a contract to place an electric plant in a building in a certain city, the performance of the contract, non-payment of part of the purchase money, and an assignment of the contract to

the plaintiff. The defendant's answer in one defence averred that it was a part of the contract that the contractor should furnish an indemnifying bond, guaranteeing against all infringements, and that that bond was not given. This allegation of defendant stating a perfect defence, another allegation of the defendant was on motion of the plaintiff stricken out, the allegation being that, since the putting of the plant in the building two suits had been commenced for infringement, and that defendant had been put to the expense of employing counsel to defend those suits. *Horne v. Hoyle*, 27 Fed. Rep. 216.—BREWSTER, 1886.

265. The statutory defences are not the only defences which may be made against a patent. *Gardner et al. v. Herz et al.*, 118 U. S. 180.—SUP. CT. 1886.

266. The respondent in its answer, said, "it has never felt disposed to contest said matter with the complainant, but chose rather to make such terms as were by said complainant made with other companies, and pay its royalty rather than to have litigation, and proposes to do the same now, and has so offered to do with said complainant both before and after this suit was commenced." Thereupon, the court said: "With this admission in the defendant's answer there can be but one decree, and that is in favor of complainant, sustaining the validity of the patent and finding infringement." *Globe Nail Co. v. Superior Nail Co.*, 27 Fed. Rep. 454.—BLODGETT, 1886.

267. A bill of complaint for infringement included five patents. There was no allegation in the bill that the inventions were capable of conjoint use, or that the structure manufactured and sold by the defendants combined all the patent features. On demurrer the bill was held bad for multifariousness. *Griffith v. Segar et al.*, 29 Fed. Rep. 707.—COXE, 1887.

268. Where a bill of complaint sets out an act of infringement of a certain date, complainants cannot recover for acts of infringement prior to that date. *Koalatype Engraving Co. et al. v. Hoke et al.*, 30 Fed. Rep. 444.—THAYER, 1887.

269. A bill was brought for an infringement of an original patent. Defendant answered that it had been surrendered and reissued. The patent expired after the bill was amended to cover the reissue. It was held that such amendment was clearly within the power of the court. *Reay v. Berlin & Jones Envelope Co.*, 30 Fed. Rep. 443.—WHEELER, 1887.

270. In an action for wrongfully stamping articles as patented, an allegation in the complaint that the stamping was done "on or about

June, 1886," is sufficiently definite. *Fish v. Manning et al.*, 31 Fed. Rep. 340.—BROWN, 1887.

271. "In an action upon a penalty, the statute imposing it, and the violation thereof, must be pleaded with certainty. . . . It is therefore improper and insufficient to refer to different statutes without specifying which is relied on."—*Ib.*

272. A complaint in an action to recover penalties for wrongfully stamping articles as patented, was held defective in not alleging "(a) that the defendants had no patent for the article stamped; (b) that the article stamped contained the patented improvement; (c) that the stamping was done without the consent of the plaintiff's 'assigns or representatives.'"—*Ib.*

273. In an action for the recovery of penalties for wrongfully stamping articles as patented, "an averment that the sales were made for the purpose of deceiving the public is not pertinent to the plaintiff's cause of action, which is founded upon the stamping of patented articles, while the averment is pertinent to the stamping of unpatented articles."—*Ib.*

274. Defendant's answer averred "that it would be inequitable, under all the circumstances of the case, to enjoin him from making and selling the device described in the third claim of complainant's letters-patent." The answer also averred "that complainant is not entitled to equitable relief, because he has not come into equity with clear hands." The court held that under this pleading it could not consider any possible rights which defendant might have acquired as to the third claim of patent. *Puetz v. Bransford*, 31 Fed. Rep. 458.—THAYER, 1887.

275. "Although formerly a complainant, by a special replication, could put in issue some fact on his part necessary for the evidence of new matter in the defendants' plea or answer, but not alleged in the bill, this is not now permissible. Equity Rule 45. It is needless to say that no facts are properly in issue unless charged in the bill." *Seibert Cylinder Oil Cup Co. v. Manning et al.*, 32 Fed. Rep. 625.—WALLACE, 1887.

276. The fourth and fifth defences specified in Section 4820 of the Revised Statutes are different defences, and, in order to be available, must be pleaded specifically. *Meyers et al. v. Busby*, 32 Fed. Rep. 670.—SAWYER, 1887.

#### PRIOR INVENTION.

"PRIOR INVENTION" IN THE PATENT ACTS.

Act approved February 21st, 1793.

SECTION 6. This section provides, as a defence



to an action for infringement, proof that the alleged inventor "had surreptitiously obtained a patent for the discovery of another person." [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 15. This section provides, as a defence to an action for infringement, proof that the patentee "had surreptitiously or unjustly obtained the patent for that which was, in fact, invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same." [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 61. This section provides, as a defence to an action for infringement, as follows:

"Second. That he [the patentee] had surreptitiously or unjustly obtained the patent for that which was, in fact, invented by another, who was using reasonable diligence in adapting and perfecting the same." [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4920. This section provides, as a defence to an action for infringement, as follows:

"Second. That he [the patentee] had surreptitiously or unjustly obtained the patent for that which was, in fact, invented by another, who was using reasonable diligence in adapting and perfecting the same."

[For statutory provisions with reference to priority of invention, in interference proceedings, see "Interference" in the Patent Acts.]

#### CASES.

1. "The first inventor is entitled to the benefit of his invention if he reduce it to practice and obtain a patent therefor. A subsequent inventor cannot, by obtaining a patent therefor, oust the first inventor of his right." *Woodcock v. Parker et al.*, 1 Gall. 437.—STORY, 1813.

2. The law gives the right, as among inventors, to him who is first in time. *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

3. An allegation that the plaintiff surreptitiously obtained the patent for the invention of another, must be supported not only by proof of conception by that other, but by proof that he did not concur in the getting of the patent by plaintiff. *Dixon v. Moyer*, 4 Wash. 68.—WASH. 1821.

4. If, through a subsequent inventor, the invention comes into common use, there would be no *quid pro quo*, no price, for the monopoly. *Pennock et al. v. Dialogue*, 2 Peters, 1.—SUP. CT. 1829.

5. A prior undisclosed invention will not prevent a subsequent inventor from taking a valid

patent. *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

6. An invention is complete as soon as it is capable of successful operation. *Burrows v. Wetherill*, 1 MacArthur's P. C. 815.—MORSELL, 1854.

7. A claim that plaintiffs' patent is void, because the invention was originally communicated to the patentee by another, can only be substantiated by proof that the communication was such as to enable the patentee to put the invention in practice without the exercise of the inventive faculty. *Alden et al. v. Dewey et al.*, 1 Story, 336.—STORY, 1840.

8. The patentee's oath of invention counterbalances the oath of a single witness that he communicated the invention to the patentee.—*Ib.*

9. "If the invention be the mere speculation of a philosopher or mechanic in his closet, and he takes no steps toward obtaining a patent, but keeps his invention secret, and another person, who is an original but subsequent inventor of the same thing, obtains a patent for it and brings it into use, it has been held, both in England and in this country, that the patentee in a suit at law is to be considered as the first inventor." *Heath v. Hildreth*, 1 MacArthur's P. C. 12.—CRANCH, 1841.

10. "It cannot be just that the prior inventor, who is maturing his invention and preparing to make application for a patent at a reasonable time, should be defeated by a subsequent inventor who first obtains a patent."—*Ib.*

11. "Where the invention is not of a mere philosophical speculation, abstraction, or theory, but of something corporeal, something to be manufactured, the applicant need not show that he has reduced his invention to practice otherwise than by filing his specification and furnishing drawings and a model, as required by the statute, where the nature of the case admits of drawings or of a representation by a model."—*Ib.*

12. "No person, who is not at once the first as well as the original inventor, by whom the invention has been perfected and put into actual use, is entitled to a patent. A subsequent inventor, although an original inventor, is not entitled to a patent. If the invention is perfected and put into actual use by the first and original inventor, it is of no consequence whether the invention is extensively known or used, or whether the knowledge of use thereof is limited to a few persons, or even to the first inventor himself." *Reed v. Cutter et al.*, 1 Story, 590.—STORY, 1841.

13. "In a race of diligence between two in-

dependent inventors, he who first reduces his invention to a fixed, positive, and practical form, would seem to be entitled to a priority of right to a patent therefor. . . . Providing that is the case, he who invents first shall have the prior right, if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has, in fact, first perfected the same and reduced the same to practice in a positive form." —*Id.*

14. He who is an original and first inventor, and has his invention perfected and reduced to practice, is not deprived of his right to a patent in favor of a second and subsequent inventor simply because the first invention was not then known or used by other persons than the inventor, or not known or used to such an extent as to give the public full knowledge of its existence. —*Id.*

15. "The law is, that whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may previously have had the idea and made some experiments toward putting it in practice." *Washburn et al. v. Gould*, 3 Story, 122. —STORY, 1844.

16. Although a party may be prior in the date of making his invention, he "must proceed to perfect and patent it with due diligence, otherwise a succeeding inventor, who is more diligent in perfecting his, though not in getting out a patent, may prevail against or defeat him." *Allen v. Blunt et al.*, 2 W. & M. 121. —WOODBURY, 1846.

17. "Reducing to practice differs from bringing into use. There is no law requiring the applicant to reduce his invention to actual use before he can obtain a patent. On the contrary, the use of the invention before obtaining a patent is one of the reasons for refusing it. An inventor has reduced his invention to practice when he has so described it on paper, with such drawing or model as to enable any person skilled in the art to make and use the same. He must show that it is practicable, and the manner in which it may be used. But it is not necessary that he should do this until he has perfected his invention and is ready to apply for a patent. He may have conceived the idea years ago, but is not obliged to furnish drawings or model until he makes his application." *Perry v. Cornell*, 1 MacArthur's P. C. 68. —CRANCH, 1847.

18. The requirement of reasonable diligence in adapting and perfecting an invention "is only applicable to the case of a patent surreptitiously or unjustly obtained, while the first inventor was using reasonable diligence in adapting and perfecting his invention—not to the case of conflict-

ing applicants before any patent is granted. It is one of the pleas which the defendant, who is a supposed violator of the surreptitious patent, may plead; and, if pleaded, it may be necessary for the defendant to show, in order to vacate the patent, that he was using reasonable diligence, etc., when the patent was obtained. But before a patent is granted to any one for the invention, there is no law that requires the first inventor to disclose his invention within any limited time before application for a patent; and there is no limitation, unless the lapse of time be sufficient, to show an abandonment of the invention, which is a question for the jury and not for the Commissioner; nor does the priority of application for a patent decide the priority of the invention." —*Id.*

19. Where it is proved that a person constructed a machine embodying a patentable improvement at a certain date, the presumption arises that such person was the first inventor of such improvement. *Atkinson v. Boardman*, 1 MacArthur's P. C. 80. —CRANCH, 1847.

20. Although one inventor may be anterior to another in point of time, yet, if he does not reduce it to practical operation and then neglects it for years, a later inventor is entitled to the patent. *Parkhurst v. Kinsman et al.*, 1 Blatch. 488. —NELSON, 1849.

21. "It is not enough to defeat a patent already issued that another conceived the possibility of affecting what the patentee accomplished. To constitute a prior invention, a party alleged to have produced it must have proceeded so far as to have reduced his idea to practice and embodied it in some distinct form. It must have been carried into practical operation; for he is entitled to a patent, who, being an original inventor, has first perfected the invention and adapted it to practical use. Crude and imperfect experiments, equivocal in their results, and then given up for years, cannot be permitted to prevail against an original inventor who has perfected his improvement and obtained his patent." —*Id.*

22. When a patent is attacked on the basis of alleged prior inventions, "it is no matter whether those prior inventions were patented or not, if they existed, if they were discovered, if they were used." Failure to take patent may be some evidence that the prior inventions were not considered valuable. Whether the reliance is on prior invention and not on prior use, "it is of no consequence whether it is abandoned or not, but whether it was the prior invention." *Colt v. Mass. Arms Co.*, 1 Fish. P. C. 108. —WOODBURY, 1851.

23. "The date of the invention is the date of the discovery of the principle involved, and the attempt to embody it in some machine, not the date of the perfecting of the instrument."—*Ib.*

24. "The party cannot get a patent until he perfects it in some sense of the word—that is, until he goes on and makes improvements to render it practical and useful, for it is one element of a machine necessary to sustain a patent, that it is useful."—*Ib.*

25. "Such is the law that the date of the invention becomes very material, because it is the earliest in date that is then to succeed."—*Ib.*

26. Although an interference contestant may have delayed prosecuting his invention, a lack of means will excuse the delay. *Yearsley v. Brookfield et al.*, 1 MacArthur's P. C. 193.—MORSELL, 1853.

27. "Where the invention is not of a mere philosophical speculation, abstraction, or theory, but of something corporeal—something to be manufactured—the applicant need not show that he has reduced his invention to practice otherwise than by filing his specification and furnishing drawings and a model, as required by the statute, where the nature of the case admits of drawings or of a representation by a model." *New England Screw Co. v. Sloan*, 1 MacArthur's P. C. 210.—MORSELL, 1853.

28. He who first conceives an improvement, and uses reasonable diligence to perfect it, is entitled to a patent over him who subsequently conceives but first reduces to practice. *Marshall v. Mee*, 1 MacArthur's P. C. 229.—DUNLOP, 1853.

29. "A long course of mere fruitless experiments to reduce the principle to practice would not be sufficient to prevent a subsequent original inventor, who had perfected his invention without knowledge of the prior inventor, from his right to a patent; but, on the other hand, where a prior inventor has been using reasonable diligence to perfect and adapt his invention to practical use, his right will be reserved and protected, although his success may not have been perfect." *McCormick v. Howard*, 1 MacArthur's P. C. 238.—MORSELL, 1853.

30. "If there has preceded the invention, for which a patent has been obtained, another invention of the same kind, and that has been perfected within the meaning of the patent law, so as to be of practical utility, and not to end in mere experiment, then it has anticipated the subsequent discovery or invention, and such inventor cannot be entitled to the monopoly or exclusive privilege that is claimed by the patent." *Howe*

*et al. v. Underwood et al.*, 1 Fish. P. C. 160.—SPRAGUE, 1854.

31. "To constitute a prior invention, the party alleged to have made it must have proceeded so far as to entitle himself to a patent in case he has made an application." *Allen v. Hunter*, 6 McLean, 303.—McLEAN, 1855.

32. "If both the plaintiff and defendant are inventors of the thing claimed by them respectively, the one who first perfected his invention is protected by the law." "A general remark, that he had accomplished his object, without particularizing what he had invented or discovered, is not satisfactory. But a statement of the thing invented or discovered should be considered as evidence, so far as it agrees with the patent subsequently obtained, or with the work claimed to have been perfected."—*Ib.*

33. "There is no law requiring the applicant to reduce his invention to actual use before he can obtain a patent. An inventor has reduced his invention to practice when he has so described it on paper, with such drawings or models as to enable any person skilled in the art to make and use the same. He must show that it is practicable, and the manner in which it may be used; but it is not necessary that he should do this until he has perfected his invention and is ready to apply for a patent. He may have conceived the idea years ago, but is not obliged to furnish drawings or model until he makes his application." *Stephens et al. v. Salisbury*, 1 MacArthur's P. C. 379.—MORSELL, 1855.

34. As to the diligence, provided for by Section 15 of the Statute of 1836, "it has application to the case of a prior inventor by way of defence, where a subsequent inventor has obtained a patent for the same invention surreptitiously and directly only in such a case, or where it has appeared that analogous principles are involved, and then by an equitable construction of the rule."—*Ib.*

35. "The circumstance that a person has had an idea of an improvement in his head, or has sketched it upon paper—has drawn it, and then gives it up—neglects it—does not, in judgment of law, constitute, or have the effect to constitute him a first and original inventor. It is not the person who has only produced the idea that is entitled to protection as an inventor, but the person who has embodied the idea in a practical machine, and reduced it to practical use. He who has first done this is the inventor who is entitled to protection." *Winans v. N. Y. & Harlem R. R. Co.*, 4 Fish. P. C. 1.—NELSON, 1855.

36. "If a person has some vague idea of the

application of the principle which another party has made available—if he makes numerous trials and long-continued experiments—if those trials and experiments never result in such a knowledge, upon his part, as will enable him to put in successful practice the idea of which he has this vague and undefined notion, he has never become an inventor in the sense of the patent law; he has never embodied the principle so as to make it available for practical use; and the party who embodies the principle, and makes it available for practical use, is the party who is entitled to a patent, and to protection under the patent law.” *Ransom et al. v. N. Y.*, 1 Fish. P. C. 252.—HALL, 1856.

37. “If the plaintiffs did not use reasonable diligence to perfect the invention patented after the idea of it was first conceived, and in the mean time other persons not only conceived the idea, but perfected the invention, and practically applied it to public use, before the invention of the plaintiffs had been so far perfected that it could be applied to practical use, the plaintiffs’ patent is void, because they were not the first and original inventors of the thing patented. And if the plaintiffs, after they had perfected their invention, unreasonably delayed their application for a patent, and other persons, before such application was made, actually perfected and applied the same invention to practical use, and gave the knowledge thereof to the public, and the plaintiffs, after the knowledge of such subsequent invention or discovery, and its public use, failed to make objection, and to apply, without unreasonable delay, for a patent for their invention, they cannot sustain their patent, because they failed to give to the public that consideration for the grant of exclusive privileges upon which all valid patents must be based.”—*Id.*

38. Under our statute the invention must be new at the time of the original discovery, not, as under the English law, at the time of application for patent. *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILSON, 1856.

39. Where a party makes a new machine the presumption is that he is the inventor thereof. *Hill v. Dunklee*, 1 MacArthur’s P. C. 475.—MORSELL, 1857.

40. “An invention being an intellectual process of conception, for the purpose of showing who, in point of time, is the prior inventor, he who first makes it known sufficiently by describing it in words or drawings will be considered to be the first discoverer, and vested with an inchoate right to its exclusive use, which he may embody, perfect, and make absolute by

proceeding to mature it in the manner which the law requires.”—*Id.*

41. The introduction in evidence of a patent carries the date of an invention back only to the date of filing the application for that patent. *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

42. If, in 1848, a certain inventor had perfected his invention as shown in his patent of 1853, or, if not then perfected, he “used reasonable diligence to perfect it, then he had a right to have it incorporated into his patent, and to supersede those who had intervened between his first invention or discovery and the subsequent taking out of his patent. If he has not perfected it, and did not use due diligence to carry it into effect, and, in the mean time, before he got his patent, somebody also had invented and used, and incorporated into a practical, useful machine, that mode of feeding, then he could not, by subsequent patent, appropriate to himself what was thus embraced in the former machine.”—*Id.*

43. “Although the party has a right to keep his inchoate title to his invention concealed from the public as long as he pleases, yet, when he desires to perfect his right by a patent, he must proceed with vigilance to secure his protection by as early an application as practicable; for, although no particular time is limited for the application for a patent, by the statute, yet it is very clear, according to a fair construction of its spirit and meaning, that it ought to be done in a reasonable time; otherwise, the right may be lost by the laches of the party. What is or is not a reasonable time depends on the circumstances of each case.” *Ellithorp v. Robertson*, 1 MacArthur’s P. C. 585.—MORSELL, 1858.

44. “It is certainly true, that while the original inventor chooses to depend upon his own secret contrivance—his inchoate right of invention—to secure him in the exclusive use and enjoyment thereof, he has a right to do so, and no one can complain of being injured; yet, when he finds it necessary to resort to the public for their aid to perfect his inchoate right by a patent, a new and different condition of rights are to take place, limited by statute, in the nature of a statutory compact with mutual considerations—a *quid pro quo* offered by the inventor—the terms of which compact, according to the spirit and mode thereof, must be fulfilled—on the one part, fourteen years’ exclusive right, secured by patent; on the other part, a new and useful invention, to become public without restriction at the expiration of that term. The main object with the Legislature was to bring

inventions early into public and unrestricted use; and this, of course, forming an essential part of the consideration, the public has a right to the knowledge as early as possible, consistently with the rights of the inventor in using such reasonable diligence on his part as may be necessary in adapting and perfecting his invention."—*Ib.*

45. "It is not so much he who made and perfected the first machine or instrument as he who may appear, from the evidence, to have been the first to have conceived the idea, and so described it by words or drawings as to have been sufficient to enable a skilful workman to bring it into useful, practical operation; for such a person shall be said to have made the first claim, and will be protected against the claim of any subsequent inventor who may have been the first in adapting a machine or instrument to the invention, provided such first discoverer has been using due diligence in effecting the same end, and that, although he may have been unsuccessful in some of his experiments, if by following them up he at length succeeds." *Davidson v. Lewis*, 1 MacArthur's P. C. 599.—MORSELL, 1858.

46. The defendants' patent may be subsequent in point of time to that of plaintiffs, but if the defendants be the first inventors they cannot be held to be infringers of plaintiffs' patent, especially when defendants had a caveat on file at time of plaintiffs' application, and no notice of the interference was given defendants. *Phelps et al. v. Brown et al.*, 4 Blatch. 362.—NELSON, 1859.

47. "The object of the patent laws was to encourage useful improvements reduced to actual practice. Before a patent can be granted it must be made to appear that the party applying for it was the original inventor of the thing sought to be patented, and that he has reduced the same to practice. To defeat a patent which has been issued, it is not enough that some one, before the patentee, conceived the idea of effecting what the patentee accomplished. To constitute such a prior invention as will avoid a patent that has been granted, it must be made to appear that some one, before the patentee, not only conceived the idea of doing what the patentee has done, but also that he reduced his idea to practice, and embodied it in some practical and useful form. The idea must have been carried into practical operation. The making of drawings of conceived ideas is not such embodiment of such conceived ideas into practical and useful form as will defeat a patent which has been granted. Experiments, equivocal in their results, and given up for years, will

not be permitted to prevail against an original inventor who has reduced his invention to practice, and has, without fraud, obtained a patent." *Ellithorpe v. Robertson et al.*, 4 Blatch. 307.—INGERSOLL, 1859.

48. It seems that in an interference proceeding in court, the bill must allege that the patentee has surreptitiously or unjustly obtained his patent for that which was, in fact, invented or discovered by the complainant, who was using reasonable diligence in adapting and perfecting the same.—*Ib.*

49. "In the sense of the patent laws the fact of invention, and not a knowledge of the degree of its utility, is the proper subject of inquiry. If a party omit to test the value of his invention, and fail to bring it into use, and himself remain ignorant of the extent of its value, if it be the same with that of a subsequent discoverer, he is yet entitled to a patent over the latter." *Farley v. National Steam Gauge Co.*, 1 MacArthur's P. C. 618.—MERRICK, 1859.

50. "To constitute a perfected invention which will entitle a party to a patent, it is not necessary that he should have actually constructed the machine which is the subject of his invention. If, having conceived a valuable idea, he has manifested it before the world in any form which evidences the completeness of the idea, and which is sufficient, when communicated to others, to enable those skilled in the particular art to reproduce his invention, he has done enough to entitle himself to a patent, and this, whether such evidence consists of written description, drawing, models, or a complete machine."—*Ib.*

51. Wickersham made an application for patent for improvement in sewing-machines February 13th, 1850. On the 20th the papers were returned to him for correction. March 15th he returned amended papers. April 5th, 1850, the papers were returned to him for further amendment. May 28th, 1851, he withdrew his application and took back the twenty dollars allowed by law. From that time to October 2d, 1858, he made no movement in the matter and then filed another application. Meanwhile Singer procured patents covering the same subject-matter and put the improvement into use. During this interval of delay Wickersham applied for five different patents in this country and one in England, and made a visit to England in 1854. Wickersham was held to have abandoned his invention; two years' public use was found against him, and priority of invention was found in favor of Singer. *Wickersham v. Singer*, 1 MacArthur's P. C. 645.—MERRICK, 1859.

52. "The design of the law is that the earliest knowledge and use of the invention by the public, consistent with just and reasonable rights of the inventor, should be obtained, and protection will not be given from dangers happening from unnecessary delays on the part of the inventor after he has perfected his invention and before his application for a patent; as, [among others], if in such interval a subsequent discoverer of the same invention should put the public in possession of the knowledge and use thereof, how could such inventor, lying by for years, and suffering such public use by another, be in a condition to offer a *quid pro quo* to the public—how could he say that it was not known to others? And, further, the spirit of the objection being that the invention is known by others and in public use, how can it be material whether the person so making it known and putting it into public use be a patentee or not?" *Savary et al. v. Lauth*, 1 MacArthur's P. C. 691.—MORSELL, 1859.

53. As between him who suggests an improvement and him who, hearing that suggestion embodies it, the former is the inventor. *Stearns v. Davis*, 1 MacArthur's P. C. 696.—DUNLOP, 1859.

54. The improvement in dispute appertained to cook-stoves. Belson discovered it, perfected it, and applied it to use in his kitchen in the fall of 1853; in the year 1858 Spear patented the same improvement without knowledge of Belson's invention; Belson applied for a patent May 25th, 1859. Belson claimed that his delay was caused by his poverty, but the claim was inconsistent with other proved facts. Priority of invention was awarded to Spear. *Spear v. Belson*, 1 MacArthur's P. C. 699.—DUNLOP, 1859.

55. "When the idea first enters into the mind of the inventor, it is, almost necessarily, in a crude and imperfect state. His mind will naturally dwell and reflect upon it. It is not until his reflections, investigations, and experiments have reached such a point of maturity that he not only has a clear and definite idea of the principle and of the mode and manner in which it is to be practically applied to useful purposes, but has reduced his idea to practice, and embodied it in some distinct form, that it can be said that he has achieved a new and useful invention. That is the real time of his invention, though it may be months or years before he obtains a patent for it. Indeed, he would be none the less an inventor though he never obtained a patent for it." *Matthews v. Skates et al.*, 1 Fish. P. C. 602.—JONES, 1860.

56. A person made a sort of model of an improvement in 1853 or 1854; he tried some experiments in the same line in 1857; nothing more was heard of it again until November, 1859, subsequent to the issue of a patent for the same to another person. The latter was held entitled to his patent. *Coxe v. Griggs et al.*, 1 Bissell, 362.—DRUMMOND, 1861.

57. "It is the right and privilege of a party, when an idea enters his mind in the essential form of invention—inasmuch as most inventions are the result of experiment, trial, and effort, and few of them are worked out by mere will—to perfect by experiment and reasonable diligence his original idea, so as not to be deprived of his skill and labor by a prior patent, if he is the first inventor. But there must be what we would consider reasonable diligence looking at all the facts of the case."—*Ib.*

58. "It is necessary, in order to prevent a man from having the benefit of his patent, that another person should first have discovered the thing and reduced it to actual practice."—*Ib.*

59. When a patentee attempts to carry the date of his invention back of the date of his application for patent, it is "incumbent upon him to prove by competent and sufficient evidence that he made the invention at the period suggested, and that he reduced the same to practice in the form of an operative machine," and if he fails to prove either of the elements of the proposition, the verdict should go against him. *Johnson v. Root*, 2 Clifford, 108.—CLIFFORD, 1862.

60. For an example of an invention held not to have been followed up with reasonable diligence, see —. *Ib.*

61. "He is the first inventor, in the sense of the patent act and entitled to a patent for his invention, who has first perfected and adapted the same to use, and . . . until the invention is so perfected and adapted to use, it is not patentable under the patent laws," . . . "subject to the qualification, that he who invents first shall have the prior right, if, as is prescribed in Section 15 of the Patent Act, he is using reasonable diligence in adapting and perfecting the same within the meaning of that provision." *White et al. v. Allen*, 2 Clifford, 224.—CLIFFORD, 1863.

62. "Where an invention is . . . voluntarily broken up and laid aside, without any controlling impediment in the way of an application for a patent, . . . and another in the mean time invents the same thing, without any knowledge of that which is so suspended, and reduces the same to practice, applies for and takes out his patent, and introduces the patented invention into public use, . . . he must be regarded as

the original and first inventor of the improvement. Federal courts have everywhere held that an inventor who has first actually perfected his invention, will not, if he has exercised good faith, be deemed to have surreptitiously or unjustly obtained a patent for that which was, in fact, first invented by another, unless the latter was at the time using due diligence in adapting and perfecting what he had accomplished."—*Id.*

63. A reduced the invention in dispute into working form in April or May, 1858, and applied for patent in January, 1859, which application was rejected. The application was afterward renewed and patent granted December, 1860. B invented January, 1859, and applied for patent April, 1860. A prevailed. *Smith et al. v. Allen*, 2 Fish. P. C. 572.—LOWELL, 1865.

64. Complainant's patent was dated May 5th, 1863. Defendant defended under a reissued patent of June 28th, 1864, based on an original patent dated May 14th, 1861. The original patent by itself was obscure and ambiguous, but the reissued patent was clear and intelligible. The issue was priority of invention on these facts, and was decided in favor of defendant. *House v. Young*, 3 Fish. P. C. 335.—SHERMAN, 1867.

65. The improvement in question, an amalgamating barrel, was conceived by complainants' patentee early in 1862, and reduced to practice by him in the summer of 1863, and application for patent was made in November, 1863. The inventor, put forward by defendant, conceived of the improvement in August, 1863, and reduced it to practice in December, 1863. Complainants' patentee was held to be the prior inventor. *Brodie et al. v. Ophir Silver Mining Co.*, 5 Sawyer, 608.—FIELD, 1867.

66. "The patent is *prima facie* evidence that the patentee was the first inventor. Whoever controverts and denies his claim in this respect has the burden of proof upon him to establish the contrary. This is not accomplished by showing the construction of the improvement before the patent issued; it must be shown that the construction preceded the invention of the patentee—that is, before the conception of the improvement was applied in practice."—*Id.*

67. "Whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may have previously had the idea and made experiments toward putting it in practice. He is the inventor, and is entitled to the patent, who first brought the machine to perfection and made it capable of useful operation." *Agawam Co. v. Jordan*, 7 Wall. 583.—SUP. CT. 1868.

68. "Where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they, in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the improved principle, and may be embodied in his patent as a part of his invention.

"Suggestions from another, made during the progress of such experiments, in order that they may be sufficient to defeat a patent subsequently issued, must have embraced the plan of the improvement, and must have furnished such information to the person to whom the communication was made, that it would have enabled an ordinary mechanic, without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation.

"Persons employed, as much as employers, are entitled to their own independent inventions; but, where the employer has conceived the plan of an invention, and is engaged in experiments to perfect it, no suggestions from an employé, not amounting to a new method or arrangement, which, in itself, is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. But where the suggestions go to make up a complete and perfected machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belonged to another."—*Id.*

69. Dundas, complainant's patentee, took a patent in 1859 for a cultivator. He had the first conception thereof in June or July, 1850. He began the construction of such a cultivator in the winter of 1850 and 1851, and ironed it about June 1st, 1851; made application August 1st, 1851. Marsh, the contesting inventor, described the improvement in question to other persons in 1849, gave directions to a mechanic for constructing one in 1851, tried it in March, 1851, made application for patent July 1st, 1851, which application was rejected and never successfully prosecuted. Marsh was held to be the prior inventor. *Sayles v. Hapgood et al.*, 2 Bissell, 189.—DRUMMOND, 1869.

70. "Original and first inventors are entitled to the benefit of their inventions if they reduced the same to practice, and seasonably comply with the requirements of the patent law in procuring

letters-patent for the protection of their exclusive rights. Crude and imperfect experiments are not sufficient to confer a right to a patent; but, in order to constitute an invention, the party must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form." *Seymour v. Osborne*, 11 Wall. 516.—SUP. CT. 1870.

71. "He is the first inventor in the sense of the patent law, and entitled to a patent for his invention, who first perfected and adapted the same to use, and it is well settled that until the invention is so perfected and adapted to use it is not patentable under the law."—*Id.*

72. The process in dispute being the filtering of coal-oil through bone-black, it was found that complainant's patentee invented the process in 1861, that the contesting inventor invented the same in 1862, and complainant's inventor took patent in June, 1865. Complainant's inventor was held to be the prior inventor. *National Filtering Oil Co. v. Arctic Oil Co.*, 8 Blatch. 416.—BLATCHFORD, 1871.

73. Complainant's patentee completed his invention in the first part of November, 1864, and filed application for patent January 16th, 1865. The contesting inventors did not make the article successfully until the early part of 1865. The court said that, although complainant's inventor might have started later in his experiment than the contesting inventors, yet he first made and completed a successful invention and followed it up by patent. "In the race of diligence he must be held to be the first inventor." *Taylor v. Archer et al.*, 8 Blatch. 315.—BLATCHFORD, 1871.

74. Complainants' patent was for improved defensive armor for ships and other batteries, the patent being granted April 14th, 1863. Defendant set up prior publication in 1861. The idea of the improvement occurred to the inventor in 1856, at which time he wrote to an admiralty board desiring such a construction tried, which desire was refused. In 1858 he tried experiments with boards and sheet-iron and a revolver, with a view to testing the idea in a small way. He did not make a model till 1861. It was held that he did not carry his invention back to a time prior to the publication. *Webb et al. v. Quintard*, 9 Blatch. 352.—BLATCHFORD, 1872.

75. To constitute a person a prior inventor as regards a printed publication, he must, before the publication, "have proceeded so far as to have reduced his idea to practice and embodied it in some distinct form."—*Id.*

76. Where one person announces to another that he desires a paper of certain quality gotten

up, and the second person proceeds to get it up, that does not make the first person an inventor of the product. *Union Paper Collar Co. v. Van Deusen et al.*, 10 Blatch. 109.—BLATCHFORD, 1872.

77. A defendant must make out the defence of prior invention, by satisfactory proof, in order to prevail. *Fisk et al. v. Church*, 5 Fish. P. C. 540.—BLATCHFORD, 1872.

78. "A patentee, whose patent is assailed upon the ground of want of novelty, may show, by sketches and drawings, the date of his inceptive invention, and, if he has exercised reasonable diligence in 'perfecting and adapting' it, and in applying for his patent, its protection will be carried back to such date; and in a race of diligence between rival inventors, the one who first perfects an invention, and embodies it in a distinct form, is entitled to priority; but . . . this" cannot "be accorded to one who has conceived the idea of an invention, and has sketched it on paper, but has done nothing more in reference to it for a period of five years, as against the patent of an independent though subsequent inventor. Reasonable diligence in 'perfecting and adapting' the invention, is essential to the efficacy of such a claim." *Reeves v. Keystone Bridge Co. et al.*, 9 Phil. 368.—McKENNAN, 1872.

79. "Independent of this provision [the last one stated], he is entitled to priority of right to a patent who first reduces his invention to a fixed, positive form, adapted to practical use."—*Id.*

80. "It must . . . be considered as an established rule that illustrative drawings of conceived ideas do not constitute an invention, and that unless they are followed up by a seasonable observance of the requirements of the patent laws, they can have no effect upon a subsequently granted patent to another."—*Id.*

81. Making sketches of a proposed invention, and then letting the matter lie for five years, and until after another has invented and reduced to practice, will not permit the former party to prevail over the latter.—*Id.*

82. Where priority of invention is set up, and the actions of the alleged prior inventor are inconsistent with his claim, they will overbear his claim. *Gear v. Holmes et al.*, 6 Fish. P. C. 595.—SHEPLEY, 1873.

83. Where one party makes a model of an improvement and lays it aside, and meanwhile another party invents and reduces to practice, the second party is the prior inventor. *Smith v. O'Connor*, 2 Saw. 461.—SAWYER, 1873.

84. "When the patentee proposes to show



that his invention is of a date prior to the time when he filed his original application, he takes upon himself the burden of proof, and to maintain that theory as against another patented improvement of the same construction and mode of operation, he must prove not only that he made his invention at the period claimed, but that he reduced the same to practice as an operative machine." *Jones et al. v. Sewall*, 3 Clifford, 563.—CLIFFORD, 1873.

85. Where, during the delay between alleged date of invention and subsequent application for patent, the alleged inventor is making and selling the invention in the same city where the opposing inventor makes and sells the same invention, the inventor first mentioned is chargeable with knowledge of the making and selling by the latter, and it makes against the former's claim of priority. *Frink v. Petry et al.*, 11 Blatch. 422.—BLATCHFORD, 1874.

86. A defendant cannot succeed upon the defence of prior invention where the evidence is vague and unsatisfactory. *Taylor v. Wood*, 12 Blatch. 110.—BLATCHFORD, 1874.

87. One Waters filed an application for patent on lubricators March 31st, 1868. One Taylor filed application for substantially the same thing April 21st, 1868. Both applications were rejected. Waters narrowed his claim and took a patent of limited scope, but Taylor persisted, and, upon appeal, secured a broader patent June 23d, 1868. Waters, learning of Taylor's broad patent filed a second application, went into interference with Taylor, on final appeal was adjudged the prior inventor, and took patent June 29th, 1869. The court held that Waters's last patent must stand upon his last application, and that the presumption of priority was in favor of Taylor. *Pelton et al. v. Waters et al.*, 1 Bann. & Ard. 599.—EMMONS & SWING, 1874.

88. "If, intermediate the first and second application, the patentee manifests an actual intention to abandon the first, his patent will have relation to the last one only. His actual intention severs the proceeding. The law deems the first application terminated and as bearing no relation to the patent, which rests solely on the last one."—*Ib.*

89. The patent of complainant, Burrows, was for a furnace to be used in the manufacture of white oxide of zinc. Defendant's inventor, Wetherill, in September, 1852, filed a caveat for the improvement, dated July, 1852, and about that time erected an exclusively experimental furnace. Burrows made application for his patent in October, 1852, and sought to carry back his invention to his experiments made in the

early part of 1851. These experiments were unsuccessful, and so far as the furnaces of complainants and defendant were in conflict, Wetherill was held to be the prior inventor. *Burrows et al. v. Lehigh Zinc Co.*, 10 Phil. 262.—McKENNAN, 1874.

90. The making of a model does not constitute an invention in a contest over priority. *Stilwell & Bierce M'fg Co. v. Cincinnati Gaslight & Coke Co. et al.*, 1 Bann. & Ard. 610.—SWING, 1875.

91. "Illustrative drawings of conceived ideas do not constitute an invention; unless they are followed up by a seasonable observance of the requirements of the patent laws, they can have no effect upon a subsequently granted patent to another. But a patentee whose patent is assailed upon the ground of want of novelty, may show by sketches and drawings the date of his inventive invention, and, if he has exercised reasonable diligence in perfecting it, and in applying for his patent, its protection will be carried back to such date." *Draper v. Potomack Mills Corporation*, 3 Bann. & Ard. 214.—SHEPLEY, 1878.

92. "Upon a question of priority of invention, the presumption, in the absence of proof would be, that the application was of the same date as the patent; but there the burden of proof would be upon a party claiming a prior application describing the invention, to show it." *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 17 Blatch. 303.—WHEELER, 1879.

93. In the absence of an application for patent or other evidence, the date of an invention is to be taken to be the same as the date of the patent therefor. *Webster Loom Co. v. Higgins et al.*, 15 Blatch. 446.—WHEELER, 1879.

94. "The burden of proof rests upon the defendants to show, beyond any fair doubt, the prior knowledge and use set up; but, where they have sustained that burden by showing such knowledge and use prior to the patent, the burden of showing the still prior invention claimed, by at least a fair balance of proof, must rest upon the plaintiff."—*Ib.*

95. "A patentee whose patent is assailed upon the ground of want of novelty, may show, by sketches and drawings, the date of his inventive invention, and if he has exercised reasonable diligence in perfecting and adapting it, and in applying for his patent, its protection will be carried back to such date." *Kneeland et al. v. Sheriff et al.*, 2 Fed. Rep. 901.—McKENNAN, 1880.

96. A patentee conceived of the invention, as evidenced by a sketch shown to his brother and explained in the fall of 1869. In the fall of 1869,

or spring or summer of 1870, he experimented at making the invention, a cuspidor, and in 1870 made a large number experimentally. Some time in the fall or summer of 1870 he made one substantially in the afterward patented shape. It then took a year to get the necessary machinery to make them for market. He applied for patent June 3d, 1871, which was granted October 10th, 1871. *Held*, that the date of the invention was the fall of 1869 or early in 1870, and that he had exercised reasonable diligence in embodying the invention and perfecting it. *U. S. Stamping Co. v. Jewett et al.*, 18 Blatch. 469.—BLATCHFORD, 1880.

97. Where it is sought to anticipate a patent by a prior invention, the case must be made out for the prior invention, "beyond all reasonable doubt," in order to succeed.—*Ib.*

98. The testimony of a number of persons to circumstances of prior invention will not avail to prove it where they are shown to be mistaken as to dates incidentally brought in.—*Ib.*

99. Pope [complainant's patentee] conceived the invention in dispute during the week prior to November 6th, 1872; after April 25th, 1873, he prepared his application for patent; he filed the application May 15th, 1873, and took patent July 1st, 1873. Previous to patent he made neither tests, models, nor experiments. After his patent was granted he set up a working model in 1875 or 1876. Hall [respondent's patentee] conceived about December 21st, 1872; in the latter part of April, 1873, attached the signal, set up in his shop, to a railroad track, and let it remain in operation for months. In December, 1873, he attempted to attach it regularly to a railroad and found a practical difficulty, which he surmounted February 14th, 1874; his patent was granted July 13th, 1875. Respondent was held not to infringe, and, as a necessary consequence, that Hall was the meritorious inventor. *Electric R. R. Signal Co. v. Hall R. R. Signal Co.*, 6 Fed. Rep. 603.—SHIPMAN, 1881.

100. By the court: "The patent having been granted to Pope, and now being attacked on the ground that the patentee was not the first inventor, it is not enough for the defendant to show that Hall had conceived the same idea, and had made drawings or models, and experiments with his models, but the defendant must establish that Hall reduced what he conceived to practice in the form of an operative machine, and embodied it in some practical and useful form before Pope made his application, it being a fact in the case that Pope had not reduced his idea to practice before his application."—*Ib.*

101. The inventor's shop was in Meriden,

Conn., not far from the New York, New Haven & Hartford Railroad. He attached his signal apparatus to the "down" track, and had it operate the signal in his shop. *Held*, to be a reduction to practice.—*Ib.*

102. "He is the first inventor who has actually perfected the invention; the qualification being that if the one first to conceive of the invention was at the time using reasonable diligence in adapting and perfecting the same, he is recognized as the first inventor, although the second to conceive may have been the first to reduce to practice."—*Ib.*

103. "It is true that the determination of the fact of diligence is not to be reached by comparison of the diligence of the two inventors. If Pope" [the first to conceive] "was reasonably diligent in perfecting his idea, it does not matter that Hall was exceedingly diligent and made more rapid advances."—*Ib.*

104. Time spent upon other inventions is not the exercise of reasonable diligence as to the invention in hand.—*Ib.*

105. It seems that in attempting to defeat a patent by prior invention, such prior invention must have "reached a practical result," before the patentee made his invention. *Union Met. Cartridge Co. v. U. S. Cart. Co.*, 7 Fed. Rep. 344.—LOWELL, 1881.

106. "In the absence of other evidence of the dates of invention, the first application must be taken to represent the invention." *Pennington et al. v. King*, 7 Fed. Rep. 462.—LOWELL, 1881.

107. Parshall took patent—for a lubricator—May 22d, 1877. Renschard, an independent inventor, made complete drawing of the same device August 10th, 1876, antedating Parshall's conception, but did not "reduce it to actual use until after it had been successfully accomplished by Parshall, nor until after the date of his patent. This mere drawing, therefore, cannot be allowed to have the effect of depriving Parshall of his title of being the first and original inventor." *Detroit Lubricator M'fg Co. v. Renschard et al.*, 9 Fed. Rep. 293.—MATTHEWS, 1881.

108. A wife looked on and saw her husband take out a patent, as inventor, and sell interest in it to other parties. She then procured patent for the same thing as her own invention. She was held to be estopped from claiming that she was the inventor. *Nat. Feather Duster Co. v. Hibbard*, 11 Bissell, 76.—BLODGETT, 1881.

109. Where a person has the desideratum of an invention in mind, and is striving and experimenting to attain that end, he may adopt the suggestion of another and it may lead to suc-

cess, and he, and not that other, is the legal inventor.—*Ib.*

110. An earlier patent, to the same inventor, for an inferior form of device for the same purpose, is evidence, approaching the conclusive, that the later and perfected form was not invented first. *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1882.

111. By the court: "I . . . do not find that Parshall completed and reduced to practice the invention in question before Gates made it. The idea was probably conceived by the two inventors nearly at the same time. Which was the earlier to conceive it, I cannot say, but Gates fully tested and proved and adapted it to use, while Parshall was trying to overcome a practical difficulty of construction which the particular form of his machine required him to overcome, and he did not succeed until years after Gates's machine had been in general use." Gates's patent antedated Parshall's six years. Priority found for Gates. *Siebert Cylinder Oil Cup Co. v. Phillips Lubricator Co.*, 10 Fed. Rep. 677.—LOWELL, 1882.

112. When an inventor shows a drawing of his improvement to another, who then makes no claim to the invention, and subsequently advises against its adoption, such second person cannot afterward reasonably maintain a claim to such improvement. *Webster Loom Co. v. Higgins et al.*, 105 U. S. 580.—SUP. CT. 1882.

113. "An invention relating to machinery may be exhibited either in a drawing or in a model, so as to lay the foundation of a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it."—*Ib.*

114. In making the defence of prior invention, it is inexplicable that defendants' alleged prior inventor should never have applied for a patent on the improvement, where he is connected with the art and accustomed to taking patents.—*Ib.*

115. It seems that the defence of prior invention must be specifically pleaded in the answer.—*Ib.*

116. It seems that the decision of the Patent Cases in an interference is *res judicata* between the same parties in court. *Sawyer v. Miller et al.*, 4 Woods, 472 —PARDEE, 1882.

117. Complainant having brought suit on its patent, defendant submitted the evidence and decision in a Patent Office interference awarding priority to defendant's patent. The court said: "While this decision is not conclusive here, it is nevertheless entitled to sufficient weight to cast the burden of proof on the plaintiff." *Wire Book Sewing-Mach. Co. v. Stevenson*, 11 Fed. Rep. 155.—BUTLER, 1882.

118. Where, upon a question of prior invention, a man's conduct is strongly inconsistent with the claims and evidence he produced, such conduct will overcome such claims and evidence. *Atlantic Works v. Brady*, 107 U. S. 192.—SUP. CT. 1883.

119. By the court: "The question of priority having been determined in favor of complainants in that proceeding, [a Patent Office interference] it is *res adjudicata* as between the parties to it." Defence of want of novelty is still open to defendants. *Shuter et al. v. Davis et al.*, 16 Fed. Rep. 564.—WALLACE, 1883.

120. Lockwood claimed that in 1870 he discovered the principal idea of the afterward patented invention; made experiments afterward, and filed his application for patent June 24th, 1875, which was granted September 7th, 1875. Horton claimed that he made the discovery of the substance of the invention in 1872; made experiments afterward, and made his application for patent June, 1874, a long time after Lockwood had established the value of the patented article by creating a demand for it in the public markets. Priority was awarded to Lockwood. *Lockwood v. Cleveland et al.*, 18 Fed. Rep. 37.—NIXON, 1883.

121. In November, 1873, Rogers made his conception, and placed his article on the market in the fall of 1877; he filed his application for patent February 27th, 1875. Stanwood began his experiments in the fall of 1872, or the following winter, and made the article in small quantities; his customers did not like it, whereupon he gave up his attempts and did not resume them until the fall of 1876, after Rogers had obtained his patent. The Patent Office decided in Stanwood's favor, but the court decided in Rogers's favor. *Gloucester Isinglass & Glue Co. v. Brooks et al.*, 19 Fed. Rep. 426.—NELSON, 1884.

122. "It is well settled that the decisions of the Commissioner of Patents, though entitled to great weight on questions of priority, are not final between those who have been fully heard in the interference."—*Ib.*

123. By the court: "This date being fixed, the burden was transferred to the complainant, to satisfy the court by proof as convincing as that required of the defendants that his invention antedated theirs. The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required that does not admit of reasonable doubt. Where interests so vital are at stake, where intervening years have made perfect accuracy well-nigh impossi-

ble, where an event not deemed important at the time has been crowded from the memory by the ever-varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the fact accords with his inclination concerning it.

"The evidence of prior invention is usually within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive, and unequivocal; nothing must be left to speculation or conjecture." *Thayer v. Hart, Jr., et al.*, 22 Blatch. 229.—COXE, 1884.

124. "Drawings may carry date of invention back, if reasonable diligence is shown. . . Making drawings of an idea is not invention, and is of no effect unless followed up. . . Merely making drawings is not such an embodiment of invention as will defeat a subsequent patent." *Odell et al. v. Stout et al.*, 29 O. G. 862.—SAGE, 1884.

125. An inventor made a drawing of the machine invented by him, but between the making of that drawing and his application for the patent there was an interval of a year, and in the mean time patents for the same machine issued to another. It was held that the drawings could not be recognized as giving priority of invention as against said patents, whatever might be their effect upon the question of want of priority if these patents had not been issued.—*Id.*

126. Where, after an important invention has come into public use, and the patentee thereof has won fame and profit, another seeks priority of invention over the patentee, it is of the first importance to satisfactorily explain the reason of his delay. *Am. Bell Telephone Co. et al. v. People's Telephone Co. et al.*, 22 Blatch. 531.—WALLACE, 1884.

127. "Where [upon a question of prior invention] a witness falsifies a fact in respect to which he cannot be presumed liable to mistake, courts are bound, 'upon principles of law, morality, and justice, to apply the maxim *falsus in uno falsus in omnibus*.'"—*Id.*

128. By the court: "Succinctly stated, the most favorably for the defendants, the case is this: one hundred witnesses, more or less, testify that on one or more occasions, which took place from five to ten years before, they think they saw this or that device used as a talking machine. They are ignorant of the principles and of the mechanical construction of the instruments, but heard speech through them perfectly

well, and through one set of instruments as well as the other. This case is met on the part of the complainants by proof that the instruments, which most of the witnesses think they saw and heard through, were incapable of being heard through in the manner described by them, and, further, that the man who knew all about the capacity of his instruments never attempted to use them in a manner which would demonstrate their efficiency and commercial value, but, on the contrary, for ten years after he could have patented them, and for five years after they were mechanically perfect, knowing all the time that a fortune awaited the patentee, and with no obstacles in his way, did not move, but calmly saw another obtain a patent and reap the fame and profit of the invention."—*Id.*

129. Defendants were found to have embodied the invention in dispute in one form in the early part of 1878. Complainant was found to have embodied the invention in another and improved form in the fall of 1878. Defendants claimed to have had drawings of the invention prior to the year 1878, but their conduct was held inconsistent with the claim. Defendants contended that they embodied the invention in the improved form prior to the fall of 1878, but their evidence was held unsatisfactory and inconclusive. Defendants were held to be the inventors of that form of the invention which they embodied early in 1878, and complainant was held to be the inventor of that improved form of the invention which he embodied in the fall of 1878. *Wooster v. Hill et al.*, 22 Fed. Rep. 830.—WHEELER, 1885.

130. In a contest over priority of invention, the invention will not take date from a time when the inventor had simply an idea that *some* means might be devised to accomplish certain practical results. *Gibson et al. v. Scribner*, 22 Fed. Rep. 840.—WEBB, 1885.

131. "In the absence of any explanatory facts, evidence offered to carry back the date of the invention to a date considerably anterior to the application for a patent, in order to save the patent from being defeated for want of novelty, should be critically examined." *Walker Glass Co. v. Souweine et al.*, 24 Fed. Rep. 603.—WALLACE, 1885.

132. Where the defence of prior invention is set up "the burden of proving such a defence is upon the defendants. Any doubt respecting the evidence is fatal." *Duffy v. Raynblds et al.*, 24 Fed. Rep. 855.—NIXON, 1885.

133. Where a man stands by and sees another make an application for a patent for an improvement, and afterward claims to be the inventor

thereof, his conduct makes strongly against his claim. *Fraim v. Keen*, 25 Fed. Rep. 820.—BUTLER, 1885.

134. Where a person conceives of an improvement and employs a skilled person to embody it, the former is the inventor and not the latter. *Yoder v. Mills*, 25 Fed. Rep. 821.—McKENNAN, 1885.

135. A conceived of an invention and employed B to embody it. As to a part of the invention B added a distinct feature conceived by himself. The court doubted A's right to claim the combination including the additional feature.—*Ib.*

136. Where a man claims to have invented a telephone, but has waited fifteen years, meanwhile having abundant means, and meanwhile having taken out patents on other things, his claim is below serious consideration. *Am. Bell Tel. Co. v. Mol. Tel. Co.*, 23 Blatch. 253.—WALLACE, 1885.

137. The invention in issue being an inside bottle-stopper, with a centrally located figure 8 handle-wire, the defendants' inventor was shown to have made, anterior to the invention of complainant's inventor, an inside bottle-stopper with a double figure 8 handle-wire, each located peripherally on the stopper, which he did nothing with until after the other inventor reduced to practice the bottle-stopper, with the central figure 8 handle-wire. Complainant's inventor was held entitled to priority. *Hutchinson v. Everett et al.*, 26 Fed. Rep. 531.—BRODGETT, 1885.

138. "Bell made the affidavit to his claim and specifications, as originally filed, on January 20th, and . . . Gray's description of his invention embodied in his caveat was not written out till three or four days prior to February 14th, when it was filed." Bell's fifth claim, as originally filed, was: "'[5] The method of, and apparatus for, transmitting vocal or other sounds, as herein described, by causing electrical undulations similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth.'" Thereof the court said: "In the fifth claim of the specification . . . the applicant declares that his invention consists in this: in the discovery that vocal or other sounds, by being uttered or otherwise communicated through a receiver, and by reason of their force being made to impinge upon an armature, impart to it the vibrations of the air; that these motions of the armature cause corresponding undulations in the electrical current, so that, at the end of the circuit, similar vibrations are given to another armature, and through it to the surrounding air, to the human ear. Thus, voice

is communicated to the electrical current, and reproduced at the end of the wire in the air, and all this by reason of the discovered fact that vibrations in the air caused by sound are so similar to the undulations in the electrical current, that vocal sound, of whatever character itself, may be passed from air to the electrical current, and delivered again through the air, by means of a receiving and delivering or emitting armature. The great discovered fact was, that the vibrations in the air are similar in form to the following and imparted electrical undulations, and that the undulations are similar to the ultimate vibrations. It follows that as are the vibrations so are the undulations; whether gradual or sudden; of whatever pitch or loudness; whether constant or varying in pitch or loudness; whether caused by a single or successive sounds." *Am. B. Telephone Co. v. Nat. Imp. Telephone Co. et al.*, 27 Fed. Rep. 663, *per curiam*, 1886.

139. In an interference between one Taylor and one Tucker, "Taylor conceived the invention in January, 1882, applied for his patent March 23d, 1882, which was issued April 3d, 1883; . . . Tucker conceived the invention in November, 1880; made drawings in January, 1881; commenced to make working drawings for a machine by October 1st, 1881, which were completed in December, 1881. A machine was ordered July 5th, 1882, was built in August, 1882, and put into successful operation in September, 1882. He applied for his patent July 20th, 1883." Tucker was held entitled to the patent. *Hubel v. Dick*, 28 Fed. Rep. 132.—SHIPMAN, 1886.

140. "The question of reasonable diligence is of prime importance, and if the first inventor postpones for an unreasonable period the practical embodiment of his mental conceptions, and his application for a patent, the consequence of his laches may be fatal."—*Ib.*

141. "That laches merely in applying for a patent, where there were no laches in otherwise perfecting the invention, may compel an inventor to be deprived of his patent, another inventor having meanwhile given the same invention to the public, is probably true."—*Ib.*

142. When an inventor of a machine of an important character has been diligent in perfecting and reducing his invention to practice, and in attempts to bring his machine to the knowledge of the public, a delay in applying for his patent of nineteen months, after he completes his working drawings, and ten months after he completes his machine will not deprive him of a patent in favor of a later inventor.—*Ib.*

143. A patent was granted to Ball and Case in 1881. One Allison had made sketches of the invention in 1870, but did not apply for patent until after the issue of the patent to Ball and Case. Priority was awarded to Ball and Case. *Penn. Diamond Drill Co. v. Simpson et al.*, 37 O. G. 218.—ACHESON, 1886.

144. "In the race of diligence between two independent inventors, he who has first perfected and adapted his invention to actual use is entitled to the patent. . . . But mere conception, which is not seasonably followed by some practical step, counts for nothing against a subsequent independent inventor who, having complied with the patent laws, has obtained the patent."—*Id.*

145. In a contest over priority of invention, conduct and letters inconsistent with the claimant's testimony have great weight. *Lamson Cash Ry. Co. v. Osgood Cash Car Co. et al.*, 29 Fed. Rep. 210.—COLT, 1886.

146. When the question of priority of invention is under consideration, it is incredible that a preliminary statement, filed by one of the contestants in a Patent Office interference, should fail to show correctly his earliest dates of conception, etc. *Detroit Lubricator Co. v. Lunkenheimer*, 38 O. G. 331.—BROWN, 1886.

147. For a statement of the facts as regards Meucci's telephone, and the finding that he was not the prior inventor thereof over Bell, see —. *Am. Bell Tel. Co. v. Globe Tel. Co. et al.*, 31 Fed. Rep. 729.—WALLACE, 1887.

## PRIOR PATENT OR PUBLICATION.

### "PRIOR PATENT OR PUBLICATION" IN THE PATENT ACTS.

Act approved February 21st, 1793.

SECTION 6. This section provides as a defence to an action for infringement proof that the patented thing "had been described in some public work anterior to the supposed discovery of the patentee." [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 15. This section provides, as a defence to an action for infringement, the fact that the patented thing "had been described in some public work anterior to the supposed discovery thereof by the patentee;" also that the patented thing "had before been patented or described in any printed publication." [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 24. This section provides that a thing, in order to be patentable, must be "not patented or described in any printed publication in

this or any foreign country before his invention or discovery thereof."

SEC. 61. This section provides as a defence to an action for infringement as follows:

"Third. That it [the patented thing] had been patented or described in some printed publication prior to his [the patentee's] supposed invention or discovery thereof." [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4886. This section provides that a thing, in order to be patentable, must be "not patented or described in any printed publication in this or any foreign country before his [the patentee's] invention or discovery thereof."

SEC. 4920. This section provides as a defence to an action for infringement as follows:

"Third. That it [the patented thing] had been patented or described in some printed publication prior to his [the patentee's] supposed invention or discovery thereof."

## CASES.

1. A person cannot have two valid patents of different dates for the same invention. The earlier is a bar to the later. *Odiorne v. Amesbury Nail Factory*, 2 Mason, 28.—STORY, 1819.

2. A prior existing patent estops a second patent to the same party for the same thing. *Morris v. Huntington*, 1 Paine, 348.—THOMPSON, 1824.

3. A hose company's book of minutes is not a "public work." *Pennock et al. v. Dialogue*, 4 Wash. 538.—WASH. 1825.

4. Doubts as to whether a prior patent exhibits the device of the patent in suit is fatal to defence on that point. *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

5. A prior patent, in order to be a successful anticipation, must clearly describe the patented thing in issue. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

6. Where a patented invention proves to be of great utility, and defendant attempts to anticipate the patent in issue by a prior patent, it is a matter of weight, making against defendant's position, that during a period of years no one constructed the patented thing from the prior patent.—*Id.*

7. A prior publication, in order to be a bar, must describe the afterward patented thing in all its material parts. *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

8. In pleading a book as a prior publication, the notice should specify the page or heading. *Foote v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

9. Where prior publication is set up by defendant, "and the proof relied on is a description of such structure, contained in a printed publication, such description must have been sufficiently full and precise to have enabled a mechanic to construct it, and must also have been, in all material respects, like that covered by or described in the plaintiff's patent." *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

10. "An individual who has obtained a patent for a thing which he claims to have invented cannot at any future time claim another patent for a substantial part of the same thing." *Smith v. Ely et al.*, 5 McLean, 76.—MCLEAN, 1849.

11. When a prior patent is offered, it *prima facie* covers what it describes, notwithstanding a subsequent patent may cover a portion of the same thing. *Colt v. Mass. Arms Co.*, 1 Fish. P. C. 108.—WOODBURY, 1851.

12. If the jury believe that an alleged prior thing was given up as incomplete, it is to be considered as an abandoned experiment.—*Id.*

13. The defence of prior publication, where the work in question contains upward of thirteen hundred pages, is not properly pleaded by simply referring to the work as a whole. *Silsby et al. v. Foote*, 14 Howard, 218.—SUP. CT. 1852.

14. "So cautiously does the law regard the public rights, that if the thing invented or discovered had been described in any foreign publication, it is declared to be fatal to the patentee. This provision goes upon the presumption that if such foreign publication has been made the patentee may have acquired a knowledge of it. And this presumption is not rebutted by proving, so far as a negative can be proved, that the inventor had no knowledge of it. The publication may be proved, as to its contents, and the fact of publication by the production of the book, or by parol testimony." *Allen v. Hunter*, 6 McLean, 303.—MCLEAN, 1855.

15. Statements in a prior publication as to facts occurring before the date of the publication are immaterial. *Seymour et al. v. McCormick*, 19 Howard, 96.—SUP. CT. 1856.

16. The invalidating prior publication may be a home or foreign publication. *Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co.*, 3 Fish. P. C. 43.—INGERSOLL, 1858.

17. A prior patent anticipates a later patent if it describes, though it does not claim, the thing claimed in the later patent. *Whipple v. Baldwin M'fg Co.*, 4 Fish. P. C. 29.—SPRAGUE, 1858.

18. A prior publication, in order to be sufficient as a defence, should be such "as to enable a

mechanic skilled in the art to construct the machine; it should not be vague reference to or suggestions of the thing described." *Hayes et al. v. Sulsor et al.*, 1 Bond, 279.—LEAVITT, 1859.

19. A prior publication, in order to be available as a defence, must have been prior to the complainant's invention and not simply to his application for patent. *Bartholomew v. Sawyer et al.*, 4 Blatch. 347.—INGERSOLL, 1859.

20. Defendants' answer having set up a certain printed publication, they were not permitted to offer in evidence a work which consisted of plates and drawings without printed description. *Judson v. Cope et al.*, 1 Bond, 327.—LEAVITT, 1860.

21. A prior patent or publication, in order to be available as a defence, must describe the invention so clearly and intelligibly that it can be made or constructed by a competent mechanic. Mere suggestion or imperfect description is insufficient.—*Id.*

22. A foreign patent, in order to be available as a defence, must be prior to the invention of the home patentee, and not simply prior to his application. *Hove v. Morton et al.*, 13 M. L. R. 70.—SPRAGUE, 1860.

23. In considering whether a prior patent anticipates the patent in suit, the model appurtenant to the application for the prior patent is admissible in evidence. *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

24. A person cannot have a patent for an improvement which is substantially described and claimed in a prior patent to himself. *Sickles v. Falls Co.*, 4 Blatch. 508.—NELSON, 1861.

25. Where the defence relied on is a prior description, in order to be effective as such it must describe substantially the same organized mechanism as that of the patent, operating in substantially the same manner. *Clark Patent Steam & Fire Regulator Co. v. Copeland*, 2 Fish. P. C. 221.—SHIPMAN, 1862.

26. A patent was applied for December 11th, 1854, and issued September 11th, 1860. The same inventor applied for another patent June 15th, 1857, which was issued December 1st, 1857. The patent first applied for and last issued described what was embraced by the claim of the patent last applied for and first issued. The court held that the patent last issued was not thereby invalidated. *Hayden v. Suffolk M'fg Co.*, 4 Fish. P. C. 86.—SPRAGUE, 1862.

27. A prior foreign patent of June 16th, 1853, being set up as a defence, thereof the court said: "Unless, therefore, the complainants show that the invention embodied in the patent claimed by

them was made and reduced to practise prior to June 16th, 1853, they cannot prevail in the suit, and the burden of proof is shifted upon them to establish those facts." *White et al. v. Allen*, 2 Clifford, 224.—CLIFFORD, 1863.

28. "Where an invention has been patented in a foreign country or has been described in a public work, then a man claiming to have been the inventor in this country is presumed, in the eye of the law, to have been acquainted with that invention as it was known in the foreign country." *Swift et al. v. Whisen et al.*, 2 Bond, 115.—LEAVITT, 1867.

29. Where the device of a prior patent is inoperative, impracticable, and worthless, it does not operate as an anticipation of a prior patent. *Harwood et al. v. Mill River M'fg Co.*, 3 Fish. P. C. 526.—SHIPMAN, 1869.

30. "Patented inventions cannot be superseded by the mere introduction of a . . . publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practise the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defence, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the peculiar circumstances under which the publication takes place, the account published, to be of any effect to support such a defence, must be an account of a complete and operative invention capable of being put into general and practical operation." *Seymour v. Osborne*, 11 Wall. 516.—SUP. CT. 1870.

31. "A patent is rendered invalid by a prior published description only where that description was sufficient to give to the public a practical knowledge of the invention claimed." *Roberts v. Dickey*, 4 Brews. 260.—STRONG, 1872.

32. Prior publications which are remotely suggestive of the patented invention in suit, but not describing it in such terms that the public could construct it and put it in practice without further invention, do not invalidate the patent. *McMillin et al. v. Barclay et al.*, 3 Pittsb. 377.—MCKENNAN, 1872.

33. To constitute a person a prior inventor as

regards a printed publication, he must, before the publication, "have proceeded so far as to have reduced his idea to practice and embodied it in some distinct form." *Webb et al. v. Quintard*, 9 Blatch. 352.—BLATCHFORD, 1872.

34. A scientific work, such as "Mahan's Civil Engineering," cannot be offered in evidence to prove the prior art. *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

35. Where defendants rely upon a prior publication, they must show that the work was published before the date of complainant's patent. "This must be directly proved. It is not deducible from the imprint on the title-page." *Reeves v. Kenstone Bridge Co. et al.*, 9 Phil. 368.—MCKENNAN, 1872.

36. "More than one patent for the same invention cannot be legally issued by the Commissioner, but the regular issuing of the second patent cannot impair the right of the patentee under the first patent, if it was valid at the time it was granted." *Jones et al. v. Sewall*, 3 Clifford, 563.—CLIFFORD, 1873.

37. "Patented inventions cannot be superseded by the mere introduction in evidence of a foreign publication, though of a prior date, unless the description or drawings contain or exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which the improvement appertains to make, construct, and practise the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent."—*Ib.*

38. A rejected application for patent is not a prior publication or a prior patent. *Brown v. Guild*, 23 Wallace, 181.—BRADLEY, 1874.

39. Rejected applications for patent are not prior publications, "because they lack the essential quality of a publication, in that they are not designed for general circulation, nor were they made accessible to the public generally." *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 1 Bann. & Ard. 177.—MCKENNAN, 1874.

40. "A written description of a machine, although illustrated by drawings, which has not been given to the public, does not constitute an invention within the meaning of the patent law. It may be so full and precise as to enable any one skilled in the art to which it appertains to construct the machines described, but, until it has been embodied in a form capable of useful operation, it has not attained the proportions or the character of a complete invention. However suggestive and valuable it may be as an untried



theory, it is ineffective against the practical and useful product of inventive skill."—*Ib.*

41. An English provisional specification, in order to operate as a prior publication, and "in order to be sufficient to invalidate the plaintiff's patent, must describe the thing which the plaintiff's patent claims, and must do so in a manner so distinct and clear as to leave no reasonable doubt that the thing described is the same." *Cohn v. U. S. Corset Co. et al.*, 12 Blatch. 225.—BLATCHFORD, 1874.

42. A defence of prior publication "must be established affirmatively by the defendant in order to be found for him, the patent having been issued and standing until overthrown."—*Ib.*

43. If a description in a prior publication is a sufficient description of the complainant's device to show its structure in the particulars covered by the claim, it is not necessary to show otherwise the existence or use of the device described in the prior publication.—*Ib.*

44. "A written description of a machine, although illustrated by drawings, which has not been given to the public, does not constitute an invention within the meaning of the patent laws. Evidence that such a description was made does not show, of itself, a prior invention. Such a description has not the same effect as a printed publication. It lacks the essential quality of such a publication, for, even though deposited in the Patent Office, it is not designed for general circulation, nor is it made accessible to the public generally, being so deposited for the special purpose of being examined and passed upon by the Patent Office, and not that it may thereby become known to the public. Although it may incidentally become known, the deposit of it is not a publication of it within the meaning of the statute or the law. Moreover, although the description may be so full and precise as to enable any one skilled in the art to which it appertains to construct what is described, it does not attain the proportions or the character of a complete invention until it is embodied in a form capable of useful operation." *Lyman Ventilating & Refrigerator Co. v. Lalor*, 12 Blatch. 303.—BLATCHFORD, 1874.

45. Prior patents that are general, indefinite, and ambiguous in their descriptive parts will not avail to defeat a later patent. *Westinghouse, Jr., v. Gardner & Ranson Air Brake Co.*, 2 Bann. & Ard. 55.—SWAYNE and WELKER, 1875.

46. The existence of a prior patent is not evidence of prior use. *Weston v. White et al.*, 13 Blatch. 364.—SHIPMAN, 1876.

47. Where a description of the device in ques-

tion in a prior publication is as good as it is in the patent in suit, it suffices as an indication that both the publications may be defective in clearness. *Woven Wire Mattress Co. v. Whittlessey et al.*, 8 Bissell, 23.—BLODGETT, 1876.

48. "Unless the earlier printed and published description does exhibit the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make it, or repeat the process claimed, it is insufficient to invalidate the patent." *Cohn v. U. S. Corset Co. et al.*, 93 U. S. 366.—SUP. CT. 1876.

49. For an example of prior publication held sufficient although it had several defects, see —. *Ib.*

50. Where a patent in suit is for a product, it is entirely immaterial that the prior publication should show the mode of making that product.—*Ib.*

51. "The reason which the patentee gives for the operation or use of his device is not conclusive. A man may, in other words, invent an improvement producing results beyond what he knows or dreams of, and a better reason may be given by a skilled person than the one assigned for the use of the device which is used or adopted." (Said of a prior patent.) *Stow v. City of Chicago*, 8 Biss. 47.—BLODGETT, 1877.

52. If the device of a prior patent necessarily has a certain useful function, it is not essential that the prior patent does not point out that function.—*Ib.*

53. Rejected applications for patents are not admissible in evidence as anticipatory of a later patent. *Herring et al. v. Nelson et al.*, 14 Blatch. 293.—JOHNSON, 1877.

54. "It is a well-settled principle of patent law that the mere suggestion that a given result can be obtained is not patentable, and does not anticipate a patent by another; but a mechanism or device must be described by which the suggested result is attained.

"The mere saying, for instance, as was done a century, or two or three centuries ago, that vessels could be propelled by steam, did not deprive Fitch or Fulton of their right to a patent on the mechanism by which they accomplished that result. The mere idea that intelligence could be communicated by electricity did not deprive Morse of his patent upon his mechanism." *Graham v. Gammon et al.*, 7 Bissell, 490.—BLODGETT, 1877.

55. A rejected application for a patent is not admissible in evidence to impeach the novelty of a subsequent patent. *Rubber Stop M'fg Co.*

v. *Metropolitan R. R. Co. et al.*, 3 Bann. & Ard. 252.—SHEPLEY, 1878.

56. "A foreign patent or other foreign printed publication describing an invention is no defence to a suit upon a patent in the United States, unless published anterior to the making of the invention or discovery secured by the latter, provided that the American patentee, at the time of making application for his patent, believed himself to be the first inventor or discoverer of the thing patented. He is obliged to make oath to such belief when he applies for his patent; and it will be presumed that such was his belief until the contrary is proven." *Elizabeth v. Pavement Co.*, 97 U. S. 126.—SUP. CT. 1878.

57. "In England the enrolment of the specification is the first publication of the particulars of a patented invention."—*Id.*

58. "Neither the defendant in an action at law nor a respondent in an equity suit can be permitted to prove that the invention described in the prior patent or the invention described in the printed publication was made prior to the date of such patent or printed publication, for the reason that the patent or publication can only have the effect as evidence that is given to the same by the act of Congress." *Bates et al. v. Coe*, 98 U. S. 31.—SUP. CT. 1878.

59. "Inventions patented here cannot be superseded by the mere introduction of a . . . patent or publication, although of prior date, unless the description or drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, without the necessity of resorting to experiments, to make, construct, and practise the invention." *Cahill v. Brown*, 3 Bann. & Ard. 580.—CLIFFORD, 1878.

60. "Patented inventions cannot be superseded by the production of a . . . publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practise the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defence, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the mechanism, and to carry the

invention into operation." *Goff et al. v. Stafford et al.*, 3 Bann. & Ard. 610.—CLIFFORD, 1878.

61. "Neither the defendant or respondent can be permitted to prove that the invention described in the alleged prior patent, or the invention described in the printed publication, was made prior to the date of such patent or printed publication, for the reason that the patent or publication can only have the effect as evidence that is given to them by the act of Congress." *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

62. Statements in a publication as to what had previously been done are not evidence. *Irish v. Knapp*, 5 Bann. & Ard. 47.—BUTLER, 1879.

63. Complainant's patent in suit was for "the combination of gutta-percha and metallic wire in such form as to encase a wire or wires, or other conductors of electricity, within the non-conducting substance gutta-percha, making a submarine telegraph cable, at once flexible and convenient, which may be suspended on poles in the air, submerged in water, or buried in the earth, to any extent, for atmospheric or submarine telegraphic communication, and for other electric, galvanic, or magnetic uses, as hereinbefore described." Defendant set up the defence of prior publication, a German publication which said: "The trials which the Government here is, at this time, causing to be made concerning the introduction of electro-magnetic telegraphs best answering the purpose, do result, in the highest degree, in favor of laying the wires underground in coatings of gutta-percha." The court held that this German publication did not disclose the patented invention with sufficient precision to constitute a full defence. *Colgate v. Gold & Stock Telegraph Co.*, 16 Blatch. 503.—BLATCHFORD, 1879.

64. "Foreign patents are not admissible in evidence against an American patent anterior to the date of their enrolment." *Willimantic Linen Co. et al. v. Clark Thread Co. et al.*, 4 Bann. & Ard. 133.—NIXON, 1879.

65. A prior patent, which describes an afterward patented improvement with the exception of what common mechanical skill would supply, is a bar to the later patent. *McCloskey's Application*, 3 MacArthur, 14.—MACARTHUR, 1879.

66. The model "of an alleged anticipatory patent," if differing from the description and drawings of the patent, cannot be regarded to affect complainants' patent. *Thatcher Heating Co. v. Spear et al.*, 1 Fed. Rep. 411.—BLATCHFORD, 1880.

67. "Of two patents for the same invention [to the same inventor], the one last granted is void, although it may have been first applied for." *McMillan et al. v. Ress et al.*, 1 Fed. Rep. 722.—MCKENNAN, 1880.

68. "Whether two patents cover the same invention must be determined by the tenor and scope of their claims, not by the description in the specifications."—*Id.*

69. "Separate patents for severable parts of the same invention may be granted, although the whole invention is fully described in each of them, to explain the purpose and mode of operation of the parts covered by the claims in such patents."—*Id.*

70. "The fact that the original mechanical patent was issued more than two years after the design patent is of no importance," the latter covering shape, the former mechanical combination, and the former being applied for within two years after the date of the latter. *Collender v. Griffith et al.*, 18 Blatch. 110.—BLATCHFORD, 1880.

71. A patent or printed publication must, in order to defeat a patent subsequently obtained, describe the invention so as to enable those skilled in the art to which it belongs or most nearly appertains to construct and use it. It is not sufficient to say that a lifting apparatus can be combined with a Gifford injector, leaving others to invent the mode of doing it. *Nathan et al. v. N. Y. El. R. R. Co.*, 2 Fed. Rep. 225.—WHEELER, 1880.

72. Where a prior patent is set up to defeat a later one, the file wrapper, etc., of the prior patent are not admissible in evidence. *Howes et al. v. McNeal*, 17 Blatch. 396.—BLATCHFORD, 1880.

73. An alleged prior publication must describe a device of "practical utility" and must be "full and explicit." *Page et al. v. Holmes Burglar Alarm Tel. Co.*, 17 Blatch. 484.—BLATCHFORD, 1880.

74. "Because of the difficulty of ascertaining the amount of knowledge which may have been derived from the exhibition, publication, or use of the invention, it has always been held that when the public have had means of knowledge they have had knowledge of the invention. Thus, if a book has been published describing the invention, it is not important that no one has read it. If a pier has been placed in the bed of a river, or a pipe underground, it is conclusively presumed to be known to all men." (Many cases cited.) *Perkins v. Nashua Card & Glazed Paper Co.*, 2 Fed. Rep. 451.—LOWELL, 1880.

75. The specification and drawings of a prior

patent to be effectual as an anticipation of a patent sued on must be "full, clear, and exact," and must furnish such definite information as to enable a skilled person, beyond any reasonable doubt, by following it, without aid from anything not then known, to construct an apparatus like the plaintiff's. *Bignall v. Harvey et al.*, 18 Blatch. 353.—BLATCHFORD, 1880.

76. When the defence of a prior patent is relied upon by defendant, and the complainants prove that their invention antedates the prior patent, it is not pertinent to show the date of the invention of the prior patentee. *Tyler et al. v. Crane*, 7 Fed. Rep. 775.—NIXON, 1880.

77. While the date at which a foreign patent takes effect is to be taken as the date of the foreign patent, so far as its limiting effect on a home patent for the same invention is concerned, the date of its publication is the important date so far as its effect in anticipating a home patent is concerned. *De Florez et al. v. Reynolds et al.*, 17 Blatch. 436.—BLATCHFORD, 1880.

78. An applicant for a patent withdrew two claims from the application, and made them the subject matter of a new application. A patent was then granted on the first application, and subsequently one on the second. *Held*, that the second patent was valid; that it was not a case for the reissue of the first patent; and that in computing two years' public use, as to the later patent, the computation must run from the earlier application. *Graham v. Geneva Lake Crawford M'fg Co.*, 11 Fed. Rep. 138.—DYER, 1880. *Graham v. McCormick et al.*, 10 Bissell, 39.—DRUMMOND, 1880.

79. "Now, while it is true, as a matter of law, that the issuance of a patent gives a *prima facie* right to the claimant to operate under that patent, it is by no means conclusive, but it is subject to investigation by the proper courts when questioned by a party whose rights are claimed to be infringed thereby." *Wilt v. Grier*, 5 Fed. Rep. 450.—BRADFORD, 1881.

80. In the absence of other evidence of the dates of invention, the first application must be taken to represent the first invention. *Pennington et al. v. King*, 7 Fed. Rep. 462.—LOWELL, 1881.

81. It seems that if a foreign patent were kept secret it would not be a bar to a later patent here. *Schoerken v. Swift, Courtney & Beecher Co.*, 19 Blatch. 209.—WHEELER, 1881.

82. The fact that a copy of a foreign patent is properly certified goes to show that it is an open and not a secret patent.—*Id.*

83. Either claim in defendant's patent may be valid as a whole, and yet there may be no

right to make the whole structures shown in its drawings without a license under a former patent. *Collignon et al. v. Hayes*, 8 Fed. Rep. 912.—BLATCHFORD, 1881.

84. For a description, without drawings, of a mechanical device held sufficient to enable a mechanic to work by it, see —. *Gottfried v. Crescent Brewing Co.*, 9 Fed. Rep. 762.—GRESHAM, 1881.

85. A prior patent is rendered nugatory as an anticipation by showing that complainant's invention preceded it. *Lorillard & Co. v. Donan, Carroll & Co.*, 20 Blatch. 63.—WHEELER, 1881.

86. A prior patent is not rendered nugatory as a bar to subsequent patents by the fact that the machine described therein has defects in working that mere mechanical skill would remove. *Pickering et al. v. McCullough et al.*, 104 U. S. 310.—SUP. CT. 1881.

87. Prior publications which are vague and uncertain, and which describe a machine not capable of practical and successful use for the purpose in hand, do not anticipate a patent. *Gottfried v. Crescent Brewing Co.*, 13 Fed. Rep. 479.—GRESHAM, 1882.

88. An earlier patent to the same inventor, for an inferior form of device for the same purpose, is evidence, approaching the conclusive, that the later and perfected form was not invented first. *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1882.

89. By the court: "If he was the author of any other invention than that which he specifically describes and claims, though he might have asked to have it patented at the same time and in the same patent, yet if he has not done so, and afterward desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent."—*Id.*

90. In attempting to use an English patent as a defence, the patent must date from the filing of the complete application. *Coburn et al. v. Schroeder et al.*, 20 Blatch. 392.—WHEELER, 1882.

91. An imperfect drawing, unaccompanied by description, is not a valid prior patent or prior publication. *Hoe et al. v. Kahler*, 20 Blatch. 430.—BLATCHFORD, 1882.

92. A British provisional specification does not patent the article described within it, within the meaning of our statute. *Parsons v. Colgate et al.*, 21 Blatch. 171.—WHEELER, 1882.

93. A patent prior to that sued on showed the same device, a pavement, effecting the same result as that described in complainant's patent, but such result was not described in the prior patents. Complainant's patent was held to be

anticipated. *Stow v. Chicago*, 104 U. S. 547.—SUP. CT. 1881.

94. It seems that a man may not claim in a patent a thing that is exhibited in a prior patent to himself. *McKay et al. v. Jackman*, 20 Blatch. 466.—WHEELER, 1882.

95. By the court: "I am much inclined to think that the mere fact that a new article is shown in the drawings of a patent for a machine would not of itself be an abandonment of the new article, which could properly be subject of a different patent, until the statutory forfeiture of use for two years had been incurred." *Hatch et al. v. Moffitt*, 15 Fed. Rep. 252.—LOWELL, 1883.

96. The machine of a prior patent must be an operative machine in order to be effective as an anticipation. *Aram et al. v. Moline Wagon Co.*, 16 Fed. Rep. 236.—BLODGETT, 1883.

97. In considering a prior publication, it is proper to prove and consider in the same connection the general manner of use of devices the same as, or similar to, the one shown in the publication. *Downton v. Yaeger Milling Co.*, 108 U. S. 466.—SUP. CT. 1883.

98. In this case a prior patent to the same patentee, showing and describing, but not claiming, the improvement claimed in the patent in suit, was mentioned by the court as if, as a matter of course, it did not affect the validity of the patent in suit. *Estey et al. v. Burdett*, 109 U. S. 633.—SUP. CT. 1884.

99. Where a patentee's later patent claims what was described in his earlier patent, but the application for the later patent was on file when the earlier patent was granted, the earlier patent has no effect upon the validity of the later patent. *Railway Register M'fg Co. v. Broadway & Seventh Ave. R. R. Co.*, 30 O. G. 180.—WHEELER, 1884.

100. In making the defence of prior publication, it is not enough to prove that the prior work was patented. "The statute goes upon the theory that the work has been made accessible to the public, and that the invention has thereby been given to the public and is no longer patentable by any one. Publication means put into general circulation or on sale where the work is accessible to the public." *Cottier et al. v. Stimpson et al.*, 20 Fed. Rep. 906.—DEADY, 1884.

101. Where defendants rely upon a structure in a prior publication as an anticipation of the patented structure, "the burden of proof is on the defendants to show the similarity."—*Id.*

102. "A patent is not invalidated by a statement in an earlier publication, unless those state-

ments are full and definite enough to inform those skilled in the art how to put in practice the invention so patented." *Hood et al. v. Boston Car Spring Co. et al.*, 21 Fed. Rep. 67.—GRAY, 1884.

103. "It has been held generally, and perhaps universally, that business circulars which are sent only to persons engaged or supposed to be engaged in the trade are such publications as the law contemplates in Section 4886."—*New Process Fermentation Co. v. Kock*, 21 Fed. Rep. 580.—BROWN, 1884.

104. "The burden is upon the defendants to satisfy the court that the prior description contained such a clear, full, and exact statement that a person skilled in the art, with the statement before him, could produce the fabric in question. . . . The law requires something beyond mere suggestion to defeat a patent. Prophecy will not do; facts, not theories, are needed." *Celluloid M'fg Co. v. Chrolithion Collar & Cuff Co.*, 31 O. G. 519.—COXE, 1885.

105. Where publications which are relied upon as prior publications show nothing more than suggestions and speculations of scientific writers, who never tested the practicability of their suggestions or demonstrated the truth or value of their speculations, such publications will not be sufficient to anticipate a patent. *Jensen v. Keasby et al.*, 24 Fed. Rep. 144.—BUTLER, 1885.

106. "A description in a prior publication, in order to defeat a patent, must be in such terms as would enable a person skilled in the art to make, construct, or practise the invention as he could from a prior patent or from the patent itself." *Adams v. Bellaire Stamping Co. et al.*, 36 O. G. 567.—JACKSON, 1886.

107. "Whether the two patents cover the same thing must be determined by the scope of the claim in the later patent rather than by the description in the specification."—*Id.*

108. "A patent is avoided for the want of novelty, although the advantages of the device are neither claimed nor seen by the prior inventor, provided his specification disclose it." *Leonard v. Lovell*, 29 Fed. Rep. 310.—SEVERENS, 1886.

109. Prior "publications must contain in themselves such a full, clear, and exact description of the invention as, without anything more, will enable one skilled in the art to practise the invention." *Cary et al. v. Lovell M'fg Co.*, 31 Fed. Rep. 344.—ACHESON, 1887.

110. It is sufficient to defeat a later patent if a prior patent describes the same thing without claim. "If a prior foreign patent describes the device covered by a patent of the United States,

or describes it so nearly that it is made patent to the public, and the clumsiest mechanic can readily make the change from one to the other, the later patent cannot be sustained. Any other rule would promote inconsistency and fraud."

*United States Bung M'fg Co. v. Independent Bung & Bushing Co.*, 31 Fed. Rep. 76.—COXE, 1887.

111. "Description in a prior patent does not of itself alone invalidate a subsequent patent for the invention so described, applied for in due season." *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.*, 31 Fed. Rep. 562.—WHEELER, 1887.

112. "Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practise the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defence, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defence, must be an account of a complete and operative invention, capable of being put into practical operation." *Emmes v. Andrews et al.*, 122 U. S. 40.—SUP. CT. 1887.

## PRIOR USE.

### "PRIOR USE" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 1. This section provides that a thing, in order to be patentable, must be "not before known or used." [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 6. This section provides as a defence to an action for infringement proof that the patented thing "was not originally discovered by the patentee, but had been in use." [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 6. This section provides that a thing, in order to be patentable, must be "not known or

used by others before his or their [the patentee's] discovery or invention thereof."

SEC. 15. This section provides that "whenever it shall satisfactorily appear that the patentee, at the time of making his application for the patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country." [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 24. This section provides that a thing, in order to be patentable, must be "not known or used by others in this country" "before his [the patentee's] invention or discovery thereof."

SEC. 62. *And be it further enacted*, That whenever it shall appear that the patentee, at the time of making his application for the patent, believed himself to be the original and first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been known or used in a foreign country before his invention or discovery thereof, if it had not been patented or described in a printed publication. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4886. This section provides that a thing, in order to be patentable, must be "not known or used by others in this country" "before his invention or discovery thereof."

SEC. 4923. Whenever it appears that a patentee, at the time of his application for the patent, believed himself to be the original and first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been known or used in a foreign country before his invention or discovery thereof, if it had not been patented or described in a printed publication.

#### CASES.

1. "If it appears that the plaintiff was not the original inventor, in reference to other parts of the world as well as America, he is not entitled to a patent." *Reutgen v. Kanowers et al.*, 1 Wash. 168.—WASH. 1804.

2. Prior foreign use vitiates a patent. It must appear that the invention was original as to all the world. *Dawson v. Follen*, 2 Wash. 311.—WASH. 1808.

3. That an invention has been in public use for years before the date of the patent does not vitiate the grant, provided the patentee was the original inventor. [Under act of February

21st, 1793.] *Goodyear v. Matthews*, 1 Paine, 300.—LIVINGSTON, 1814.

4. In pleading prior use, the special facts [names of prior users and place of use] need not be set out either in special pleading or under the general issue with notice. *Evans v. Kremer*, 1 Peters' C. C. 215.—WASH. 1816.

5. There is no limitation of time beyond which a patent cannot be defended against on the ground of prior use. (Referring to Section 10, act of 1793.) *Evans v. Eaton* 1 Peters' C. C. 322.—WASH. 1816.

6. In pleading prior use it is not necessary to specify the user and the place of use. (Section 6, act of 1793.)—*Ib.*

7. "The intent of the statute was to guard against defeating patents by the setting up of a prior invention which had never been reduced to practise." *Bedford v. Hunt et al.*, 1 Mason, 302.—STORY, 1817.

8. "Any patent may be defeated by showing that the thing secured by the patent had been discovered and put into actual use prior to the discovery of the patentee, however limited the use or the knowledge of the prior discovery might have been."—*Ib.*

9. That a machine once in use has fallen into disuse does not prevent it from being an anticipation of a subsequent patent. *Evans v. Het-tick*, 3 Wash. 408.—WASH. 1818.

10. Prior use does not involve wide publicity.—*Ib.*

11. Prior use "is a mixed question of fact and law." *Evans v. Eaton*, 3 Wash. 443.—WASH. 1818.

12. An invention once in public use cannot be monopolized by a subsequent patentee. *Evans v. Eaton*, 3 Wash. 454.—SUP. CT. 1818.

13. Prior use must needs be before the plaintiff's invention and not merely before the date of the patent. *Dixon v. Moyer*, 4 Wash. 68.—WASH. 1821.

14. An allegation of prior use in the United States does not warrant evidence of prior use abroad.—*Ib.*

15. Section 1 of the act of February 21st, 1793, means that the invention "should be unknown, and not used as the invention of any other than the patentee before the application for patent." *Morris v. Huntington*, 1 Paine, 348.—THOMPSON, 1824.

16. If a specimen of hose "placed in a domestic warehouse for public examination" "was never in use before the plaintiffs' invention, then it cannot impeach the validity of their patent." *Pennock et al. v. Dialogue*, 4 Wash. 538.—WASH. 1825.

17. "It must be shown that the invention is new not only in the United States, but in the world." (Act of February 21st, 1793.) *Mellus v. Silsbee*, 4 Mason, 108.—STORY, 1825.

18. The invalidating use must be prior to the plaintiff's invention.—*Id.*

19. The use of a prior cracker machine, to the extent of a half barrel of flour, for an experiment, then thrown aside, held as a use within the statute. (Act of February 21st, 1793, Section 6.) *Watson v. Bladen*, 4 Wash. 580.—WASH. 1826.

20. To show that a product similar to the product of plaintiffs' patented machine existed previously is not necessarily to show that a machine like plaintiffs' existed previously. *Treadwell et al. v. Bladen*, 4 Wash. 703.—WASH. 1827.

21. The prior contemplation of use does not constitute prior use.—*Id.*

22. The invalidating use by others must be prior to the patentee's discovery, not simply prior to his application for patent. (With reference to the act of February 21st, 1793.)—*Id.*

23. Prior knowledge or use is a question of fact which may be established by a single witness. *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON and BALDWIN, 1831.

24. The invention must be new as to all the world.—*Id.*

25. "The burden of proving the previous invention, knowledge, or use of the thing patented is on the defendants."—*Id.*

26. Where a defendant would show prior use in evidence, he must, in pleading, set up the witnesses having knowledge. *Philadelphia & Trenton R. R. Co. v. Stimpson*, 14 Peters, 448.—SUP. CT. 1840.

27. As to the defence of prior use, "the burden of proof rests upon defendant." He must establish the point beyond a reasonable doubt. *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

28. A prior use abroad may be availed of as a defence in an action for infringement. *Street v. Silver*, Brightly, 96.—ROGERS, 1846.

29. Where the defence of prior use is pleaded, nothing more specific is required than the names and residences of the persons who possess the prior knowledge of the thing patented, and the name of the place at which it had been used. It would be unreasonable to extend the language of the act, unless it clearly required the court so to do, to the names and residences of all the witnesses whom the defendant meant to summon. *Wilton v. The Railroads*, 1 Wallace, 192.—SUP. CT. 1847.

30. Defendants, in their notice of defences, had given notice of A as having had prior knowledge of the patented thing. They called B as a witness under this allegation. B was held admissible. *Many v. Jagger et al.*, 1 Blatch. 372.—NELSON, 1848.

31. "By the rules of law, when a dispute arises as to the priority of an invention, a patentee is allowed to show the real date of it, and have his rights as fully secured as if he had taken out his patent." *Parker v. Hulme*, 7 West. L. J. 417.—KANE, 1849.

32. Evidence as to occurrences of ancient date are always to be viewed with distrust, and this without in any manner impeaching the credibility of the witnesses.—*Id.*

33. It is not enough to show that an alleged prior thing was made, but it must also be shown that it was used "before the plaintiff's invention. This is the test of what is required to defeat the title of a patentee of an improved machine."—*Id.*

34. The patent in issue being for a water wheel, a witness testified that thirty years before he helped to make such a wheel, and saw it carried away to be put into a mill, but did not see it afterward. This was held to establish prior use. *Parker v. Ferguson*, 1 Blatch. 407.—NELSON, 1849.

35. Prior use abroad is not the use of our statute. *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

36. Prior use abroad is not the invalidating prior use of our statute. *Silsby et al. v. Foote*, 14 Howard, 218.—SUP. CT. 1852.

37. "The mere speculation of a philosopher or mechanic, never put into actual practice or operation, will not deprive a subsequent inventor, who has employed his labors and talents in putting it into practice, of the reward due to his ingenuity and enterprise. But if the first inventor reduced his theory to practice and put his machine or other invention into use, the law never could intend that the greater or less use in which it might be, or the more or less widely the knowledge of its existence might circulate, should constitute the criterion by which to decide upon the validity of any subsequent patent for the invention. And it would, therefore, be defeated by showing that the thing secured by the patent had been discovered and put into actual use prior to the discovery of the patentee, however limited the use or knowledge of the prior discovery might have been." *Rich et al. v. Lippincott et al.*, 2 Fish. P. C. 1.—GRIER, 1853.

38. "If the original inventor of the machine abandons the use of it, and does not take a pat-

ent first, no other person can entitle himself to a patent for it. There are exceptions to this general rule, as in the case of a lost art, where the knowledge of it has been lost for ages." And if, in the case of a patented safe, it be found that, prior to the invention of the patentee, the improvement had been put into practice, but that the safe itself had disappeared and the knowledge of the improvement was completely lost, as if it had never been discovered, then the patent might stand; but if the prior safe was in existence and use, and the knowledge of it not entirely forgotten and lost, the omission to bring it into public use or notice would not give the later inventor a right to the patent. The earlier inventor might have abandoned its use and been ignorant of the extent of its value, yet if the invention was substantially the same, the later inventor would not upon that ground be entitled to a patent, provided the earlier safe and its mode of construction were still in the memory of others.—*Ib.*

39. Prior use abroad is not the invalidating prior use of our statute. *O'Reilly et al. v. Morse et al.*, 15 Howard, 62.—*SUP. CT.* 1853.

40. "Invention, in the sense of the patent law, is the finding out, contriving, devising, or creating something new and useful, which did not exist before, by an operation of the intellect; and if there was, at any time or under any circumstances, an accidental combination similar in character to that which the plaintiffs have patented—if that combination was made accidentally or otherwise, under such circumstances that the public obtained no knowledge of the mode in which" it "could be made available, then the invention was not made by the parties who produced this combination. In other words, if the parties who made the combination, although seeing with the eye, perceived not, or hearing with the ear, understood not what would be the result of this combination, they added nothing to their own stock of knowledge, and the fact, if observed by other men [if they understood it not], added nothing to the knowledge of science upon that subject. Therefore the invention was not made until the parties contriving, or others observing, the existing combination, saw that it could be made available for the purpose of producing a result similar to the one which the plaintiffs have mentioned in their specification." *Ransom et al. v. New York*, 1 Fish. P. C. 252.—*HALL*, 1856.

41. "In order to avoid the plaintiffs' patent, on the ground of want of originality, it is necessary that . . . there was substantially the combination and connection in the organization and

arrangement which existed prior to the plaintiffs' alleged invention, as is claimed as the invention of the plaintiffs in the specification annexed to their patent."—*Ib.*

42. "It has happened . . . that the party producing a witness has to rub the rust off his recollection of many things, and more especially dates, and in doing this he may leave marks that did not exist before."—*Ib.*

43. Prior use abroad does not constitute the prior use of the statute. *Hayes et al. v. Sulzor et al.*, 1 Bond, 279.—*LEAVITT*, 1852.

44. Prior use abroad is not that prior use which constitutes a defence under the statute. *Bartholomew v. Sawyer et al.*, 4 Blatch. 347.—*INGERSOLL*, 1859.

45. "By knowledge and use the Legislature meant knowledge and use accessible to the public." *Cahoon et al. v. Ring*, 1 Clifford, 592.—*CLIFFORD*, 1859.

46. Prior use abroad is not the prior use of the statute. *Furbush et al. v. Cook et al.*, 10 Mo. L. R. 664.—*CURTIS*, 1857.

47. Prior use abroad is not admissible in evidence on the ground that such use was appurtenant to a certain foreign patent. *Judson v. Cope et al.*, 1 Bond, 327.—*LEAVITT*, 1860.

48. Prior use abroad is not the prior use of the statute.—*Ib.*

49. Prior use, in order to be effective as a defence, must be prior in point of time to the patentee's invention, not simply prior to the application for patent.—*Ib.*

50. If a prior machine has been actually perfected and used, it will not, by disuse, fail to establish the defence of prior use.—*Ib.*

51. Where a witness, after the lapse of twenty-one years, undertakes to describe a machine from memory, it is hazardous to take the recollection as satisfactory. *Ely v. Monson & Brimfield M'fg Co.*, 4 Fish. P. C. 64.—*SPRAGUE*, 1860.

52. The fact that a prior machine would not do the work of the patented machine is a stubborn fact, making against the identity of the prior machine with the machine of the patent.—*Ib.*

53. It is competent to show prior use, without notice thereof in the answer. *Vance v. Campbell et al.*, 1 Black, 427.—*SUP. CT.* 1861.

54. A prior machine, in order to be an anticipation of a subsequently patented machine, "must have been a practical machine, capable of performing the object of the maker." *Case v. Brown*, 1 Bissell, 382.—*DRUMMOND*, 1862.

55. In deciding whether an alleged prior use is of a perfected invention, there is to be considered its mode of operation and the effect pro-



duced. *Hayden v. Suffolk Mfg Co.*, 4 Fish. P. C. 86.—SPRAGUE, 1862.

56. "A party who sets up . . . an old instrument that has passed away, has upon him the burden of satisfying the jury, upon a preponderance of evidence, that it is substantially the same before they will set aside the patent."—*Ib.*

57. When the defence of prior use is set up, it is not enough for defendants to raise a doubt on that point; their proof must be satisfactory. *Magic Ruffie Co. v. Douglas et al.*, 2 Fish. P. C. 330.—SHIPMAN, 1863.

58. In proving the defence of prior use, it is not material that the prior thing, once having been in use, is afterward disused. *Waterman v. Thomson et al.*, 2 Fish. P. C. 461.—SHIPMAN, 1863.

59. On the question of prior use, doubts as to the credibility of defendant's witnesses are to be resolved in favor of plaintiff. *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

60. It is not enough for defendants to raise a doubt on the question of prior use; they must show it by preponderating evidence. *Tompkins v. Gage et al.*, 5 Blatchford, 268.—SHIPMAN, 1865.

61. The recollections of a witness "after the lapse of sixteen years are quite too indistinct and uncertain to set up a lost machine to defeat a valuable improvement and deprive a meritorious inventor of the fruits of his toil and labor." *Wing v. Richardson*, 2 Clifford, 449.—CLIFFORD, 1865.

62. If a device "has been once used, and is a practical improvement or machine, no one else can claim to be the inventor." *Sayles v. Chicago & Northwestern R. R. Co.*, 1 Bissell, 468.—DRUMMOND, 1865.

63. Machines set up as anticipatory of a complainant's patent "must have been working machines, not mere experiments. They must have done work, or been capable of doing work, and not been mere experiments, afterward abandoned. Whether they were in fact operated for a greater or less time, it is of no importance except so far as that may tend to make you believe that they were or were not mere experiments; in that view, the fact is of some consequence. But if you are satisfied that they were machines capable of doing work substantially by the same arrangement as the plaintiff's actual working machines, then the fact that they were operated but a short time and then abandoned for other reasons than because they had failed as machines is of no consequence." *Woodman v. Simpson*, 3 Fish. P. C. 98.—LOWELL, 1866.

64. "Where a machine has long been in public use, under a patent which has existed for a number of years unchallenged and undisputed, a jury should hesitate before coming to the conclusion that the patent was void on the ground of want of novelty. . . . A jury should be clearly satisfied in their own minds that the invention in controversy was anticipated by something known before the date of the patent, in order to come to the conclusion that the patent was void." *Blanchard et al. v. Puttman et al.*, 2 Bond, 85.—LEAVITT, 1867.

65. Use abroad is not the prior use of the statute. *Swift et al. v. Whisen et al.*, 2 Bond, 115.—LEAVITT, 1867.

66. "That which a person perfects or invents and applies to a practical use, that is to be regarded as the invention, and the mere knowledge by an individual of a prior mechanical structure similar to the one patented, which has not been used practically, would not be an answer to the novelty of the later patent."—*Ib.*

67. "The prior use of an alleged invention must be a public use and not a private use. If an invention is made and used in a private way, and then thrown aside and not given to the public, a patent granted to a subsequent inventor would be a valid patent. But if, in the use of the invention by the first inventor, the second inventor had access to it and could have knowledge of it, then the patent subsequently issued would be void and invalid." *Haselden v. Ogden*, 3 Fish. P. C. 378.—SHERMAN, 1868.

68. "A putting of an invention into use is generally strong evidence of a reduction of it to practise. But it may be a completed invention, put into a practical form, ready for practical use, and reduced to practise, without being put into use in the general acceptance of that word. If the adaptation to use, or even the use itself, is merely experimental, the invention is not perfected. But the use is not necessarily required in order to show perfection or completion. In respect to most inventions use, not merely experimental, is one of the best proofs of the reduction of an invention to practise." *Coffin v. Ogden et al.*, 7 Blatch. 61.—BLATCHFORD, 1869.

69. Complainant's patentee did not make the invention, an improvement in locks, earlier than March 1st, 1861. One Erbe constructed such a lock in the latter part of the year 1860, and showed it to others in the winter of 1860-61. The patent of complainant's patentee was granted in 1861. It was held that the patent in suit was anticipated by the Erbe lock.—*Ib.*

70. Where the defence of prior use is set up, defendants must show "satisfactory and pre-

ponderating evidence that they antedate the invention set forth in the patent." *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

71. Where a patent is for a process, it is not sufficient to show that a previously existing apparatus could have been used to practise the complainant's process. It must appear affirmatively and satisfactorily that the application was put to such prior use. *Piper v. Brown et al.*, 1 Holmes, 20.—SHEPLEY, 1870.

72. Where an alleged prior use is set up, and that by parties whose interest it was to continue that prior use, and they did not continue it, such fact makes strongly against the validity of such prior use as a defence. *Woodward v. Dinsmore*, 4 Fish. P. C. 163.—GILES, 1870.

73. A prior device which was not intended, when new, to serve the purpose of the afterward patented device, and only did so after it became worn, and then was not fitted to disclose the improvement to the public eye, is not an anticipating prior use. *Hartshorn v. Tripp et al.*, 7 Blatch. 120.—BLATCHFORD, 1870.

74. The patent in question was for the Blake stone crusher. A single witness, examined before the examiner upon interrogatories, testified to assisting in making such a machine, said to have been built in Louisville. If it had been operated publicly, it must have been known to many. These considerations raised so much doubt that the alleged prior use was held not proven. *Blake v. Eagle Works M'fg Co.*, 3 Bissell, 77.—DRUMMOND, 1871.

75. The patent in suit was for the Tanner brake. Defendant claimed that such a brake had been applied on a certain car on the Camden & Amboy Railroad on a certain date. The court held it practically incredible that such could have been the fact, in view of the other facts that it was very valuable, and was not applied on other cars of that road. *Sayles v. Chicago & Northwestern R. R. Co.*, 3 Bissell, 52.—DRUMMOND, 1871.

76. "If it were manifest that the thing claimed in the patent was accomplished, one use would be sufficient. If the construction of the thing itself demonstrated that it was within the principle here stated, then perhaps no use need be established. It might be said to prove itself. But in most cases sufficient use must be shown to prove it will accomplish what is claimed; and while this is generally true of a patent, it is equally true of that which is sought to be defeated; otherwise it rests in the region of mere experiment."—*Id.*

77. "When a great success is achieved in the field of mechanical invention, and the higher

organism is protected by a patent, it is almost as certain that invasions will follow, as that there exists the relation of cause and effect. Such is the voice of universal experience. When the infringer is called to account, one of two defences is usually set up, and frequently both. First, that the invention in one of the lower grades is substantially the same with that of the patentee. The confidence of the attacking witnesses is often in proportion to the distance in time that one is removed from the other. Their imagination is wrought upon by the influences to which their minds are subjected, and beguiles their memory. When the defence is made, it is the duty of courts and juries to give it effect. But such testimony should be weighed with care, and the defence allowed to prevail only where the evidence is such as to leave no room for a reasonable doubt upon the subject." *Wood et al. v. Cleveland Rolling Mill Co.*, 4 Fish. P. C. 550.—SWAYNE, 1871.

78. An alleged prior use was claimed by the defendant to have occurred in 1856 and 1857. In January, 1860, defendant issued a circular, the clear inference of which was that the improvement in question was then new with defendant. This circular was held controlling against defendant's claim. *Masury v. Tiemann*, 8 Blatch. 426.—BLATCHFORD, 1871.

79. A general allegation of prior use in evidence is entirely nugatory; the knowledge must be of some specific use or instance. *Young v. Lippman et al.*, 9 Blatch. 277.—BLATCHFORD, 1872.

80. For an example of testimony as to prior use held insufficient, see —. *Sarven v. Hall et al.*, 9 Blatch. 524.—WOODRUFF, 1872.

81. "The presumption arising from silence where there is . . . much interest to assert, an occasion to assert it, and the party intelligent and the results certain, if the facts warranted it, has far more strength than any preponderance in number of witnesses and literal statements made by them." *Smith v. Fay et al.*, 6 Fish. P. C. 446.—EMMONS, 1873.

82. Where an improvement has been patented and an alleged prior use is set up, and as to the alleged prior user "you show that he is engaged in the very department of production where it is most important; see him with the means in his hands to employ it if he knew how, and for years manufacturing in a different mode, with less accuracy and greater expense, then, upon any principle of action, this is conclusive that this one man at least did not possess the idea." *Roots et al. v. Hyndman*, 6 Fish. P. C. 439.—EMMONS, 1873.

83. "The mere previous knowledge or use of the thing patented, in a foreign country, will not defeat a patent issued here to an original inventor." *Jones et al. v. Sewall*, 3 Clifford, 563.—CLIFFORD, 1873.

84. "The court ought to be fully convinced, by a clear preponderance of evidence, before declaring a patent void on the ground of prior knowledge and use." *Gear et al. v. Grosvenor et al.*, 1 Holmes, 215.—SHEPLEY, 1873.

85. "The invention or discovery relied upon as a defence must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate, if it rested in speculation or experiment, if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires not conjecture, but certainty. If the question relate to a machine, the conception must have been clothed in substantial forms which demonstrate at once its practical efficacy and utility. . . . The prior knowledge and use by a single person is sufficient. The number is immaterial. . . . Until his work is done, the inventor has given nothing to the public." *Coffin v. Ogden et al.*, 18 Wall. 120.—SUP. CT. 1873.

86. "A patent relates back, where the question of novelty is in issue, to the date of the invention, and not to the time of the application for its issue." *Klein v. Russel*, 19 Wall. 433.—SUP. CT. 1873.

87. "An experiment may be a trial, either of an incomplete mechanical structure, to ascertain what changes may be necessary to make it accomplish the design of its projector, or of a completed machine to illustrate or test its practical efficiency. Obviously, in the first case, the incompleteness of the inventor's efforts, if they were then abandoned, would have no effect upon the rights of a subsequent inventor.

"But if the experiment proves the capacity of the machine to effect what its inventor proposed, the law assigns to him the merit of having produced a complete invention." *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 1 Bann. & Ard. 177.—MCKENNA, 1874.

88. Effectual prior knowledge and use of the alleged invention must be "under such circum-

stances as to give the public the right to its continued use against the patentee." *Crouch v. Speer et al.*, 1 Bann. & Ard. 145.—NIXON, 1874.

89. For an example of testimony as to an alleged prior use, held insufficient, see —. *Id.*

90. Where an article, exhibited for the purpose of proving prior use, was made in England, and stamped as patented as of a certain date, the inference is strong, if not irresistible, that such an article was unknown in England prior to the year in which it was patented there. *Know et al. v. Loweree et al.*, 1 Bann. & Ard. 589.—NIXON, 1874.

91. "It is hardly just to inventors that the *prima facie* case, made by original letters-patent, or reissue and an extension, should be set aside by the naked testimony of a witness, with nothing except a fallible memory to support his statement that upward of twenty years before he made a machine closely resembling the complainants'; and more especially when not a single person is produced who ever saw the machine." *La Baro et al. v. Hawkins et al.*, 1 Bann. & Ard. 428.—NIXON, 1874.

92. "The patent carries with it a presumption of the novelty of the thing patented, and the burden of rebutting that presumption is upon the defendant. In order to defeat a patent on the ground of want of novelty, the proof of prior use or previous knowledge must be such as to establish the fact clearly and satisfactorily, and beyond a reasonable doubt. Where the proofs are contradictory, mere preponderance is not sufficient to sustain the allegation. The preponderance in such case must be such as to remove all reasonable doubt." *Haves v. Antisdel*, 2 Bann. & Ard. 10.—LONGYEAR, 1875.

93. For an example of evidence as to alleged prior use held unsatisfactory, see —. *Id.*

94. If a prior device effects the same result as the patented device, it is not a material fact that such was not the intent in the prior device. *Tufts et al. v. Boston Mach. Co.*, 1 Holmes, 459.—SHEPLEY, 1875.

95. Complainants' patent was for an improvement designed for use in oil wells. The same idea had before been used in a salt well, but such use was given up in the salt well because it diminished the supply of salt water. This prior use was held not to be an abandoned experiment. *Shoup et al. v. Henrici et al.*, 2 Bann. & Ard. 249.—MCKENNA, 1876.

96. Where a prior device has been in successful operation, the giving up of that use, by reason of a defect relating to another matter, does not prevent it from being an effectual prior use.—*Id.*

97. The existence of a prior patent is not evidence of prior use. *Weston v. White et al.*, 13 Blatch. 364.—SHIPMAN, 1876.

98. Where defendants' device is proved to have been in public and practical use prior to the date of the patented invention, defendants cannot be held to be infringers. *Lyman Ventilating & Refrigerator Co. v. Chamberlain et al.*, 2 Bann. & Ard. 433.—SHEPLEY, 1876.

99. "A patent may be defeated by showing that the thing secured by the patent had been invented and put into actual public use prior to the discovery of the patentee, however limited such use [other than experimental] or knowledge of the prior discovery may have been." *Boston Elastic Fabrics Co. v. East Hampton Rubber Thread Co.*, 2 Bann. & Ard. 268.—SHEPLEY, 1876.

100. "Proof of prior use in a foreign country will not supersede a patent granted here, unless the alleged invention was patented in some foreign country. Proof of such foreign manufacture and use, if known by the applicant for a patent, may be evidence tending to show that he is not the inventor of the alleged new improvement; but it is not sufficient to supersede the patent if he did not borrow his supposed invention from that source, unless the foreign inventor obtained a patent for his improvement, or the same was described in some printed publication." *Reomer v. Simon*, 95 U. S. 214.—SUP. CT. 1877.

101. Indefinite and uncertain testimony will not avail to establish the defence of prior use. *Marsh et al. v. Seymour et al.*, 97 U. S. 348.—SUP. CT. 1877.

102. "An abandonment of the use of a mechanical structure which has been brought to . . . maturity, and whose operative merit has been demonstrated by trial, will inure to the benefit of the public, and not to that of even an original but subsequent inventor." *Pickering et al. v. McCullough, Jr., et al.*, 3 Bann & Ard. 279.—MCKENNAN, 1878.

103. Where a prior machine has been used successfully and satisfactorily, it does not become an abandoned experiment by being disused, where the disuse is satisfactorily accounted for. *Snow v. Tapley*, 3 Bann. & Ard. 228.—SHEPLEY, 1878.

104. He who sets up the defence of prior use, must establish it by evidence of satisfactory force and clearness or fail in his defence. *Konold et al. v. Klein et al.*, 3 Bann. & Ard. 226.—MCKENNAN, 1878.

105. Prior use being set up as a defence, the defendants showed that the prior device was

made as part of a machine which was never completed, and it was kept secret until a long time after the subsequently patented invention was made. It was held that prior use was not established. *Bullock Printing Press Co. v. Jones et al.*, 3 Bann. & Ard. 195.—WHEELER, 1878.

106. Where an inventor, by the efforts of his own genius, brings an invention to the public and places it in the public possession, the law regards him as the original and first inventor, although the improvement had been invented before and privately used by others.—*Id.*

107. Where the alleged prior thing is not produced, and the testimony is as to a use which happened many years before, such evidence, however honest, "is of little practical weight. It requires something more accurate than the average human memory to carry in the recollection, through a long series of years, these little resemblances or differences in construction or arrangement which distinguish things, and which are necessary to be recalled in order to make the testimony of any value." *Thatcher Heating Co. v. Carbon Stove Co.*, 4 Bann. & Ard. 68.—NIXON, 1878.

108. Prior use abroad is not the prior use of the statute. *Henry v. Providence Tool Co.*, 3 Bann. & Ard. 501.—CLIFFORD, 1878.

109. "Evidence of mere knowledge without use is not sufficient to defeat a patent valid in form. . . . The evidence is sufficient to support the defence of prior knowledge and use, if it proves that the invention was complete and capable of working, if it had been put in use and was known to any considerable number of persons." *Judson v. Bradford et al.*, 3 Bann. & Ard. 539.—CLIFFORD, 1878.

110. Rejected applications for patents are in themselves no evidence of prior use. *Hovess et al. v. McNeal*, 15 Blatch. 103.—BLATCHFORD, 1878.

111. "Models made and used merely as experiments, and which were not capable of use as operative machines, cannot affect the right of a patentee holding a patent issued in due form. Incomplete attempts to construct a machine amount to nothing as evidence to support such a defence; but if the evidence shows that it was complete and operative, even for a temporary use, and that its existence and use were within the knowledge of a few persons, it may be sufficient to establish the proposition that the thing patented was made and used by another prior to the patented invention." *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

112. Reliance is not to be placed upon testimony of prior use occurring forty or forty-five

years in the past, when the witness was only eleven or twelve years old. *Gottfried et al. v. Phillip Best Brewing Co.*, 5 Bann. & Ard. 4.—DYER, 1879.

118. "To justify the court in overthrowing a patent for what appears to be a new and useful invention or improvement, on the ground that the device has been anticipated by another and earlier invention, the court should be well satisfied, by clear and credible testimony, that the alleged earlier invention actually existed; that it was a perfected device, capable of practical use; that it was embodied in distinct form, and carried into operation as a complete thing, and was not of such character as to entitle it only to be regarded as an unperfected or abandoned experiment."—*Ib.*

114. "It is so easy, after a new and useful invention has come into existence and been brought into public use, especially if a characteristic of such invention is simplicity, for persons to come forward with the claim that they invented the same thing many years before, and should, therefore, be esteemed the real and original inventors, that the court should require convincing proof of the merit of such claims before overturning the patent. Especially so, when it appears that the alleged prior inventor has not apparently regarded his supposed invention as of sufficient importance to push it upon public notice, or to apply for a patent which would protect him in its exclusive use."—*Ib.*

115. "The mere use of complainant's device in a foreign country, without its being patented or described in any printed publication, is not sufficient to anticipate his patent." *Phillips et al. v. City of Detroit*, 4 Bann. & Ard. 347.—BROWN, 1879.

116. "Evidence to defeat the patent, by showing an invention prior to a clearly established one of the patentee, ought to be clearly established, to the extent at least of removing all fair and reasonable doubts." *Campbell v. James et al.*, 17 Blatch. 42.—WHEELER, 1879.

117. "Foreign prior public use . . . not brought home to the knowledge of the patentee before the date of the patent . . . cannot be used . . . against its validity. The prior use which invalidates a patent, under our law, is a use within the United States." *Adams v. Left*, 4 Bann. & Ard. 495.—NIXON, 1879.

118. For examples of alleged anticipatory structures held insufficient because not "practically useful" for the purpose of the patentee's device, the deficiency being in a lack of size of parts and an inconvenient shape of parts, see —

*Thatcher Heating Co. v. Spear et al.*, 1 Fed. Rep. 411.—BLATCHFORD, 1880.

119. Two witnesses testified to different instances of prior use, and it was held sufficient to establish prior use. *Collender v. Griffeth et al.*, 18 Blatch. 110.—BLATCHFORD, 1880.

120. Defendants alleged prior use by themselves, and evidenced it by the testimony of a single witness. They subsequently abandoned the use of the device. Prior use held to be satisfactorily proved, and that defendants' doings were not abandoned experiments. *McNish v. Everson et al.*, 2 Fed. Rep. 899.—MCKENNAN, 1880.

121. "A patentee is entitled to the presumption of priority which his patent affords, and this presumption is only overcome by clear and satisfactory proof to the contrary. Some of the cases held that the defence that the patentee was not the original and first inventor of the patented subject can only prevail when shown beyond any reasonable doubt." *Rogers v. Beecher et al.*, 3 Fed. Rep. 639.—WALLACE, 1880.

122. A claim to have used the patented improvement prior to the patentee's invention, is not consistent with subsequent experimenting on defendants' part to reach a satisfactory result.—*Ib.*

123. Complainant's patented improvement consisted in the use of layers of roofing felt, roofing cement, and concrete or the like "in sanitary waterproof cellars, cisterns, vaults, reservoirs, and similar underground receptacles." (This from the claim.) Defendant used the construction in a cellar to keep water out. Prior to the patented invention, it had been used in a cistern to keep water in. *Held*, that the cistern embodied the improvement, and that the patent covered such cisterns. *New v. Lawrence*, 3 Fed. Rep. 714.—BENEDICT, 1880.

124. Complainant's patent claimed: "The method of utilizing the leather of old card clothing by heating it with gum-tragacanth, and resetting it with teeth reversely to the original teeth, substantially as described." Complainant claimed that the use of the gum-tragacanth was non-essential. Prior use, where the gum-tragacanth was not used, and where the leather was turned over instead of around, was proved. *Held*, to anticipate the patent. *Brummitt v. Howard et al.*, 3 Fed. Rep. 801.—LOWELL, 1880.

125. Use by a single person is sufficient to establish prior use. *Proctor v. Brill et al.*, 4 Fed. Rep. 415.—BUTLER, 1880.

126. The fact that in numerous suits, many years before, the defendant took a license and complainant withdrew the suits, is strong evi-

dence that the prior use then set up as a defence was not a sustainable one. *Atwood v. Portland Co.*, 10 Fed. Rep. 283.—LOWELL, 1880.

127. Billings and Bissell had made certain full-sized beds which Farnham saw before beginning upon his afterward patented invention. In that patented invention he embodied ideas which were in the Billings and Bissell beds. The court said thereof: "What Billings and Bissell may have done may have suggested to Farnham the device he finally adopted, but this does not invalidate the patent. He seems to have been the first to achieve success, and . . . what these others had done should not defeat his patent." *Whittlesey et al. v. Ames et al.*, 9 Bissell, 225.—BLODGETT, 1880.

128. The patentee fastened a plug into the hollow butt of a whip-stock that he might by "turning," finish the butt, and then saw off the plug. A prior structure had such a plug but not for the patentee's purpose; it was held to anticipate the claim. *Am. Whip Co. v. Hampden Whip Co. et al.*, 4 Fed. Rep. 536.—LOWELL, 1880.

129. "When the defence of want of novelty is made, it is the duty of the tribunal, whether court or jury, to give it effect; but such proof or testimony should be weighed with care and never be allowed to prevail where it is unsatisfactory, nor unless its probative force is sufficient to outweigh the *prima facie* presumption arising from the introduction of the patent." *Miller et al. v. Smith et al.*, 5 Fed. Rep. 359.—CLIFFORD, 1880.

130. By the court: "We do not intend to be understood as intimating that the witnesses who have testified to the various instances of the use of barbed wire for fencing purposes have been guilty of intentional false swearing, but simply to say that this proof, which is almost wholly made up of the recollections of witnesses revived after the lapse of many years, and contradicted, as it is in most instances, by the explicit testimony of other equally credible witnesses, leaves so much doubt as to the actual existence of these various barbed wire fences, or many of them, as to make it at least unsafe ground on which to defeat a patent." *Washburn & Moen M'fg Co. et al. v. Haish*, 10 Bissell, 65.—BLODGETT & DRUMMOND, 1880.

131. When prior use is set up as a defence, the use, to be effectual, must have been an actual reduction to practice [not conception and experiments, though the same ultimately proceed to a patent prior in date to complainants' patent] prior to complainants' conception. *Tyler et al. v. Crane*, 7 Fed. Rep. 775.—NIXON, 1880.

132. For an example of testimony as to prior use not found to be clear and conclusive enough to establish such use, see —. *Wilson v. Coon et al.*, 18 Blatch. 532.—BLATCHFORD, 1880.

133. Examples of evidence of prior use held insufficient. *Marks v. Fox et al.*, 18 Blatch. 502.—BLATCHFORD, 1880.

134. A prior structure never used for the purpose of the patent, and incapable of use for that purpose, cannot be an anticipation of a patent. *Fischer v. Hayes*, 19 Blatch. 26.—BLATCHFORD, 1881.

135. Amid testimony as to prior use so contradictory as to be uncertain the finding will be for the patent.—*Ib.*

136. The patentee made a very perfect article by machinery and patented the article. The same article, in poorer shape, had been made by hand. Patent found invalid. *Buzzell v. Field*, 7 Fed. Rep. 465.—LOWELL, 1881.

137. The unsupported testimony of a single witness to the minor details of a few structures he made fifteen years before, none of which structures are produced, cannot overcome the presumption that belongs to a patent. *Wooten Wire Mattress Co. v. Wire Web Bed Co.*, 8 Fed. Rep. 87.—SHIPMAN, 1881.

138. Prior use to be effectual, must be fully proved. *Andrews et al. v. Cross*, 19 Blatch. 294.—BLATCHFORD, 1881.

139. Where a prior use is set up to defeat a patent, the defendants, in order to prevail, must be able to prove that the prior article had the capabilities of the patented article. *Coburn et al. v. Schroeder et al.*, 19 Blatch. 377.—WHEELER, 1881.

140. Two witnesses situated so as to be likely to have known of an alleged prior use, if there had been any, testified negatively, and the defence was held not proven. *Shirley v. Sander-son*, 8 Fed. Rep. 905.—BLATCHFORD, 1881.

141. "The statute [Rev St. Section 492<sup>a</sup>] does not require the names of witnesses to be given, but only those who knew of the thing, and where they can be found, and where and by whom the thing was used." *Sutro et al. v. Moll*, 19 Blatch. 89.—BLATCHFORD, 1881.

142. By the court: "The testimony of all these witnesses is merely from recollection of the shape of a few structures made from twenty-three to twenty-five years before they testified, and is not sufficient to destroy the presumption of a patent upon an article which has been long and extensively used. . . . In the absence of specimens of the work made at the time, such testimony is an unsafe foundation upon which to rest a finding that the patent had been antici-

pated." *Zane et al. v. Peck Bros. & Co.*, 9 Fed. Rep. 101.—SHIPMAN, 1881.

143. An accidental production of an afterward patented device, with no discovery of the patented use, does not anticipate the patent. *Maxheimer et al. v. Meyer et al.*, 20 Blatch. 17.—WHEELER, 1881.

144. A patented device is not legally anticipated by a prior device having the same parts and functions, but never used for the same purpose, and not known to any one in connection with such a purpose. *Campbell v. N. Y.*, 20 Blatch. 67.—WHEELER, 1881.

145. Amid conflicting testimony as to prior use, all doubts will be resolved in favor of the patent. *Spring et al. v. Domestic Sewing Mach. Co.*, 9 Fed. Rep. 505.—NIXON, 1881.

146. A limited use by a single person, for a limited period, suffices to establish prior use. *Miller & Worley v. Foree & Co.*, 9 Fed. Rep. 603.—BAXTER, 1882.

147. *Query.* Is knowledge, by a resident of the United States, of a prior use abroad sufficient to bar a patent? *Illingworth v. Spaulding et al.*, 9 Fed. Rep. 611.—NIXON, 1881.

148. "The rule is familiar, that where it is claimed that a patented device is anticipated by another, and that there has been a prior use, it is necessary to show, not, perhaps, that the anticipating device has been actually used, but certainly that it was capable of practical and successful use." *Allis et al. v. Showell et al.*, 9 Fed. Rep. 304.—DYER, 1881.

149. In pleading the defence of prior use, the place where the prior knowledge or use was had must be stated. *Searls v. Bouton et al.*, 20 Blatch. 426.—WHEELER, 1882.

150. Complainant's patented improvement consisted in having paving-blocks with spaces between filled with gravel or the like, rammed down so hard as to be forced into, and thereby compact, the soil under the paving-blocks. A prior use showed all this, except that it did not fully appear that the ramming was hard enough to force the gravel into and compact the underlying soil. It was intimated that the difference was one of degree merely. *Stow v. Chicago*, 104 U. S. 547.—SUP. CT. 1881.

151. Testimony of witnesses that they did not know of an alleged prior use, when the circumstances were such that they would have been likely to have known of it, if it had existed, is entitled to great weight. *Am. Ballast Log Co. v. Cotter*, 21 O. G. 1030.—BUTLER, 1882.

152. By the court: "While it is true that this plaintiffs' evidence, principally, is negative in character, the circumstances are such that it

is little, if any, less valuable than the direct testimony of the other side. Considering the occupations and experiences of the plaintiffs' witnesses, it seems virtually impossible that the prior use alleged could have existed without their knowledge."—*Id.*

153. An effectual prior use must practically accomplish the results accomplished by the complainant's invention. *Lindsay v. Stein*, 20 Blatch. 370.—BLATCHFORD, 1882.

154. The direct and positive testimony of four witnesses held insufficient to prove prior use in the face of negative testimony. *Green v. French*, 21 O. G. 1351.—NIXON, 1882.

155. The invention under consideration being an improvement in frictional gearing, it was found that, prior to the making of the invention by the present patentee, working drawings showing the invention had been made, and gears made from such drawings, but not according to the drawing; and it was held that prior use was not proved. *Delamater et al. v. Woodruff*, 11 Fed. Rep. 414.—SHIPMAN, 1882.

156. Evidence of knowledge or use abroad does not affect an American patent. *Coburn et al. v. Schroeder et al.*, 20 Blatch. 392.—WHEELER, 1882.

157. Prior use, in order to be effective, must antedate the invention, not simply the application for patent. *McWilliams M'f'g Co. v. Blundell*, 11 Fed. Rep. 419.—COLT, 1882.

158. Complainant's patent was "for a pipe or tube made by spirally winding a strip of metal and uniting its edges by a groove or flanged seam or joint." Of this the court said: "Undoubtedly the claim covers a pipe made by hand, but such pipe never has been and never will be so made for the trade; a piece of pipe so fashioned as a curiosity, before his time, ought not to destroy his title." *Lamb v. Hamblen et al.*, 11 Fed. Rep. 722.—LOWELL, 1882.

159. By the court: "We adhere to the rule that it is not sufficient to raise a doubt as to the invalidity of the plaintiff's patent; it must be affirmatively proved to be old by preponderating and satisfactory proof." *Doubleday v. Beatty*, 11 Fed. Rep. 729.—ACHESON, 1882.

160. "A plaintiff, who, after an acquiescence of twelve years in the almost universal use of a patented invention, buys into the patent and essays to enforce it against the public, ought not to be surprised to find the courts inclined to believe a multitude of respectable witnesses who testify to prior use, even should the witnesses speak largely from memory."—*Id.*

161. A prior device which cannot, without material and substantial changes, successfully

accomplish the purpose of the patented device does not anticipate a patent. *Gottfried v. Orescent Brewing Co.*, 13 Fed. Rep. 479.—GRESHAM, 1882.

162. The court said of an alleged prior use: "Any raising of the tube unnecessarily high, so as to admit of a flow of gas through an orifice between the cone to the flame, cannot be regarded as amounting to an anticipation of what Clough invented. The structure was not designed for the same purpose as Clough's; no person looking at it, or using it, would understand that it was to be used in a way Clough's is used, and it is not shown to have been really used and operated in that way." *Clough v. Gilbert & Barker M'fg Co. et al.*, 106 U. S. 166.—SUP. CT. 1882.

163. A prior machine must have been an operative machine in order to be effective as an anticipation. *Aram et al. v. Moline Wagon Co.*, 16 Fed. Rep. 236.—BLODGETT, 1883.

164. If the alleged prior use of a process "was under such secrecy that the public obtained no knowledge of the mode of its operation, or the result to be attained by it, there is no prior use within the meaning of the patent law." *Boyd v. Cherry*, 4 McCrary, 70.—MCCRARY, 1883.

165. Use abroad has no bearing on United States patents. *Cornely v. Marchwald*, 21 Blatch. 367.—WHEELER, 1883.

166. Use abroad has no bearing on a home patent. *Worswick M'fg Co. v. Steiger*, 17 Fed. Rep. 250.—WELKER, 1883.

167. By the court: "If a certain machine or organization is capable of a certain use only under unusual, and, as I may say, abnormal conditions, so that a person of skill and knowledge in the art to which it relates, or a person using the machine, would not, unless by accident, discover that it was capable of such mode of operation, it shall not be considered an anticipation of a machine or organization which is founded upon such mode of operation." *Am. Bell Telephone Co. v. Dolbear et al.*, 17 Fed. Rep. 604.—LOWELL, 1883.

168. "The use, or a knowledge of the use of an invention in a foreign country, by persons residing in this country, will not defeat a patent which has been granted to a *bona fide* patentee, who at the time was ignorant of the existence of the invention or its use abroad." *Doyle v. Spaulding et al.*, 27 O. G. 300.—NIXON, 1884.

169. Evidence offered to prove prior use in order to overcome the presumption of the validity arising from the grant of the patent, must be "cogent and satisfactory." *Hicks v. Otto et al.*, 22 Blatch. 94.—WALLACE, 1884.

170. Where, under the defence of prior use, defendants seek to show that the patentee was not the original inventor, "the burden is upon them to satisfy the court beyond a reasonable doubt. A mere preponderance of evidence is not enough, the proof must be of such a convincing character that the court can say without hesitancy that the allegations of the answer in that behalf are true." *Worswick M'fg Co. et al. v. City of Buffalo et al.*, 22 Blatch. 157.—COXE, 1884.

171. Vague and indefinite evidence of prior use will not suffice. In order to be effective it must be "of that high character which convinces the court beyond a reasonable doubt." *Everest v. Buffalo Lubricating Oil Co.*, 20 Fed. Rep. 848.—COXE, 1884.

172. In comparing a patented structure with a prior structure, the question as to the prior structure is not, how it was actually used, but rather how it was capable of being used. *Cherry v. Swab et al.*, 21 Fed. Rep. 246.—LOVE, 1884.

173. Where defendant sets up the defence of prior use, the burden of proof is on him to show it, and if he leaves that matter in doubt, such doubt will be resolved against him. *Bostwick v. Goodrich*, 21 Fed. Rep. 316.—BUTLER, 1884.

174. An inventor, resident in Aspinwall, Colombia, sent a drawing of an improvement in perches for dumping cars to Portland, Me., and at that place had made from such drawing a number of cars embodying said improvement, the parts of which were never assembled, with the exception of a single car, and the whole were shipped to Aspinwall before they were used. This was held to be a prior use. *Stitt, Trustee, v. Eastern R. R. Co.*, 22 Fed. Rep. 649.—COLT, 1884.

175. "The prior invention, relied upon as a defence, must be complete and capable of producing the result to be accomplished. It must not be inchoate or rest in speculation or experiment. The evidence is sufficient to support the defence of prior knowledge and use, if it proves the invention was complete and capable of working, if it has been put to use and was known to any considerable number of persons. If the construction of the prior thing of itself demonstrates that it is within the principles of the patent, then, perhaps, no use need be established, for it might be said to prove itself. It is not necessary that the present invention should have been actually used for the purpose contemplated, but that it must have been capable of such use."—*Id.*

176. "The primary inquiry is one of identity between two things. If the identity can only be known by actual use such use should be



proved. If the identity is apparent on an inspection, it is not necessary to prove actual use. If there is a reasonable doubt as to identity, want of novelty is not made out."—*Id.*

177. "If the prior invention was the same as that described in the patent; if it was complete and capable of producing the same result, and was known in this country, it is sufficient to sustain the defence of want of novelty."—*Id.*

178. Prior public use abroad is not the prior use which will defeat a patent. *McFarland et al. v. Spencer et al.*, 23 Blatch. 155.—COXE, 1885.

179. For an example of various kinds of testimony in support of an allegation of prior use, that were held insufficient, see —. *Washburn & Moen M'fg Co. et al. v. Grinnell Wire Co. et al.*, 24 Fed. Rep. 23.—BREWER, 1885.

180. "The patent carries with it a presumption of novelty, and the burden of rebutting that presumption is upon defendants. The evidence to establish prior knowledge or use must be clear and beyond a reasonable doubt." *McDonald v. Whitney et al.*, 24 Fed. Rep. 600.—COLT, 1885.

181. Where, in attempting to support the defence of prior use, the case of defendants is left to rest upon the unaided recollection of several witnesses, some of whom are evidently mistaken as to dates, and some of whom are not able to fortify their statements by any corroborative circumstances, their statements will not avail to support the defence. *Walker Glass Co. v. Souweine et al.*, 24 Fed. Rep. 603.—WALLACE, 1885.

182. Of proof offered to substantiate the defence of prior use, the court said: "So much doubt is thrown about it upon the whole proof as to bring it below the degree of certainty requisite to defeat a patent. After repeated examinations serious doubts remain about the production of the article as claimed. The proof should overcome these doubts in order to invalidate the patent, and, as it does not, the patent stands as valid." *Jennings et al. v. Kibbe et al.*, 24 Fed. Rep. 697.—WHEELER, 1885.

183. "The burden is upon the defendants to satisfy the court beyond a reasonable doubt that the defence of prior knowledge and use has been established." *Dryfus v. Schneider et al.*, 25 Fed. Rep. 481.—COXE, 1885.

184. Upon a motion for a provisional injunction, the patented thing being "tumbled" rubber, defendants read affidavits to show that the improvement had been practised by one Roberts, prior to complainant's invention. All the rubbers made by Roberts were made for one Faber. Faber's letters to complainant were inconsistent with this claim, and it was held that Faber's acceptance of a license from the complainant was

also thus inconsistent, and the provisional injunction issued. *Lockwood v. Hooper et al.*, 25 Fed. Rep. 910.—NELSON, 1885.

185. For an example of testimony as to alleged prior use which, after the lapse of seventeen years of time, was held not satisfactory, see —. *Yale Lock M'fg Co. v. Berkshire Nat'l Bank et al.*, 26 Fed. Rep. 104.—COLT, 1885.

186. For an example of evidence held insufficient to prove prior use, see —. *Am. Bell Telephone Co. v. People's Telephone Co. et al.*, 25 Fed. Rep. 725.—WALLACE, 1885.

187. For an example of doubtful evidence of prior use held sufficient to prove such use, see —. *Dorlan v. Guie*, 25 Fed. Rep. 816.—BUTLER, 1885.

188. For an example of prior use held established by the application of the afterward patented improvement to two or three machines only, see —. *Brown et al. v. Davis et al.*, 116 U. S. 237.—SUP. CT. 1886.

189. For an example of testimony held insufficient to prove prior use, see —. *Adams & Westlake M'fg Co. v. Rathbone et al.*, 26 Fed. Rep. 262.—BLODGETT, 1886.

190. "Parties asserting a prior use of a device covered by a patent have the burden of proof, and are bound to establish such prior use by strong and convincing, if not absolutely conclusive, proof." *Thayer v. Spaulding*, 27 Fed. Rep. 66.—BLODGETT, 1886.

191. "The burden of proof is upon the defendants to establish this defence, for the grant of letters-patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters-patent and of its novelty. Not only is the burden of proof to make good this defence upon the party setting it up, but it has been held that 'every reasonable doubt should be resolved against him.'" *Cantrell et al. v. Wallick*, 117 U. S. 689.—SUP. CT. 1886.

192. Two witnesses testified to a certain alleged prior use. The contrivance in question was not produced, nor any model of it, but was merely represented in a drawing made by the witness six years after the event. These two witnesses were contradicted by four others engaged in a factory where the use was alleged to have happened. The defence was held not proved.—*Id.*

193. The defence of prior use in order to be effectual must be "established beyond reasonable doubt." *Wetherell v. Keith et al.*, 27 Fed. Rep. 364.—BLODGETT, 1886.

194. Three witnesses testified to an alleged prior use occurring sixteen years before, the patented thing being a hoop-skirt. No sample of the alleged manufacture was produced, and

other witnesses gave contradictory evidence. The defence was held not proven.—*Ib.*

195. Testimony as to alleged prior use conflicting with testimony by some witnesses in another case held insufficient to prove the defence. *Bragg v. City of Stockton*, 27 Fed. Rep. 509.—SAWYER, 1886.

196. "The rule is well settled that an anticipation in order to defeat a patent must be clearly made out. A patent raises a presumption of priority which can only be overcome by clear proof." *Donoughe v. Hubbard et al.*, 35 O. G. 1561.—BRADLEY, 1886.

197. Evidence of alleged prior use that is too vague, uncertain, and indirect to satisfy the mind of the court beyond a reasonable doubt, cannot overcome the presumption of novelty arising from the patent itself. *Butler et al. v. Brainbridge et al.*, 37 O. G. 1124.—COXE, 1886.

198. "If the defendant attempts to defeat the patent by showing that the patentee was not the original discoverer of the thing patented, the patent will, for the purpose of meeting such proof, be considered as relating back to the original discovery." *Consolidated Bunting Apparatus Co. v. Woerle*, 29 Fed. Rep. 449.—BLODGETT, 1887.

199. Although several witnesses may testify as to the details of a device seen and used thirteen years before, if circumstances should raise doubt in the mind of the court as to the correctness of the testimony, the prior use is not sufficiently proven. *Seibert Cylinder Oil Cup Co. v. Nightingale et al.*, 32 Fed. Rep. 171.—COLT, 1887.

200. A casual, vague, inchoate conception of the principles developed in the afterward patented invention is not a satisfactory prior use. *Reed et al. v. Lawrence et al.*, 32 Fed. Rep. 228.—SEVERENS, 1887.

201. The defence of prior use in order to prevail "must be established by proof as explicit and convincing as that required to convict a person charged with crime; proof which preponderates the complainants' testimony not only, but which satisfies the mind beyond a reasonable doubt." *Cuett et al. v. Clafflin et al.*, 30 Fed. Rep. 921.—COXE, 1887.

202. "Although corruption, prejudice, and self-interest may be wholly absent, it is well-nigh impossible for a witness, no matter how intelligent he may be, or how retentive his memory, to recall the details of ordinary transactions occurring twelve or fifteen years before."—*Ib.*

203. Evidence of prior invention that simply creates doubt cannot prevail. It must produce conviction. *Osborne v. Glazier*, 31 Fed. Rep. 402.—BUTLER, 1887.

## PRIOR USE—ABANDONED EXPERIMENT.

### CASES.

1. Casting a few car-wheels, using them experimentally, and then throwing them aside, amounts to an abandoned experiment and nothing more. *Many v. Jagger et al.*, 1 Blatch. 372.—NELSON, 1848.

2. Experiment alone is not sufficient to constitute priority of invention. The article must be completed for public use, and the result must be known, although it is not necessary that it should be actually used, by the public; the question is whether the thing patented was before known. The conception of the idea, and the attempt to produce it, ending in unsuccessful experiment, is not sufficient to defeat a subsequent invention. *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

3. "A machine, . . . in order to anticipate any subsequent discovery, must be perfected; that is, made so as to be of practical utility, and not to be merely experimental and end in experiment. The terms 'being an experiment' are used in contradistinction to the terms 'being of practical utility.' Until of practical utility, the public attention is not called to the invention; it does not give to the public that which the public lays hold of as beneficial." *Hove et al. v. Underwood et al.*, 1 Fish. P. C. 160.—SPRAGUE, 1854.

4. "If it is experiment only, and ends in experiment, and is laid aside as unsuccessful, however far it may have been advanced, however many ideas may have been combined in it, which, subsequently taken up, might, when perfected, make a good machine, still, not being perfected, it has not come before the public as a successful thing, and is therefore entirely inoperative as affecting the rights of those coming forward."—*Ib.*

5. For an example of a machine laid aside from 1835 to 1851, and held to be an experiment, see —. *Ib.*

6. "How invariable is it that, after a great invention has been brought before the world, and has become known to the public, and has been put in a form to be useful, people start up in various places and declare that they invented the same thing long before! The cotton-gin and the ether discovery are illustrations in point, and others of similar character might be added indefinitely. These pretended prior inventors had thought of such a thing; they had the conception of such a thing, perhaps, but they had never carried it to the extent of making it of

utility so that the world could obtain possession of it. But when they find that another has completed that which they had begun, they are astonished that they did not see think they must have seen all that is necessary, and claim that they have invented it. After having seen what has been done, the mind is very apt to blend the subsequent information with prior recollections and confuse them together. Prophecy after the event is easy prophecy."—*Id.*

7. The fact that an alleged prior thing is laid aside, and such action is not accounted for, tends strongly to show that the prior thing was an abandoned experiment.—*Id.*

8. "An unsuccessful experiment abandoned, although involving the same idea or principle, will not invalidate a patent granted to a subsequent inventor, who has reduced the invention to successful practice, and published it by obtaining letters-patent. Much less will it invalidate letters-patent granted to a prior inventor, who was also the first to present the invention in a practical form."—*Id.*

9. "Where a person is engaged in producing some new and useful instrument or contrivance, and has embodied it into a machine, and endeavored to reduce it to practice by experiments—if trials fail—if he fail in success and abandon it, or give it up, that consideration affords no impediment to another person who has taken up the same idea or class of ideas, and who has gone on perseveringly in his studies, trials, and experiments until he has perfected the new idea, and brought it into practical and useful operation. He is the person—the meritorious inventor—who is entitled to the protection of the law." *Winans v. N. Y. & Harlem R. R. Co.*, 4 Fish. P. C. 1.—NELSON, 1855.

10. "Proof of prior experiments on the principle of" the patented "invention, if not carried on to completion does not make out the fact of prior knowledge or use within the meaning of the patent laws. The machine or structure, alleged to be similar to that patented, must have been so far perfected as to be of practical utility. And if abandoned after experimental trials as useless, a presumption would arise that the alleged invention was not identical with one subsequently patented to another person, the merits and utility of which are proved by its general use and admitted superiority over all others." *Wayne v. Holmes*, 1 Bond, 27.—LEAVITT, 1856.

11. Abortive attempts to produce an improvement laid aside and not resumed constitute an abandoned experiment. *Stainthorp et al. v. Elkington*, 1 Fish. P. C. 349.—GRIER, 1858.

12. Complainants had a patent for a seed-

sower. Defendant set up alleged anticipatory acts of other persons. The court charged the jury: "In respect to those machines, you are instructed to inquire whether either of those persons made an operating machine, or whether they made models or drawings from which machines might be constructed. If the latter were only made, and although such models might be capable of being used for agricultural purposes, and were made prior to Cahoon's invention, then, as a matter of law, I instruct you that such alleged inventions never were completed, and cannot affect the validity of Cahoon's patent." *Cahoon et al. v. Ring*, 1 Clifford, 592.—CLIFFORD, 1859.

13. Complainants had a patent for a seed-sower. Defendant set up alleged anticipatory machine of another person. Thereof the court charged the jury: "Should you find that it was made and completed prior to the Cahoon invention, and that it does embody the improvements in the Cahoon patent, as already defined and explained, you will then inquire whether it was, in point of fact, a machine completed and reduced to practice in contradistinction to an experimental machine, or a machine made by the supposed inventor in the prosecution of experiments and inquiries, and that unless it appears to your satisfaction that such machine was actually used as a seed-sower in sowing seed for agricultural purposes, you are warranted in presuming that it was a mere experiment, and, if so, you are instructed that it would not invalidate the plaintiffs' patent."—*Id.*

14. Complainants' patent was for a seed-sower. Complainants set up the alleged anticipatory device of another person. Thereof the court charged the jury: "Upon this same subject you are . . . instructed, that as a single specimen only of such a machine was made, whether capable of use, and whether actually used or not by the party making it, for the purpose of testing its operation, if you find, from the evidence, that the same was kept in his own possession, from the knowledge of the public, and was subsequently broken up, and its materials used for other purposes, or that the substantial parts of it were finally lost prior to May 14th, 1857, and that its construction was only recalled to the mind of the maker by the present controversy, and when so recalled, that the essential parts of the machine did not exist, so that the public could not derive the knowledge of it from the machine itself, but only from the memory of the alleged inventor, the existence of such machine will not invalidate the patent under consideration, even if the invention of Ca-

hoon was subsequent in date, and although such machine may have embodied all the improvements subsequently invented by Cahoon, if he was the original inventor of his improvements without knowledge of such machine." May 14th, 1857, was the date of filing the application for complainants' patent.—*Ib.*

15. The making of a model of a sewing-machine feed from a shingle, and doing nothing with it for some years afterward, will not defeat a patent subsequently granted to another for such a feed. *Potter et al. v. Wilson et al.*, 2 Fish. P. C. 102.—NELSON, 1860.

16. "It is not enough that another person should have conceived the idea of effecting what the patentee actually accomplished, for the law is, that whoever first perfects a machine and brings it into useful operation, is entitled to the patent, and is the real inventor, although others may previously have had the idea, and made some experiments toward putting it in practice." *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

17. "It does not matter how many experiments have been tried by different inventors, if they failed, if their experiments never were perfected, if they were never brought into use—and by that I do not mean general use, but to perform the functions of the plaintiffs' machine, or any of the perfected machines of this day—if they rested in experiment alone, they were not of such a character as to deprive subsequent inventors of the benefit of their inventions if they brought them into use. The man who brings his invention before the country and into actual use, is the one to be protected, for he is the one who confers the benefit upon the country."—*Ib.*

18. An effectual prior use must be of a perfected invention, by which is meant one "that is brought to such a condition as to be capable of practical use. If it was an experiment, or a series of experiments, and ended in experiment merely, and was then abandoned, then . . . it was not perfected in the eye of the law, so as to invalidate a subsequent patent obtained by another inventor." *Hayden v. Suffolk M'fg Co.*, 4 Fish. P. C. 86.—SPRAGUE, 1862.

19. "If there were experiments made, . . . and they tend to a certain point, and there is no certainty to what extent they went, then the subsequent conduct of the parties who made experiments, and were interested in it, may aid . . . in forming an opinion of what they accomplished. If they preserved it, as a thing valuable, it has a weight in one direction as showing that they had accomplished something. If they did not preserve it, but abandoned it, the

evidence is to be weighed whether it was abandoned or not; whether a success had been obtained in anything that was worthy of preservation, or could accomplish a practical and useful purpose, and the weight of this you will probably know is in proportion to the importance of the thing."—*Ib.*

20. The court charged the jury: "There may be an invention, gentlemen, of so unimportant a character, that although it be really an invention, something of practical use, it may be in relation to a subject-matter of little importance or of transient interest, that the occasion may pass by and it may be laid aside and never used afterward, because there is no occasion for it, as there are many patents for articles of dress of the day, which are patented for the day, while the fashion lasts, and pass away when the fashion passes away. On the other hand, if the invention be of something which can be of great practical importance, an enduring importance, then you will consider how much stronger will be the incentive to success in perfecting that which would have been of importance; and the greater the importance of the invention, the less probable it is that, if achieved, it would have been laid aside and not extended itself to others interested in its use."—*Ib.*

21. The patent in suit was for a candle-making machine. An alleged prior use was set up as a defence. The prior use consisted of a working model used two or three hours in making candles by way of experiment and then disused. The user was for some twelve years afterward engaged in making other candle-machines. This was held to be an abandoned experiment. *Stainthorp et al. v. Humiston*, 4 Fish. P. C. 107.—HALL, 1864.

22. "Crude and imperfect experiments, equivocal in their results, and then abandoned and given up, shall not be permitted to prevail against an original inventor who has perfected his improvement and obtained his patent. Settled rule is, that it is not enough to defeat a patent already issued that another previously conceived the possibility of effecting what the patentee has accomplished, unless it also appear that he has reduced what he has conceived to practice in the form of an operative machine. To constitute a prior invention, the party alleging to have produced it must have proceeded so far as to have reduced his idea to practice and embodied it in some distinct form." *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

23. The use of a newly-invented brake upon a single railway car at intervals for a few

months, then given up, constitutes an abandoned experiment. *Sayles v. Chicago & Northwestern R. R. Co.*, 1 Bissell, 468.—**DRUMMOND**, 1865.

24. It seems that a patent for an abandoned experiment is invalid. *Whiteley v. Swayne*, 7 Wall. 685.—**SUP. CT.** 1868.

25. After an inventor's speculations have been reduced to practice, and after he, by repeated experiments, has succeeded in overcoming the prejudice and ignorance of the public, and has persuaded the public that his invention is useful, and has established its great utility and value, and his genius and patient perseverance, in spite of sneers and scoffs, is successful, another person, who then picks up his own earlier experiment, given up at the time, will not be entitled to a patent. *Roberts v. Reed Torpedo Co.*, 3 Brews. 558.—**GRIER**, 1869.

26. Complainant's patent was dated August 30th, 1864. Defendant showed the use of a like machine by his father in 1852, in a cellar, such use being known only to a few persons; the machine was then disused until after defendant heard of complainant's machine in 1865. The patent was sustained. *Hall v. Bird*, 6 Blatch. 438.—**BLATCHFORD**, 1869.

27. Complainant's patent was for a process. A prior apparatus, in which the process could be practised, was put in proof. The proof was also made of a single use of the process in the apparatus not afterward continued. This use was held to be an abandoned experiment. *Piper v. Brown et al.*, 1 Holmes, 20.—**SHEPLEY**, 1870.

28. "Desertion of an invention consisting of a machine never patented, may be proved by showing that the inventor, after he had constructed it, and before he had reduced it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments, and of restoring the machine with a view to apply for letters-patent." *Seymour v. Osborne*, 11 Wall. 516.—**SUP. CT.** 1870.

29. "It is the history of inventions that when different persons are exploring or experimenting in the same field, many efforts, which ultimately turn out to be failures, often come very near success; and when other efforts have proved successful, these last should not be deprived of the results of success simply because others have come near to them." *Sayles v. Chicago & Northwestern R. R. Co.*, 3 Bissell, 52.—**DRUMMOND**, 1871.

30. Where alleged prior use is set up of machines which, like sewing-machines, are of great

value if made practical, but the use is very small in extent, and entirely given up until after patented by another, such alleged prior use will be adjudged an abandoned experiment. *Parham v. Am. B. O. & Sewing-Mach. Co. et al.*, 1 Pa. Leg. G. Rep. 145.—**McKENNAN**, 1871.

31. For an example of a patent for increasing the flow of oil wells by exploding a torpedo therein, sustained over prior attempts at doing the same thing in other wells, see —. *Roberts v. Dickey*, 4 Brews. 260.—**STRONG**, 1872.

32. Where an alleged prior user, as of paper collars, carries on his use for a little time, then gives it up and becomes a licensee under the patent in suit, the alleged prior use is simply an abandoned experiment. *Hoffman v. Aronson et al.*, 8 Blatch. 324.—**BLATCHFORD**, 1871.

33. Where alleged prior devices were never put upon the market, never came into practical use, were never sold, were not thought worthy of preservation, and cannot be found, they only constitute abandoned experiments. *Murphy et al. v. Eastham et al.*, 1 Holmes, 113.—**SHEPLEY**, 1872.

34. A device not brought into effective operation, cast aside, and taken apart without any intention of reconstructing it, portions of its machinery being appropriated to other uses, the remaining parts being useless as a machine, constitutes only an abandoned experiment. *Gallahue et al. v. Butterfield*, 10 Blatch. 232.—**WOODRUFF**, 1872.

35. Where a person makes a trial of a device and then practically gives it up, his acts amount simply to an abandoned experiment. *Decker v. Grote et al.*, 10 Blatch. 331.—**BLATCHFORD**, 1873.

36. Two witnesses testified to an alleged prior use twenty years before; their testimony did not correspond in some important particulars. The alleged prior use was of a single machine, without evidence of any continuance. Held, to be an abandoned experiment. *Blake et al. v. Rawson*, 1 Holmes, 200.—**SHEPLEY**, 1872.

37. Devices embodied in an abandoned experiment cannot afterward become public property so as to impeach properly-granted letters-patent. *Aultman v. Holley et al.*, 11 Blatch. 317.—**WOODRUFF**, 1873.

38. An application for a patent does not necessarily remove its subject-matter from the category of abandoned experiments. *Brown v. Guild*, 23 Wall. 181.—**BRADLEY**, 1874.

39. A rejected application for patent is not a prior publication or a prior patent.—*Ib.*

40. For different examples of abandoned experiments, see —. *Ib.*

41. For an example of facts held to amount

simply to an abandoned experiment, see —. *Smith v. Glendale Elastic Fabrics Co.*, 1 Holmes, 340.—SHEPLEY, 1874.

42. For an example of an alleged prior use held to be only an abandoned experiment, see —. *Birdsell v. McDonald et al.*, 1 Bann. & Ard. 165.—SWAYNE & WELKER, 1874.

43. "Where an original inventor has perfected his improvement, whereby he puts the public into the possession of his invention, and has obtained his patent, its validity is not to be assailed, nor its value destroyed, . . . by allowing infringers and rival inventors to set up crude and unsuccessful experiments as anticipating it, in describing which dim recollections are stimulated, and the consciences of witnesses strained, in their attempts to clothe with living flesh what has always remained an inert and useless skeleton." *Le Bav et al. v. Hawkins et al.*, 1 Bann. & Ard. 428.—NIXON, 1874.

44. "The patent of an originator of a complete and successful invention cannot be avoided by proof of any number of incomplete and imperfect experiments made by others at an earlier date. This is true if the experimenters may have had the idea of the invention, and may have made partially successful efforts to embody it in a practical form." *Am. Wood Paper Co. v. Fibre Disintegrating Co.*, 23 Wall. 566.—SUP. CT. 1874.

45. For an example of an abandoned experiment, see —. *Albright v. Celluloid Harness Trimming Co.*, 2 Bann. & Ard. 629.—NIXON, 1877.

46. If an alleged prior invention "was only an experiment, and was never perfected or brought into actual use, but was abandoned and never revived by the alleged inventor, the mere fact of having unsuccessfully applied for a patent therefor cannot take the case out of the category of unsuccessful experiments." *Union Paper Bag Mach. Co. et al. v. Pultz & Walkley Co. et al.*, 15 Blatch. 160.—SHIPMAN, 1878.

47. "Knowledge of prior experiments by another will not defeat the claim of the patentee to an invention, if it appears that, after these experiments were abandoned, he first perfected and adapted the invention to actual use; but he will not be an original inventor, and his claim to originality will be defeated, if the knowledge or information which he derived from the abandoned models or experiments was sufficiently definite and clear to enable him to construct the improved thing which was the subject of his alleged invention."—*Id.*

48. Where, preceding a patentee's invention, there has been an abandoned experiment tending in the same direction, and known to the patent-

tee, "the patentee is not necessarily limited in his patent to the narrow field between the model of his predecessor and his own perfected machine, for his invention may have actually covered a wider field, and may have included the territory which the previous investigator undertook to occupy and abandoned. The patentee has the right to take up the improvement at the point where it was left by his predecessor. and if, by the exercise of his own inventive skill, he is successful in first perfecting and reducing to practice the invention which his predecessor undertook to make, he is entitled to the merit of such improvement as an original inventor . . . ; and if he is an original inventor of the improvement, he is entitled to the benefit of unsubstantial variations and modifications in form of the principle of his invention, notwithstanding such modifications may run into and include the forms of mechanism shown in the abandoned experiments of which he had knowledge, provided the invention is properly claimed and set forth in his specifications."—*Id.*

49. For an example of a machine held to be an abandoned experiment, see —. *Gottfried et al. v. Phillip Best Brewing Co.*, 5 Bann. & Ard. 4.—DYER, 1879.

50. Complainants' patented improvement was a process of "causing an explosion" in oil wells "near the oil-bearing point in connection with superincumbent fluid tamping." Such explosions in water wells prior to complainants' invention were proved in two separate instances which were not repeated. The latter of these uses appears to have been unsuccessful when tried in oil wells. *Held*, not to have disclosed complainants' invention, and to have been abandoned experiments. *Roberts et al. v. Schreiber*, 2 Fed. Rep. 855.—STRONG, 1880.

51. By the court: "In the Bradford oil district where the daily production is from 22,500 to 25,000 barrels daily, one half is proved to be due to the Roberts' invention. The cause that works such results cannot be the same as that exhibited in the abandoned experiments. Holding them up as anticipations of the patented device is another illustration of what is very common, an attempt to defeat a meritorious patented invention by proof that something similar had been previously known though it had never been perfected."—*Id.*

52. By the court: "Something has been conceived and worked out that has immensely increased production. It is confessedly embodied in his patent. Certain it is, that no one of the experimenters, whose testimony we have been considering, can say, 'I did it.'"—*Id.*

53. "Burt . . . conceived the idea of a series of wooden" [post-office] "boxes finished with metallic doors and frames for each box, with the rest of the wooden front covered or veneered with a continuous metal casting." "A casting . . . was made from the plan . . . and was sent to the plaintiffs to be filled with doors and locks." "This was discarded on account of its actual or supposed impracticability." "So far as is disclosed by the evidence, the Burt box frame was never used in a post-office and was merely experimental." *Yale Lock M'fg Co. v. Scovill M'fg Co.*, 18 Blatch. 248.—SHIPMAN, 1880.

54. Prior structures, given up after trial, will be adjudged abandoned experiments. *Wilson v. Coon et al.*, 18 Blatch. 532.—BLATCHFORD, 1880.

55. Inventions which never went into general use, and practically remembered only after patent granted to another, are open to the criticism of being abandoned experiments. *Smith et al. v. Merriam et al.*, 6 Fed. Rep. 713.—LOWELL, 1881.

56. A prior structure, a bottle-stopper, used for two years in a beer saloon, but not sent out to customers, and then laid aside, is an abandoned experiment. *Putnam et al. v. Hollender et al.*, 19 Blatch. 48.—BLATCHFORD, 1881.

57. The making and use, for a limited period, of a machine embodying an afterward patented device—the same not being followed up—held to be an abandoned experiment. *Davis et al. v. Brown et al.*, 19 Blatch. 263.—BLATCH, 1881.

58. To make wooden models, then throw them aside, make another device for the same purpose, and patent this latter, is to make, of the first models, abandoned experiment. *Worden et al. v. Fisher et al.*, 11 Fed. Rep. 505.—BROWN, 1883.

59. The patented invention was a spring. It appeared in evidence that another person had, in the course of experiments with springs, made one like the afterward patented spring, but the evidence did not show that it was tested or used in any way, or that the public had derived any benefit from it, and it was held to be an abandoned experiment. *Miller et al. v. Pickering*, 16 Fed. Rep. 540.—MCKENNAN, 1883.

60. Where it was attempted to prove the defence of prior use, the only instance was that of a small machine exhibited at an exposition, where the improvement in question was present, but not thought to be useful, and removed. This was held to be an abandoned experiment. *Phillips et al. v. Carroll et al.*, 23 Fed. Rep. 249.—ACHESON, 1885.

61. Where the alleged anticipatory thing had not been made for twenty years, and then only one thereof was made, it was held to be an abandoned experiment. *Adams & Westlake M'fg Co. v. Rathbone et al.*, 26 Fed. Rep. 262.—BLODGETT, 1886.

62. In computing damages and profits the prior art is sometimes pertinent, and so is the question whether or not the prior thing was an abandoned experiment. *Loud v. Stone*, 23 Fed. Rep. 749.—COLT, 1886.

63. The patent in issue was for a bottle-washer. An alleged prior use was set up. This alleged prior use consisted in the use of a machine for a limited period by the person who invented it, whose business made it necessary for him to wash bottles, but he soon gave up its use. This was held to be an abandoned experiment. *Hoyt et al. v. Slocum et al.*, 26 Fed. Rep. 329.—COLT, 1886.

## PRIVITY.

### CASES.

1. He who purchases from a party *pendente lite* is chargeable with all the disabilities visited upon the parties from whom the purchase was made. *Kinsman et al. v. Parkhurst*, 18 Howard, 289.—SUP. CT. 1855.

2. Where defendant contributed to a defence against the patent in a former case wherein the patent was sustained and infringement found, it would be inequitable to allow defendant to proceed in the manufacture of the patented article. *Birdsell v. Hagerstown Agricultural Implement M'fg Co.*, 1 Bann. & Ard. 426.—BOND, 1874.

3. "It may be said generally, that privies are those who are partakers or have an interest in any action or thing. The term privity denoting mutual and successive relationship to the same rights of property, privies to a suit are those who are represented by the parties and claim under them. The principle on which they are bound by the proceedings is, that they are identified with the parties in interest, and where such identity exists they are concluded by the result." *Consolidated Fruit Jar Co. v. Whitney et al.*, 2 Bann. & Ard. 30.—NIXON, 1875.

4. "An important qualification must be stated in regard to the estoppel of privies by a judgment or decree against those with whom they are in privity. In order to bind them as privies to the judgment, their succession to the rights of the property affected by it should occur after the judgment; or, if the law of *lis pendens* is invoked, after the service of the summons or subpœna. . . . One that has acquired his title

previously, must be made a party to the proceedings if he is to be bound by the result."—*Id.*

5. By "the law of *lis pendens*" the service of summons "is constructive notice of the pendency of the suit only to those who have acquired some title or interest in the property involved in the litigation, from and under the parties to the suit or some of them, since the suit was commenced. It is not applied, as may be inferred from the phrase itself, to the parties whose rights were acquired before the suit was instituted against the grantors or vendors under whom they claim."—*Id.*

6. Suit for infringement was brought against A April 11th, 1873. B had a title acquired from A in February, 1873. In April B conveyed all his rights to C. In July B was brought in as a party to the suit. The defendants claimed under the party C, and it was held that there was no legal obligation upon C to take notice of a suit pending against other parties, and that he was not estopped by the decree in another suit from maintaining the validity of his title.—*Id.*

7. One Mann began suit against Wright and another defendant. Pending suit Mann died, and the suit was revived by the executor. A decree that the patent was valid, and that defendants had infringed, was made, and the case was referred to a master. After entry of this decree, the present bill was filed against the defendant Wright and his codefendant, who since said trial had been engaged in the infringing manufacture. The present complainant had purchased the right to this patent from Mann's administrator. It was held that the present complainant was in full privity to the former decree, that the defendant Wright was also a privy thereto and bound thereby, and also that the other defendant, Wright's present partner, was so far in privity with the former case, by his partnership to Wright, that he was also bound by said decree. *Dayton v. Wright et al.*, 2 Bann. & Ard. 449.—BLDGGETT, 1876.

8. Where, in an infringement suit by A against B, A prevails, and then brings suit against C, who supplied the infringing goods to B and assumed the defence of the suit, provisional injunction will be granted against C. *United States & Foreign Salamander Felting Co. v. Asbestos Felting Co.*, 10 O. G. 828.—BLATCHFORD, 1876.

9. "Judgments are binding upon privies as well as upon parties; but this rule is to be understood with the qualification that only those are privies, within the meaning of the rule, who acquire their interest in the matter of the suit

subsequent to the suit." *Ingersoll v. Jewett et al.*, 16 Blatch. 378.—WALLACE, 1879.

10. In a suit between A and B, A's patent was upheld and B's adjudged an infringement. C derived title from A, and D derived title from B. In a subsequent suit of C against D, C was held in privity with A, and D in privity with B, and each bound by the action in the suit of A and B. *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 17 Blatch. 208.—WHEELER, 1879.

11. Where the defendant was the real, though not the nominal, defendant in a former suit, wherein the present complainant was also the then complainant, the finding in the said former suit is conclusive in the present suit. *U. S. & Foreign Salamander Felting Co. v. Asbestos Felting Co.*, 18 Blatch. 312.—BLATCHFORD, 1880. Ditto. *U. S. & Foreign Salamander Felting Co. v. Asbestos Felting Co.*, 18 Blatchford, 310.—BLATCHFORD, 1880.

12. Webb's application for patent on coffee mill was put into interference with Shepard's application, and priority was awarded to Shepard, whereupon Webb disclaimed the improvement in issue and took a patent for another claim. Shepard assigned his patent to complainant. Webb had assigned to Landers, Frary & Clark. The judge said: "The complainant's counsel contend that the defendants, who are the vendees of Landers, Frary & Clark, are privies to the interference and bound by the adjudication. . . . To this proposition I assent so far as the priority of invention is concerned. But the decision does not preclude the defendants from contesting the right of the complainant" on the ground of lack of novelty. *Peck, Stow & Wilcox Co. v. Lindsay et al.*, 2 Fed. Rep. 688.—ACHEXON, 1880.

13. The former owner of the patent in suit sued other parties than the present for infringement, who justified as licensees under another patent and prevailed, the owner of said other patent voluntarily paying the expenses of said former suit. The parties now sued were also licensees under said other patent. *Held*, that the parties in the present suit were not bound by said former adjudication. *U. S. Stamping Co. v. Jewett et al.*, 18 Blatch. 469.—BLATCHFORD, 1880.

14. Where parties combine to defend a suit for infringement of patent against one of their number, and contribute to the expenses of that defence, they are all bound by the decision in that suit. *Miller et al. v. Liggett & Meyer Tobacco Co.*, 2 McCrary, 375.—MCCRARY, 1881.

15. Complainants sued defendant under a patent granted for the invention of one Clark. Defendant had previously prevailed, upon his own



patent, in a suit against one King, in which suit defendant's patent had been held valid as against the prior Clark patent. The present complainants were King's principal witnesses, and purchased the present patent in suit from King. Present complainants held to be in privity with King and estopped from prosecuting the present case by the proceedings in the former case. *Pennington et al. v. Hunt*, 20 Fed. Rep. 195.—NIXON, 1884.

16. Where a bill for infringement of a patent is brought against a corporation and its assignee, and defendants set up, by demurrer, that the causes of action against the corporation and against the assignee are distinct and different in their nature, the demurrer is not good, because of the privity of action between the corporation and the assignee. *Gordon et al. v. St. Paul Harvester Works et al.*, 23 Fed. Rep. 147.—NELSON, 1885.

17. Privies to an interference proceeding "are bound by the judgment to the same extent as parties to the record. The decision upon an interference is not conclusive in suits upon the patent granted in pursuance of it," *Celluloid M'fg Co. et al. v. Chrolithion Collar & Cuff Co. et al.*, 32 O. G. 383.—WHEELER, 1885.

18. The defendants in this case were sued for alleged infringement of Brush's patent on electric lamps. In a prior suit by the same complainants against Condit and others, for infringement of the Brush patent, by the manufacture of electric lamps made under subsequent patents known as the Weston patents, it was decided that the combination which was the subject of the patent had been anticipated in the Hager lamp, and the bill was dismissed. The defendants in this present case pleaded that their lamps were manufactured by the United States Electric Lighting Company; were identical in construction with the electric lamps made and sold by Condit; that the defence of said prior suit was conducted by said Electric Company; that when said prior suit was commenced Edward Weston had applications pending for letters-patent on electric lamps for the benefit of said Electric Company, which were granted, and became the property of said Electric Company pending the Condit suit; that pending that same suit the Naugatuck Railroad Company took a license from said Electric Company with knowledge of the complainants' claim; that the use of the lamps so licensed under the "Weston patents" was an infringement of the Brush patent; that these defendants' lamps were made under the "Weston patents," and that the invention patented by one of them could not be made without using the invention described and claimed

in the Brush patent. Thereupon the present defendants said that the said Electric Lighting Company was the real defendant in the case of *Brush v. Condit*; that the Naugatuck Railroad Company was privy in estate with its licensor, and pleaded the judgment for the defendant in the former suit as a bar to the present suit. Plea overruled on the ground that the Brush invention and the Weston invention as claimed in the respective patents not being alike, an adjudication that the invention of the elder patent has been anticipated by a third person is a judgment which did not determine either the title of the Electric Lighting Company to the junior patents, or any liability attaching to such title. *Brush et al. v. Naugatuck R. R. Co et al.*, 23 Blatch. 277.—SHIPMAN, 1885.

19. Where a license between a patentee and a licensee is such that the patentee could be enjoined from infringing, and the patentee sells his right to a third party with knowledge of the facts, the third party can be enjoined from infringing at the instance of the licensee. *Hapgood et al. v. Rosenstock et al.*, 23 Blatch. 95.—WALLACE, 1885.

20. March 27th, 1862, an inventor and patentee gave an exclusive license covering the original term of his patent to the complainants. December 8th, 1869, he agreed to assign the extended term to the complainants, which was subsequently done September, 1873. June 16th, 1873, in a contract between the patentee and defendants, the patentee agreed, among other things, that the mode of manufacture practised by defendants was not an infringement of their patent. It was held that this agreement did not affect matters as between the complainants and the defendants. *Adams et al. v. Bridgewater Iron Co. et al.*, 34 O. G. 1045.—COLT, 1886.

21. A party owned the title of record to a patent for over six months, and conveyed it, for a money consideration, to another party, whose title was also recorded in the Patent Office. It was held that this latter title could not be attacked on the ground of fraud on the part of the party first mentioned. *Racine Seeder Co. v. Joliet Wire Check Rower Co.*, 27 Fed. Rep. 367.—BLODGETT, 1886.

22. A decree for infringement having gone against a respondent, a manufacturer in one circuit, a restraining order was subsequently granted in another circuit against the parties using the said manufacturer's product. *Alabastine Co. v. Richardson et al.*, 26 Fed. Rep. 620.—CARPENTER, 1886.

23. "A party who purchased a patent which has for years been freely plundered by a multi-

tude of trespassers does not answer the charge of laches by showing that he commenced, immediately after he required title, to bring the wrongdoers to account." *Kittle v. Hall et al.*, 29 Fed. Rep. 508.—COXE, 1887.

24. A decree sustaining the validity of the patent in suit, and ordering an injunction, was entered November 14th, 1881. The Cunard Steamship Company at the time of filing the bill and answer was a partnership. The Cunard Steamship Company, a corporation, succeeded to the partnership about July 1st, 1878. By an agreement made between the partnership and the corporation at the time of the sale and transfer of the partnership property, business and good-will, the corporation agreed to "pay, satisfy, and discharge all the debts, liabilities, and obligations of the vendors whatsoever, and adopt, perform, and fulfil all contracts and engagements binding on them, and at all times keep the vendors indemnified against such debts, liabilities, obligations, contracts and agreements, and against all actions, proceedings, costs, damages, claims, and demands in respect thereof." The alleged disobedience of the injunction was the transportation of covered meat by the Pavonia, one of the vessels of the Cunard Steamship Company, Limited, on or about April 25th, 1885. The Pavonia was a new vessel built by the corporation, and never belonged to the old partnership. The present case was an application for an attachment for contempt against Vernon H. Brown, an agent of the Cunard Steamship Company, a corporation. The motion was denied on the ground of lack of privity between the parties. *Bate Refrigerating Co. v. Gillett et al.*, 30 Fed. Rep. 685.—WALES, 1887.

25. "A judgment binds all parties to the record, and also those whom they represent, or who are in privity with them. By 'privity' is meant the mutual or successive relationship to the rights of property; and, therefore, a judgment to be binding on one who is not a party to the record, must bind him in relation to some specific right of property which is directly affected by the judgment."—*Id.*

26. "Identity of interest, in the property affected by the judgment, makes the grantee or vendee of that property privy to his grantor or vendor, whenever the sale or transfer is made after the judgment has been rendered."—*Id.*

## PROCEDURE.

### "PROCEDURE" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 4. *And be it further enacted, That*

if any person or persons shall devise, make, construct, use, employ, or vend, within these United States, any art, manufacture, engine, machine, or device, or any invention or improvement upon, or in any art, manufacture, engine, machine, or device, the sole and exclusive right of which shall be as aforesaid granted by patent to any person or persons, by virtue and in pursuance of this act, without the consent of the patentee or patentees, their executors, administrators, or assigns, first had and obtained in writing, every person so offending shall forfeit and pay to the said patentee or patentees, his, her, or their executors, administrators, or assigns, such damages as shall be assessed by a jury, and moreover shall forfeit to the person aggrieved, the thing or things so devised, made, constructed, used, employed, or vendued, contrary to the true intent of this act, which may be recovered in an action on the case founded on this act. [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 5. *And be it further enacted, That* if any person shall make, devise, and use, or sell the thing so invented, the exclusive right of which shall, as aforesaid, have been secured to any person by patent, without the consent of the patentee, his executors, administrators, or assigns, first obtained in writing, every person so offending shall forfeit and pay to the patentee a sum that shall be at least equal to three times the price for which the patentee has usually sold or licensed, to other persons, the use of the said invention, which may be recovered in an action on the case founded on this act, in the Circuit Court of the United States, or any other court having competent jurisdiction. [Repealed July 4th, 1836.]

Act approved June 7th, 1794.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That* all suits, actions, process and proceedings, heretofore had in any district court of the United States, under an act passed the tenth day of April, in the year one thousand seven hundred and ninety, intitled "An act to promote the progress of useful arts," which may have been set aside, suspended, or abated, by reason of the repeal of the said act, may be restored, at the instance of the plaintiff or defendant, within one year from and after the passing of this act, in the said court, to the same situation in which they may have been when they were so set aside, suspended, or abated; and that the parties to the said suits, actions, process, or proceedings be, and are hereby entitled to proceed in such cases as if no re

peal of the act aforesaid had taken place : *Provided always*, That before any order or proceeding other than that for continuing the same suits, after the reinstating thereof, shall be entered or had, the defendant or plaintiff, as the case may be, against whom the same may have been reinstated, shall be brought into court by summons, attachment, or such other proceeding as is used in other cases for compelling the appearance of a party. [Repealed July 4th, 1836.]

Act approved April 17th, 1800.

SEC. 3. *And be it further enacted*, That where any patent shall be or shall have been granted pursuant to this or the above-mentioned act, and any person without the consent of the patentee, his, or her executors, administrators, or assigns, first obtained in writing, shall make, devise, use, or sell the thing whereof the exclusive right is secured to the said patentee by such patent, such person so offending shall forfeit and pay to the said patentee, his executors, administrators, or assigns, a sum equal to three times the actual damage sustained by such patentee, his executors, administrators, or assigns, from or by reason of such offence, which sum shall and may be recovered, by action on the case founded on this and the above-mentioned act, in the Circuit Court of the United States, having jurisdiction thereon. [Repealed July 4th, 1836.]

Act approved February 15th, 1819.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the circuit courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries ; and upon any bill in equity filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable : *Provided, however*, That from all judgments and decrees of any circuit courts rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the Supreme Court of the United States, in the same manner, and under the same circumstances, as is now provided by law in other judgments and decrees of such circuit courts. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 14. *And be it further enacted*, That whenever, in any action for damages for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, or by any patent which may hereafter be granted, a verdict shall be rendered for the plaintiff in such action, it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damage sustained by the plaintiff, not exceeding three times the amount thereof according to the circumstances of the case, with costs ; and such damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or grantees of the exclusive right within and throughout a specified part of the United States.

SEC. 17. *And be it further enacted*, That all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the power and jurisdiction of a circuit court ; which courts shall have power, upon a bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable : *Provided, however*, That from all judgments and decrees from any such court rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the Supreme Court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of circuit courts, and in all other cases in which the court shall deem it reasonable to allow the same. [Repealed July 8th, 1870.]

Act approved February 18th, 1861.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from all judgments and decrees of any circuit court rendered in any action, suit, controversy, or case, at law or in equity, arising under any law of the United States granting or confirming to authors the exclusive right to their respective writings, or to inventors the exclusive right to their inventions or discoveries, a writ of error or appeal, as the case may require, shall lie, at the instance of

either party, to the Supreme Court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of such circuit courts, without regard to the sum or value in controversy in the action. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 55. *And be it further enacted*, That all actions, suits, controversies, and cases arising under the patent laws of the United States shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court, or by the Supreme Court of the District of Columbia, or of any territory; and the court shall have power upon bill in equity filed by any party aggrieved, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree rendered in any such case for an infringement, the *claimant* [complainant] shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same, or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case; but all actions shall be brought during the term for which the letters-patent shall be granted or extended, or within six years after the expiration thereof.

SEC. 56. *And be it further enacted*, That a writ of error or appeal to the Supreme Court of the United States shall lie from all judgments and decrees of any circuit court, or of any district court exercising the jurisdiction of a circuit court, or of the Supreme Court of the District of Columbia, or of any territory, in any action, suit, controversy, or case at law or in equity, touching patent rights, in the same manner and under the same circumstances as in other judgments and decrees of such circuit courts, without regard to the sum or value in controversy.

SEC. 59. *And be it further enacted*, That damages for the infringement of any patent may be recovered by action on the case in any circuit court of the United States, or district court exercising the jurisdiction of a circuit court, or in the Supreme Court of the District of Columbia, or of any territory, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict shall

be rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 629. The circuit courts shall have original jurisdiction as follows:

\* \* \* \* \*

Ninth. Of all suits at law or equity arising under the patent or copyright laws of the United States.

SEC. 699. A writ of error may be allowed to review any final judgment at law, and an appeal may be allowed from any final decree in equity hereinafter mentioned without regard to the sum or value in dispute:

First. Any final judgment at law or any final decree in equity of any circuit court, or of any district court acting as a circuit court, or of the Supreme Court of the District of Columbia, or of any territory, in any case touching patent rights or copyrights.

SEC. 4919. Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action, a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.

SEC. 4921. The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case.

Act approved February 16th, 1875.

SEC. 2. The said [circuit] courts, when sitting in equity for the trial of patent causes, may em-

panel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises, as may from time to time be made in the Supreme Court, and submit to them such questions of fact arising in such cause as the Circuit Court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings.

CASES.

1. A verdict repugnant or ambiguous on a material point cannot form a basis for the judgment of a court. *Stearns v. Barrett*, 1 Mason, 153.—STORY, 1816.

2. A verdict of a jury clearly opposed to the evidence, as viewed by the court, will be set aside. *Barrett et al. v. Hall et al.*, 1 Mason, 447.—STORY, 1818.

3. Upon any exception to the charge of the court the evidence forms no proper part of the record. *Pennock et al. v. Dialogue*, 2 Peters's C. C. 1.—SUP. CT. 1829.

4. Defendants are not entitled to put in affidavits in answer to plaintiff's rebuttal affidavits. *Ames v. Howard et al.*, 1 Sumner, 482.—STORY, 1833.

5. A verdict giving large damages, where the amount is supported by some evidence, but contradicted by other evidence, cannot be set aside as opposed to the evidence. *Stanley v. Whipple*, 2 McLean, 35.—MCLEAN, 1839.

6. The court cannot consider defences not raised by the pleadings. *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

7. The court will notice an objection spread upon the face of the bill though not raised in the pleadings.—*Ib.*

8. The question of the sufficiency of the description in a specification is a question of fact. *Carver v. Braintree M'f'g Co.*, 2 Story, 432.—STORY, 1843.

9. The question of novelty in a patented invention, the question of the identity of an original and reissued patent, and the question whether the patent was obtained with fraudulent intent, all involve "matters of fact which belong to the province of the jury."—*Ib.*

10. Although an answer to a bill of complaint may be filed before it is due, it is to be treated as the legal answer. *Brooks et al. v. Bicknell et al.*, 3 McLean, 250.—MCLEAN, 1843.

11. Where a motion in arrest of judgment and a motion for a new trial are both made, the latter ought first to be heard. *Pitts v. Whitman*, 2 Story, 609.—STORY, 1843.

12. By the court: "In my circuit court the plaintiff in patent cases has never been required to give any security for costs." *Woodworth v. Sherman*, 3 Story, 171.—STORY, 1844.

13. The question whether the invention is sufficiently described in the patent "is a question of law, for it depends upon the construction of the written instrument." *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

14. "Whether a description is so particular as to enable a mechanic to construct a machine is a question for the jury."—*Ib.*

15. "Unless the thing claimed to be invented is so described as to be known in the language of the statute from every other thing, the patent is void. But this must be determined by the court."—*Ib.*

16. The question of the reasonableness of delay in entering a disclaimer is a mixed question of law and fact, and must be decided by the jury under the instruction of the court.—*Ib.*

17. "Whether the patent is void for uncertainty and ambiguity in the description is a matter of fact to be decided upon the evidence by experts." *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

18. The question whether a disclaimer is filed within a reasonable time is not a mere matter of law, but is to be judged with reference to all the circumstances in evidence.—*Ib.*

19. Whether specification and drawings contain description or claim of mechanism, "with such reasonable certainty and precision as the law requires to constitute a valid claim therefor, . . . is not a matter of law, but involves a matter of fact as to the certainty and sufficiency of the description in the particulars mentioned."—*Ib.*

20. Where defendant's machine has a device described and claimed in the plaintiffs' patent, but defendant contends it is not used for the plaintiffs' purpose, that question is held to be a question of fact.—*Ib.*

21. A court cannot judicially know whether a patented machine is composed of parts no one of which are substantially new in their application.—*Ib.*

22. Where a kind of thing is mentioned generally in a claim, it may be construed to mean a specific kind of thing. Such a question is for the court and not the jury. *Davoll et al. v. Brown*, 1 W. & M. 53.—WOODBURY, 1845.

23. "It is a question for the court, and not for the jury, whether the specification can be read and construed intelligibly in a particular way."—*Ib.*

24. Objection to the jurisdiction of a federal

court, on account of the subject-matter of the issue, comes too late after pleadings filed and evidence published. *Nesmith et al. v. Calvert et al.*, 1 W. & M. 34.—WOODBURY, 1845.

25. A complainant may be required to give security for costs. *Orr, Adm'r, v. Littlefield et al.*, 1 W. & M. 13.—WOODBURY, 1845.

26. "It is the province and the duty of the court to settle the meaning of the patent, and if that cannot be ascertained satisfactorily upon the face of the specification, the law declares it insufficient for ambiguity and uncertainty. The meaning of the terms employed, in view of the object the inventor had in contemplation, and to ascertain the extent of his claim, must be determined by the court, and the matters of fact presented by the respective parties to support or defeat the patent are then to be examined and applied as if the construction fixed by the court had been incorporated in the specification." *Emerson v. Hogg et al.*, 2 Blatch. 1.—BETTS, 1845.

27. When the charge of the court does not comply with the prayer of the counsel such prayer is to be considered refused.—*Id.*

28. Whether a description is sufficiently clear and exact to enable a mechanic to work by it is a question for the jury.—*Id.*

29. Exceptions to a charge to a jury are to be to the charge as published at length and not to points ruled by the court. *Stimpson v. Westchester R. R. Co.*, 4 Howard, 380.—SUP. CT. 1846.

30. Whether a reissued patent is substantially for a different invention from that of its original, is a question for a jury on the evidence.—*Id.*

31. "Variances between the declaration and the writ cannot . . . be taken advantage of on general demurrer." *Wilder v. McCormick*, 2 Blatch. 31.—BETTS, 1846.

32. Where a court is in doubt on the question of infringement, it will send that question to be tried before a jury. *Van Hook v. Pendleton et al.*, 1 Blatch. 187.—BETTS, 1846.

33. For an example of the appointment by the court of a person to witness experiments and report to the court, see —. *Parker v. Hatfield*, 4 McLean, 61.—MCLEAN, 1846.

34. "The specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention; that is to say, to compound and use it without making any experiments of his own. In patents for machines the sufficiency of the description must, in general, be a question of fact to be determined by the jury. And this also must be the case in

compositions of matter, where any of the ingredients mentioned in the specification do not always possess exactly the same proportions in the same degree." *Wood v. Underhill et al.*, 5 Howard, 1.—SUP. CT. 1847.

35. Where a prayer for an injunction and a demurrer are both pending, the demurrer should be first heard and disposed of. *Woodworth et al. v. Edwards et al.*, 3 W. & M. 120.—WOODBURY, 1847.

36. After an order as to filing evidence has been made in a case, it is too late to take an exception to the absence of an oath to the bill.—*Id.*

37. Where a demurrer to a bill is overruled, the party making it can, on paying costs, have a trial on the merits or principal matter in dispute.—*Id.*

38. "In these cases of new trials for newly-discovered evidence, the terms are usually that costs of the former trial be first paid." *Aiken v. Bemis*, 3 W. & M. 348.—WOODBURY, 1848.

39. Where a discovery is sought from defendants in regard to particulars not stated in the original bill, and an answer to the original bill has been filed, the course of practice will justify the filing of a new bill. *Parkhurst v. Kinsman et al.*, 2 Blatch. 72.—BETTS, 1848.

40. "A supplemental bill may be filed at any stage of a cause, even after decree rendered."—*Id.*

41. For a statement at length of the procedure and principles of taking testimony in equity cases, see —. *Van Hook v. Pendleton et al.*, 2 Blatch. 85.—BETTS, 1848.

42. "It is an elementary doctrine in the practice of all courts that parties shall take advantage of irregularities at the first opportunity after acquiring knowledge of them, or be deemed to have waived all objections to them."—*Id.*

43. A new trial cannot be had at the same term as the first trial. *Wilson v. Barnum*, 1 Wallace, Jr., 347.—KANE, 1849.

44. "The specification, being an instrument of writing, and the words of which it is made up having a fixed and plain import, its interpretation is exclusively for the court, who must explain it." *Parker v. Hulme*, 7 West. L. J. 417.—KANE, 1849.

45. It is the exclusive privilege and duty of the jury to judge of all questions of fact. *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

46. When in the trial of a case, a jurymen becomes ill, another may be drawn and substituted. *Boote v. Silsby et al.*, 1 Blatch. 445.—NELSON, 1849.

47. Where defendants are prevented from in-

roducing in evidence a prior publication by reason of not properly pleading the same, they cannot have the trial of the case stopped on the ground of surprise.—*Id.*

48. A party cannot take advantage of its own error in the trial of a case even if the court acquiesce in the error.—*Id.*

49. Where defendants have been ordered to render a monthly account in lieu of an injunction, and fairly comply with the terms of the order, an injunction will not be substituted therefor. *Wilder v. Gayler et al.*, 1 Blatch. 511.—NELSON, 1849.

50. "It is the duty of the court, by a fair construction of the patent, to decide whether in all substantial particulars it conforms to the requisites of the law." *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

51. "It is for the jury to decide whether, from the evidence," the specifications are sufficiently practical "to enable a skilled mechanic to construct the thing which is described."—*Id.*

52. A case was argued in the early part of the term of the Supreme Court, and the judgment of the Circuit Court was affirmed. Subsequently, in the same term, a motion was made to open the judgment, for the purpose of amending the bill of exceptions and remitting the case, upon the ground that material evidence offered by the plaintiffs' error, which might have influenced the judgment of the Supreme Court, had been omitted in the bill of exceptions. The motion was denied, the court saying that the error, if any, might have been corrected by *certiorari*, if applied for in due time and upon sufficient cause, but not if the application was too late in point of time. *Gayler et al. v. Wilder*, 10 Howard, 509.—SUP. CT. 1850.

53. The question as to the substantial identity of two machines is a question of fact which cannot be certified to the Supreme Court from a circuit court under the act of 1802, chapter 31, Section 6. "That act evidently gives the jurisdiction only in cases where the judges of the circuit courts differ in opinion on a point of law." *Wilson v. Barnum*, 8 Howard, 259.—SUP. CT. 1850.

54. Under Section 17 of the patent act of 1836, where a judge is sitting at a stated term, and a judge is sitting in chambers of the same, the latter may, in chambers, allow a writ of error. *Foote v. Silsby et al.*, 1 Blatch. 542.—NELSON, 1850.

55. As regards a bill of exceptions, "the points must be made, and the exceptions taken, in the usual way at the trial, in order to entitle the

party to the benefits of them or the writ of error."—*Id.*

56. After an infringement suit at law between A and B, the litigated question being infringement only, and wherein A prevailed, A then filed a bill in equity asking for perpetual injunction and an accounting. After defendants had filed their answer they asked leave to file a supplemental answer setting up newly-discovered evidence, and were permitted so to do. *Foote v. Silsby et al.*, 1 Blatch. 545.—NELSON, 1850.

57. "Identity may be said to be a question merely of fact, to be determined by persons skilled in mechanics. But when the comparison to be instituted depends not merely on form or external appearance, but in ascertaining the substance, principle, or mode of operation of the machine invented, and in giving a correct construction to the words of the patent and specification, it is apparent that the question to be answered, though primarily one of mechanics and science, may be also mixed with law, inasmuch as the construction of all written instruments belongs to the court, and not to the jury." *Blanchard v. Reeves et al.*, 1 Fish. P. C. 103.—GRIER, 1850.

58. Where a plaintiff is to receive a certain compensation for the use of its patented thing, and no stated times of payment are stipulated, parts of the remuneration can be recovered separately. *W. A. & G. Steam Packet Co. v. Sickles et al.*, 10 Howard, 419.—SUP. CT. 1850.

59. Patentable novelty is a question of fact for the jury. *Hall v. Wiles*, 2 Blatch. 197.—NELSON, 1851.

60. The act of September 24th, 1789, gave the parties in actions at law the right to require the opposing parties to produce books and writings the same as the ordinary rule of proceeding in chancery. It was held that the production under this act must be only such as a court of equity would sustain on a bill of discovery. *Finch v. Rikeman et al.*, 2 Blatch. 301.—BETTS, 1851.

61. The allowance of a jury trial is not a matter of right in an equity suit for infringement of a patent. *Brooks et al. v. Norcross et al.*, 2 Fish. P. C. 661.—WOODBURY, 1851.

62. Complainants brought their bill of complaint for infringement of patent. Respondent filed what he called a cross-bill, seeking from the patentee a discovery of the time and place when and where he made his invention and first manufactured his patented article; further, discovery as to suits of the patentee; further, discovery as to proceedings in Patent Office extensions, and this so-called cross-bill also asked that the patent be adjudged void and complainants

enjoined from bringing suit for infringement. The court held that no such mode of procedure was open to respondent. *Young et al. v. Colt*, 2 Blatch. 373.—BETTS, 1852.

63. In trying a case at law before a jury, where a juror becomes unable to act through illness, it rests in the discretion of the court to treat the matter as "occasioning a vacancy on a still existing panel or as breaking up the panel altogether, and, being a matter of discretion, no error could be assigned upon it." *Silsby et al. v. Foote*, 14 Howard, 218.—SUP. CT. 1852.

64. "The courts of the United States have no power to order a peremptory nonsuit against the will of the plaintiff."—*Ib.*

65. It is for the court to construe a claim to the jury, and then for the jury to pass on the question of infringement.—*Ib.*

66. A claim of complainants' patent in suit was: "I also claim the combination, above described, by which the regulation of the heat of the stove, or other structure in which it may be used, is effected." The court held that the jury were to decide as a question of fact of what elements or members this combination consisted.—*Ib.*

67. A case came up to the Supreme Court upon a certificate of division; all the questions sent up had already been decided by the Supreme Court in another case; thereupon the case was remanded to the Circuit Court "with directions to permit either party to amend his pleadings, and also to allow the defendants an opportunity to distinguish their case, if they can, from that above referred to." *Smith v. Ely et al.*, 15 Howard, 137.—SUP. CT. 1853.

68. It is the province of the court to determine what the thing is that is patented. *Winans v. Denmead et al.*, 15 Howard, 330.—SUP. CT. 1853.

69. It is the province of the jury to determine whether the patented thing has been constructed, used, or sold by the defendants.—*Ib.*

70. An objection on account of misjoinder of parties made, for the first time, after hearing and final decree, comes too late. *Livingstone et al. v. Woodworth et al.*, 15 Howard, 546.—SUP. CT. 1853.

71. As a rule, upon a motion for a provisional injunction, the complainant is not entitled to file affidavits in the nature of rebuttal. *Day v. Boston Belting Co.*, 16 Law Rep. 329.—SPRAGUE, 1853.

72. It is "not necessary for the defendants to give to the plaintiff previous notice of their defence. They are entitled to make it by answer or depositions when the motion for injunction is brought on. But, then, on their part, the de-

fence must be complete and final as to the interlocutory proceeding." *Day v. New England Car-Spring Co.*, 3 Blatch. 154.—BETTS, 1854.

73. At the hearing of a motion for provisional injunction, after respondent had read its affidavits, complainant proposed to read rebuttal affidavits; respondent objected thereto, and the court held that, under Rule 107 of the Southern District of New York, complainant might do this, and respondent was not entitled to offer answering affidavits.—*Ib.*

74. In a trial before a jury it is "the right of the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines to make the one described. This the statute requires, and of this the jury are to judge." *Battin et al. v. Taggart*, 17 Howard, 74.—SUP. CT. 1854.

75. "The jury are . . . to judge of the novelty of the invention, and whether the renewed patent is for the same invention as the original patent, and they are to determine whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury, such as the identity of the machine used by the defendant with that of the plaintiffs, or whether they have been constructed and act on the same principle."—*Ib.*

76. Where there is a motion for a new trial, the practice is not to grant a perpetual injunction until the determination of the motion. *Day v. Hartshorn*, 3 Fish. P. C. 32.—PITMAN, 1855.

77. After a bill of complaint had been brought, complainant moved to amend the bill by adding four foreign corporations, two in Connecticut and two in New Jersey, and adding certain averments as to their title. It was held that this was an attempt to institute substantially a new suit and could not be allowed. *Goodyear v. Bourn et al.*, 3 Blatch. 266.—NELSON, 1855.

78. Where the report of the master is not objected to, and the case is appealed to the Supreme Court, it is then too late to object to the report of the master. *Kinsman et al. v. Parkhurst*, 18 Blatch. 289.—SUP. CT. 1855.

79. "The act of Congress known as the Process Act, passed May 19th, 1828, adopted the forms and modes of proceeding in the state courts in common law cases, as controlling the practice in the courts of the United States, subject to such alterations and additions as the said courts of the United States shall in their discretion deem expedient, or to such regulations as the Supreme Court shall from time to time prescribe." *Teese et al. v. Phelps et al.*, 1 McAllister, 17.—MCALLISTER, 1855.



80. Whether an improvement is a patentable invention is a mixed question of law and fact, and should not in ordinary cases be disposed of on demurrer, and without the intervention of a jury.—*Ib.*

81. As between a judge and jury "it is the duty and province of the court to determine the controverted questions of law." *Ransom et al. v. New York*, 1 Fish. P. C. 252.—HALL, 1856.

82. As between a judge and jury, it is the duty and province of the jury "to determine the controverted questions of fact in issue between the parties."—*Ib.*

83. "The courts of the United States do not, in all cases, require a verdict at law on the title before granting a final injunction, or concede a right to either party to have every issue as to originality or infringement tried by a jury." *Sickles et al. v. Gloucester M'fg Co.*, 3 Wall., Jr., 196.—GRIER, 1856.

84. In an accounting before a master, under Rule 77 prescribed by the Supreme Court, a complainant has a right, without special notice, to call and examine defendants as parties, and to obtain from them in that mode evidence in support of the claims made by complainant upon the reference; but respondents have no right in that manner to put in evidence in support of their own case. *Footte v. Silsby et al.*, 3 Blatch. 507.—HALL, 1856.

85. "The practice . . . in equity is to take the account down to the time of the hearing before the master, if the infringement continues to that period, thereby preventing the necessity and expense of a new suit." *Tatham et al. v. Lowler et al.*, 4 Blatch. 86.—NELSON, 1857.

86. "The citation of the defendant was signed by the clerk of the court and not by the judge who allowed a writ of error." Record was filed, and the case docketed in the Supreme Court, November 24th, 1856, and on December 4th defendant appeared by counsel in that court. The Supreme Court said that the citation was irregular; that the defendant in error was not bound to appear in the Supreme Court, and that plaintiff's motion to dismiss, for a reason stated by him at a subsequent term, came too late. *Chaffee v. Hayward*, 20 Howard, 208.—SUP. CT. 1857.

87. The absence of one or of all the counsel employed by a party in pursuit of other business furnishes no ground for delaying a case in the Supreme Court without the consent of the adverse parties.—*Ib.*

88. In an equity suit the complainant sought an injunction and account. The trial of the case was suspended, and a trial at law ordered.

*Muscan Hair M'fg Co. v. American Hair M'fg Co.*, 4 Blatch. 174.—HALL, 1858.

89. An order was made by consent of parties vacating a judgment on payment by defendant of the costs to that time, and it allowed defendant to procure the case to be settled with leave to convert it into a bill of exceptions. Subsequently, the judge signed and sealed the bill of exceptions; it was filed, and within two days afterward plaintiffs issued an execution on the judgment. The said order was made December 19th, 1857, the bill of exceptions was sealed in March, 1857, and the execution was issued two days afterward. Defendant then moved that the proceedings be stayed and plaintiffs compelled to enter up a new judgment and file a new judgment record. It appeared that the payment of costs by the defendant had not been made. As plaintiffs' attorney had made no payment of the costs, the court held that to be a waiver, and thereupon ordered the proceedings stayed, and plaintiffs to enter a new judgment and file a new judgment record so that the case on such new judgment be carried by defendant, by writ of error, to the Supreme Court. *Ransom et al. v. New York*, 4 Blatch. 157.—INGERSOLL, 1858.

90. Respondents attempted, at a hearing, to show that complainant's interest in the patent was not a proper one on which to bring the suit. This objection was not made in the answer, nor made in the subject-matter of evidence, and the court refused to hear it. *Grover & Baker Sewing Mach. Co. v. Sloat et al.*, 2 Fish. P. C. 112.—NELSON, 1860.

91. Where a suit is brought by the owner of a patent for the benefit of his licensees, it cannot be discontinued by the consent of such nominal complainant if the discontinuance is resisted by the real parties in interest. *Goodyear v. Bishop et al.*, 4 Blatch. 438.—NELSON, 1860.

92. What constitutes unreasonable delay in filing a disclaimer "is a question to be settled by the court, and not for the jury." *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

93. Although parties have a constitutional right of trial by jury in actions at common law, such a trial, in a suit in equity, depends upon the discretion of the court. *Ely v. Monson & Brimfield M'fg Co.*, 4 Fish. P. C. 64.—SPRAGUE, 1860.

94. A motion to amend the answer and set up new defence, made before testimony is taken, should be granted even though the hearing of the motion is not had until the testimony is completed, provided the motion is otherwise properly supported. *Morehead v. Jones*, 3 Wall., Jr., 306.—GRIER, 1860.

95. "In former years it has been much the practice of the courts, in adjudicating upon patents, when there was a seriously disputed question of fact, to send the matter to the jury. . . . The tendency of the courts, as evinced by their decisions, both in England and in America, for the last few years, has been to consider the cases themselves upon full proof instead of sending them to the jury. . . . The decision of a competent court, accustomed to the investigation of facts of this kind in relation to matters of art and science, would be more satisfactory to intelligent minds than the verdict of a jury would be likely to be. . . . The decision of a court of equity, upon a full investigation of the facts is, and ought to be, more satisfactory than the verdict of a jury under such circumstances." *Potter et al. v. Fuller*, 2 Fish. P. C. 251.—SMALLEY, 1862.

96. Where the Supreme Court of a state has construed a state statute, as to duties of county commissioners, the federal courts will follow that construction. *Jacobs v. Board of Commissioners of Hamilton County*, 1 Bond, 500.—LEAVITT, 1862.

97. A motion, in an equity case, to send the case to a jury for a trial, ought not, in general, to be granted, where a previous trial at law and in equity has been had, and resulted in favor of complainant. *Howe v. Williams*, 2 Clifford, 245.—CLIFFORD, 1863.

98. "As a general rule, a judge, rather than an ordinary jury, is best qualified to investigate and determine disputed questions depending in part on the principles and facts of chemistry and of natural philosophy." *Buchanan v. Howland et al.*, 5 Blatch. 151.—HALL, 1863.

99. In a trial at law the question of the identity of patented machines with prior machines is a question of fact for the jury. *Turritt v. Michigan Southern R. R. Co.*, 1 Wall. 491.—SUP. CT. 1863.

100. "General rule is that an interlocutory order for issues to a jury in an equity suit will not be made until the proofs are taken and publication has passed. Reason for the rule, as stated, is that such an order should not, in general, be granted at all where the truth of the facts can be conveniently and satisfactorily ascertained by the court itself; and as that question cannot usually be determined in advance of publication, the motion should be deferred to that stage of the controversy." *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Cliff. 351.—CLIFFORD, 1864.

101. "Federal courts of equity, under the Constitution of the United States and the laws of Congress, as now existing, have the power of

deciding every question of law or fact which may arise in equity suits over which they have complete jurisdiction, and, consequently, is not indispensably necessary, as matter of law, and in any case, that any question in an equity court should be sent to a jury."—*Ib.*

102. "Trial by issue, indeed, forms no necessary appendage in a court of equity even in the parent country, and never did, except that, perhaps, an heir-at-law, where the object of the suit was to divert him of a freehold estate of which his ancestor died seized, or the rector of a parish, where his common law right to tithes was drawn in question, might be entitled to issues as a matter of right. Excepting those cases, it is clear that the motion for issues was always regarded as one addressed to the sound discretion of the chancellor, and it was for him to determine whether, in view of the whole evidence, as exhibited in the record, he would decide the controversy himself or send it to the common law courts for the jury."—*Ib.*

103. "When the chancellor directs such an issue, he in general does it upon the ground that the evidence produced before him in the record is not of a character, or not sufficient to enable him to arrive at a satisfactory conclusion. Such being the state of the case, he directs the issue to be tried by a jury for the purpose of collecting additional evidence to enable him to decide the cause. Consequently, the verdict, when certified from the court to which the issues were sent, is never to be regarded as conclusive, but only as advisory, and may be set aside or even overruled."—*Ib.*

104. "Practice . . . is, that the party against whom the verdict is, has the right, notwithstanding the verdict, to proceed in the cause, and if the evidence was not closed under the rules, or if closed by leave of the court first had and obtained, to introduce evidence to support the case."—*Ib.*

105. "Defences set up in the answer, but which were not pressed at the argument, will be regarded as waived."—*Ib.*

106. "State regulations, to the extent that they define the rules of property, are regarded as furnishing the rule of decision, but they do not control or affect the process or practice of the federal courts."—*Ib.*

107. The pleadings in a case being closed, "the parties agreed in writing to refer the case to a referee, 'to hear and determine the same, that an order be entered making such reference, and that the report of the referee have the same force and effect as a judgment of the court.'" This was held to be a proper mode of procedure.

*Heckers v. Fowler*, 2 Wallace, 123.—Sup. Ct. 1864.

108. Where the duty of a referee, on a reference, is to determine all the issues, and to report the result of his finding, but is not required to report specially what his finding is upon the several issues presented in the pleadings, a general finding suffices.—*Id.*

109. "It is not the practice in the circuit courts to require a rule for judgment to be entered in any case."—*Id.*

110. "Entry of judgment in term time is never made except by leave of court; but the motion need not be in writing, and the order of the court is seldom or never entered in the minutes. When the term closes judgments are entered by the clerk under the general order without motion; reference of a pending action is ordinarily perfected in term time by an entry made in the case by the clerk, at the request of the parties, that it is 'referred,' and with the addition of nothing else except the names of the referees, or it may be done, . . . by a written agreement, signed by the parties or their attorneys, and filed in the case. When it is done, a rule is then issued, or the order of the courts may be entered in the minutes. . . Duty of the referee is to notify and hear the parties and then determine the controversy, and make a report or award to the court in which the action is pending, and from which the rule was issued. Judgment, however, cannot in general be entered in conformity to the report or award until it is accepted or confirmed by the court." "Hearing is then had, and after the hearing the court may accept or reject the report; or, if either party desires it, the report may, for good cause shown, be recommitted. Such a report of referees is in many respects a substitute for the verdict of a jury. Where there is no agreement to that effect, no judgment can be entered on such a report until the same has been accepted."—*Id.*

111. "Judgment having been entered without objection, and pursuant to the order of the court and the agreement of the parties, it is not possible to hold that there is any error in the record."—*Id.*

112. "Construction of a patent is always a question of law exclusively for the court, except in cases where the patent contains technical words or phrases, or terms of art which require explanation by parol testimony." *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

113. "It is not necessary, . . . in order to empower a court of equity [at least a court of

the United States sitting in equity], to produce a judgment in favor of the patentee, that there should first be a trial at law." *Doughty v. West et al.*, 2 Fish. P. C. 553.—SHIPMAN, 1865.

114. "The courts of the United States are authorized to take up a patent, and, upon final hearing, to pass upon it, without reference to the fact whether it has been before a jury or not."—*Id.*

115. "It is competent for the court to entertain a bill of complaint for an injunction and an account, or for the repeal of an interfering patent for the same invention, at any time after the letters-patent are granted. Undoubtedly the application for injunction is in all cases addressed to the discretion of the court, and it may be that the court, under some circumstances, might order issues to a jury in a suit . . . for the repeal of an interfering patent." *Ayling v. Hull*, 2 Cliff. 494.—CLIFFORD, 1865.

116. "It is certain, as a general rule, that the laws of a state in which a national court sits must be the rules of decision in such court. This general rule is founded on Section 34 of the judiciary act, which provides that 'the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'" *Read et al. v. Miller et al.*, 2 Bissell, 12.—MCDONALD, 1867.

117. Where the terms of a patent are too broad, but the difficulty is curable by disclaimer, "there may . . . be a decree for a perpetual injunction, each party to pay his own costs, without any actual previous disclaimer of record in the Patent Office." Accounting will not, however, be ordered until the disclaimer is filed. *Aiken v. Dolan*, 3 Fish. P. C. 197.—CADWALLADER, 1867.

118. In a suit at law, by stipulation, a jury may be waived, and the issues of law and fact tried by the court. *Blake v. Stafford*, 6 Blatch. 195.—SHIPMAN, 1867.

119. "Where a suit in equity has been heard and submitted to the court for decision, neither party has the right to file any paper in the case except by leave of the court. Such prohibition commences at the date of the submission of the cause to the court, and continues throughout the period it remains on the docket." *Union Sugar Refinery v. Matthiessen*, 3 Cliff. 146.—CLIFFORD, 1868.

120. Upon an accounting "the usual course is, that the master allow both parties, if they desire, to introduce testimony upon the subject of

damages. He hears them fully, and when he has taken all the testimony, heard both parties, and come to a conclusion, he makes a draft of his report in the office, and gives time for the parties respectively, if they see fit, to make their objections to the drafted report. When those objections are made, it becomes his duty to consider or reconsider, as the case may be, the questions involved in those objections; and if, upon final consideration, he is still of the opinion that he was right in the conclusions formed and stated in the drafted report, he then makes his final report, and the parties have a right to file their exceptions to the final report, founded upon previous objections made to the draft report, and then the whole matter comes back to the Circuit Court for adjudication upon the master's report. Either party may set down the case for the hearing upon exceptions to the master's report. Both parties may except; both may object in the first instance to the draft report, and both parties may afterward except to the final report. They are entitled to be heard upon all the questions which may have arisen before the master, provided they are embraced in their exceptions.

"When the exceptions are filed, if either party desires the evidence to be reported, they request the master to report it in whole or in part, as the case may be. It is the usual course for the master to comply with such a request; but, if either party make the request, it is not incumbent upon the master to report the evidence at all. He may or may not, in his discretion, as he sees fit. If he does report the evidence at the request of one or both parties, it then becomes the duty of the court, if there be proper exceptions, to review the questions of fact embraced in the report as well as the questions of law. But if the evidence is not reported, the court does not review the facts, but simply re-examines the questions of law."—*Id.*

121. An equity demurrer requires a certificate of counsel, but if the party bringing suit proceeds to argument he waives that objection. *Goodyear v. Toby*, 6 Blatch. 130.—HALL, 1868.

122. An objection to ambiguous pleading in an answer, ought not, generally, to be taken by exceptions, as it is a proper subject of amendment under special order. *Graham et al. v. Mason*, 4 Cliff. 88.—CLIFFORD, 1869.

123. "Attempts are often made in the trial of patent cases to introduce . . . collateral issues on the question of infringement, but they are irregular, and cannot be sanctioned, as the only proper comparison on that issue, is of the defendant's machine with that of the plaintiff, as prescribed in the pleadings. What the jury

have to determine is, Does the machine of the defendant infringe the machine of the plaintiff? and, if it does not, then the defendant is entitled to a verdict; but if it does infringe the plaintiff's machine, then the plaintiff is entitled to his remedy, and it is no answer to the cause of the action to plead or prove that the defendant is the licensee or the owner of another patent, and that his machine is constructed in accordance with that patent." *Blanchard v. Putnam*, 8 Wall. 420.—SUP. CT. 1869.

124. "In taking an accounting the master is not limited to the date of the decree. In such cases, it is proper to extend the account down to the time of the hearing before him, unless the infringement ceased prior to that time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment. The practice saves a multiplicity of suits, time, and expense, and promotes the ends of justice." *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

125. An interlocutory decree had been entered in the case of Charles Goodyear, deceased, and others against the Providence Rubber Co. and others, in the Circuit Court for the District of Rhode Island; while the case was pending before the master, complainant filed a bill alleging that it held a judgment against the estate of Charles Goodyear, deceased, in favor of E. Chaffee Co., which, it insisted, ought to be offset against such portion of the damages to be recovered in the suit first mentioned as might be due and payable to Charles Goodyear, the executor. The applicant endeavored to support the bill upon the ground that it was a cross-bill, having for its object to enforce an offset arising under such circumstances as to give a court of equity jurisdiction and authority to give the relief prayed. The court held that complainant's bill was not a proper cross-bill. *Rubber Co. v. Goodyear*, 9 Wall. 807.—SUP. CT. 1869.

126. "It is undoubtedly the practice of the United States circuit courts, in actions at law, on questions of priority of invention, where a patent under consideration is attempted to be invalidated by a prior patent, to take evidence of experts as to the nature of various mechanisms or manufactures described in the different patents produced, and as to the identity or diversity between them, and to submit all the evidence to the jury under the general instructions as to the rules by which they are to consider the evidence." *Bischoff v. Wethered*, 9 Wall. 812.—SUP. CT. 1868.

127. In taking an accounting before a master, "an exception should always be taken on the

spot to each ruling of the master which a party intends to contest. It need not then be drawn up in form, but it should be taken by giving notice to the master, and it is his duty to note the facts in his minutes. . . . If it is proper to except at all to the master's final report for rulings admitting or rejecting evidence, this can only be done where objections of the same kind have been made to the draft report." Otherwise they will not be considered by the court. "It is, indeed, somewhat doubtful whether, strictly, exceptions to the master's rulings in the admission or rejection of evidence can be properly embraced in exceptions to the master's final report at all." *Troy Iron & Nail Factory v. Corning et al.*, 6 Blatch. 328.—SHIPMAN, 1869.

128. "Rule 60 of the Rules of Equity prescribed by the Supreme Court, provides that after a replication is put in, the answer shall not be amended in any material matters, as by adding new facts or defences, except by special leave of the court or a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit. . . . In administering Rule 60, it is undoubtedly a proper construction of it in analogy to the requirements of Rule 29, that good cause for allowing an amendment of an answer, so as to set up a new defence, ought not to be regarded as being shown, when it appears that the matter of the proposed amendment could, with reasonable diligence, have been sooner introduced into the answer." *India Rubber Comb Co. v. Phelps*, 8 Blatch. 85.—BLATCHFORD, 1870.

129. Defences set up in the answer will not be examined, where the burden of proof is upon the respondents, unless some proof is introduced in their support. *Cook v. Howard et al.*, 4 Fish. P. C. 269.—CLIFFORD, 1870.

130. "Defences not set up in the answer will not be examined." *Howes v. Nute*, 4 Cliff. 173.—CLIFFORD, 1870.

131. Where one judge has referred a case to a master for an accounting, another judge will not, upon the coming in of the report of the master, open any of the questions which were decided upon the first reference. *Whitney v. Mowry*, 4 Fish. P. C. 207.—SWAYNE, 1870.

132. "A hypothetical finding by a master, based upon a supposititious construction, different from that of the court in making the reference, is not proper."—*Id.*

133. "The modern practice is, if the rights under the patent are clear, and if the infringement by the defendant is free from doubt, and particularly after the use, for a considerable time, without controversy, of the invention patented,

not to compel the plaintiff in the first instance to proceed at law. In many cases a remedy in that way is found to be entirely incomplete, and, therefore, now, in the contingency named, it is the general practice to apply to the equitable side of the court for relief, which, in a proper case, is given without hesitation." *Shelley v. Brannan*, 2 Bissell, 315.—DRUMMOND, 1870.

134. "As in a cause in equity, the court passes on the facts as well as on the law, therefore the original and the reissued patents are for the court to construe and reconcile, or to declare to be irreconcilable; and although the decision of the Patent Office is entitled to great weight, yet the reissue is but *prima facie* evidence, and the duty devolves on the court, . . . to determine whether the reissue claims more than the original specification shows the patentee to have invented." *Woodward v. Dinsmore*, 4 Fish. P. C. 163.—GILES, 1870.

135. By setting down a plea for argument complainant admits the facts therein alleged, the sufficiency of the plea as a defence is a question to be considered. *Wheeler v. McCormick*, 8 Blatch. 267.—WOODRUFF, 1871.

136. Where a suit for infringement is brought in one circuit for an offence alleged as occurring in that circuit, the suit will not abate by reason of a prior similar suit in another circuit, alleging an offence committed in the circuit last mentioned.—*Id.*

137. There was a dispute between a licensor and its licensee as to a royalty. The licensee and complainant paid the royalty into court, and meanwhile the court enjoined the defendant licensor from annulling the license. The court found itself without jurisdiction. On motion made, it refused to order the money paid to either party and held it subject to any further proper proceedings. *Florence Sewing Mach. Co. v. Singer M'fg Co.*, 8 Blatch. 177.—WOODRUFF, 1871.

138. "The correct practice, where infringement to any extent is admitted, if the patent is held to be valid, is to enter an interlocutory decree for the complainant, and send the cause to a master to ascertain the amount which the complainant is entitled to recover." *Carew v. Boston Elastic Fabric Co.*, 3 Cliff. 356.—CLIFFORD, 1871.

139. Imputing to defendant's witnesses fraud and perjury before an examiner, deserves severe reprehension; and proceedings before examiners returned to court "abounding in improper remarks, prolix statements touching the conduct of counsel, officers of the Patent Office, witnesses, and others, which are not proof," "ought

to have been expunged at the cost of complainant, before the case was brought to a hearing, or the proofs printed for the use of the court." *Smith v. Elliot*, 9 Blatch. 400.—WOODRUFF, 1872.

140. "Whatever may be our personal opinions of the fitness of a jury as a tribunal to determine the diversity or identity in principle of two mechanical instruments, it cannot be questioned that when the plaintiff, in the exercise of the option which the law gives him, brings his suit in the law in preference to equity side of the court, that question must be submitted to the jury, if there is so much resemblance as raises the question at all." *Tucker v. Spaulding*, 13 Wall. 453.—SUP. CT. 1872.

141. "The court will not so far take notice of parol agreements of counsel made or alleged to be made out of court as to undertake, when there is a conflict of opinion between the respective counsel as to the terms of the agreement, or a difference of recollection as to its existence or meaning, to decide the question of comparative accuracy of recollection or construction, and determine, first, whether such a parol agreement existed, and secondly, what were its terms, and thirdly, whether the court would enforce it against the objections of counsel or parties." *Am. Saddle Co. v. Hogg*, 1 Holmes, 177.—SHEPLEY, 1872.

142. A departure from defences set up in an answer "is not permitted in courts of chancery, where the complainant is entitled to call upon the defendants to answer under oath. The answer thus put in must be deemed and held to disclose the true and only defence which the defendants have to the allegations of the bill, and they are thereby concluded. It is with the issues thereby raised that the court has to deal." *Russell & Erwin M'fg Co. v. Mallory et al.*, 10 Blatch. 140.—WOODRUFF, 1872.

143. Where defendants appear, by the bill of complaint, to be inhabitants of another district, and would avail themselves of a plea to the jurisdiction, they must do it by appearance, etc., in person. "The appointment of an attorney, solicitor, or agent, by whom the plea is put in, is, *per se*, an appearance—an admission that the court has jurisdiction and a submission thereto." A special appearance by attorney, without leave of court, does not relieve defendants from the application of the rule. *Thayer et al. v. Wales et al.*, 5 Fish. P. C. 448.—BENEDICT, 1872.

144. "It is undoubtedly irregular to swear a person in a suit before the bill has been filed. The irregularity consists in having the affidavit sworn to under the title of a suit in which no

bill has been filed. If the title had been omitted there would have been no irregularity." *Baldwin v. Bernard et al.*, 5 Fish. P. C. 442.—BLATCHFORD, 1872.

145. Where there is a mistake in an interlocutory decree, referring a case to a master, the mode of remedy is not by exception to the master's report, but by application to the court for a resettling of the decree. *Williams v. Leonard et al.*, 9 Blatch. 476.—WOODRUFF, 1872.

146. There is no right to take a case from a state court to a federal court, because a portion of the defendants are citizens of other states than that state where the plaintiff and one of the defendants reside, and where the suit is brought. *Florence Sewing Mach. Co. v. G. & B. S. M. Co.*, 110 Mass. 70.—CHAPMAN, 1872.

147. Whether two patents are for the same invention is a question for the jury. *Hawkes v. Remington et al.*, 111 Mass. 171.—GRAY, 1872.

148. A corporation does not waive an objection to the jurisdiction of the court over it by appearing and pleading, by an attorney, to the jurisdiction of the court. *Decker v. N. Y. Belling & Packing Co.*, 6 Fish. P. C. 374.—BLATCHFORD, 1873.

149. Evidence taken by a defendant was properly objected to because of lack of proper averment in the answer. The parties agreed that if the court permitted amendment of the answer, the testimony should then be considered. The court permitted the amendment upon the condition that defendant should not in any event recover costs up to the time of hearing the case. *Roberts v. Buck, Jr.*, 1 Holmes, 224.—SHEPLEY, 1873.

150. Where evidence is offered not warranted by defendant's answer, a proper case may arise at the hearing, where proper amendment of the answer may be moved for, and granted *nunc pro tunc*. *Roberts v. Ryer*, 11 Blatch. 11.—BLATCHFORD, 1873.

151. An exception to a finding of a master on a question of fact, where the whole evidence is not reported, and where the finding depends more or less on an inspection of a machine by the master, will not be sustained. *Piper v. Brown et al.*, 1 Holmes, 196.—SHEPLEY, 1873.

152. When a case is referred to a master for an accounting in profits and damages, it is not for him to go into the general state of the art to determine whether defendants' machines infringe, or to consider the general scope and extent of the patent. *Turrell v. Ill. Cent. R. R. Co. et al.*, 5 Bissell, 344.—DRUMMOND, 1873.

153. "The right of a court to prescribe rules to regulate the time and manner of filing pleas

is beyond question, if they are reasonable, and such rules are indispensable to the despatch of business and the orderly administration of justice." *Packet Co. v. Sickles*, 19 Wall. 611.—SUP. CT. 1873.

154. Where a litigation has been pending for a number of years, it is not proper to permit an amendment of a declaration setting up the statute of limitations.—*Id.*

155. Where it is entirely clear that the plaintiff cannot recover, it is proper for the court to direct a verdict for the defendant. *Klein v. Russell*, 19 Wall. 433.—SUP. CT. 1873.

156. Protracted sickness of counsel having an intimate knowledge of a cause at issue is reason for refusing to set a case down peremptorily for hearing. *Rumford Chemical Works v. Hecker*, 1 Bann. & Ard. 185.—BLATCHFORD, 1874.

157. Where, pending a suit against a copartnership for infringement, one partner dies, his death is to be suggested on the record, and the suit proceed against the survivors, it not being necessary to cite in an administrator or executor of the deceased. *Troy Iron & Nail Factory v. Winslow et al.*, 11 Blatch. 513.—WOODRUFF, 1874.

158. "If a desire by a defendant is expressed to test in a superior court the rectitude of what has been already adjudicated, and a complainant should refuse to stipulate that the proofs taken in another cause might be filed in the one pending, the usual rule would not be followed in the granting of a preliminary injunction." *Goodyear Dental Vulcanite Co. et al. v. Willis*, 1 Flippin, 388.—EMMONS, 1874.

159. "Affidavits to be used in support of, or in opposition to special motions ought always to be served on the opposing counsel a reasonable time before the motion is brought on. Where this is not done, the court may reject the affidavits in its discretion or allow the same to be read, giving the opposite party the option to proceed with the hearing or to take time for the perusal and examination of the affidavits; and the production of affidavits in reply where this is competent." *Sterrick v. Pugsley et al.*, 1 Flippin, 350.—LONGYEAR, 1874.

160. Where respondents are sued as a partnership, it may be doubtful whether it would be competent for the court to enter a decree against them as a corporation, but such a pleading may be cured by amendment. *Needham v. Washburn et al.*, 4 Cliff. 254.—CLIFFORD, 1874.

161. The question of admissibility of evidence before a master on an accounting does not properly come up by exceptions to the master's re-

port. The master is to take down the testimony, note the objection, and the reason stated, leaving the admissibility to be determined by the court on a motion to strike out. *Am. Nicholson Pavement Co. v. City of Elizabeth et al.*, 1 Bann. & Ard. 439.—NIXON, 1874.

162. Where a patented improvement is but a part of an entire organization, and an order referring the case to a master is broad enough to cover profits and damages on the whole structure, such order is too broad, and will serve as a basis for reversing the final decree. *Littlefield v. Perry*, 21 Wall. 205.—SUP. CT. 1874.

163. Where a patent expires, and is extended pending litigation thereon, and an infringement by a respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the infringement, both before and subsequent to the extension. *Reedy v. Scott*, 23 Wall. 352.—SUP. CT. 1874.

164. A patent had been twice reissued; suit upon it was then brought. The patent mentioned in the bill was the first reissue. The case was tried by all parties as though the patent mentioned in the bill had been the second reissue; under these circumstances, after final decree, the Circuit Court permitted the proper amendment of the bill, and the Supreme Court sustained the amendment. *Tremain et al. v. Hitchcock et al.*, 23 Wall. 518.—SUP. CT. 1874.

165. "Matters embraced in the pleadings not in controversy will be passed over without comment." *Union Paper Collar Co. v. Van Deusen et al.*, 23 Wall. 530.—SUP. CT. 1874.

166. "Successive bills [of complaint] in different districts will lie for successive infringements of a patent." *Penn. Salt M'fg Co. v. Myers*, 1 Weekly Notes, 377.—MCKENNAN, 1875.

167. "As a general rule, the laws of the state in which a national court sits must be the rules of decision in such a court." *Anthony et al. v. Carroll*, 2 Bann. & Ard. 195.—SHEPLEY, 1875.

168. "The court . . . cannot take notice of what was not set up against plaintiff's patent." *U. S. & Foreign Salamander Felting Co. v. Haven*, 3 Dillon, 131.—TREAT, 1875.

169. As to the form of a decree, when the court making the decree decides differently from another court, on the same patent, see —. *Rumford Chemical Works v. Hecker*, 2 Bann. & Ard. 386.—NIXON, 1876.

170. Where a question remains undecided with regard to the damages and profits during differ-

ent terms, it is proper to order a separate accounting as to each term.—*Id.*

171. *Query.* Whether a patent owner may not bring suit against parties who are preparing to infringe his patent, and subsequently, after the patent has actually been infringed, bring a second suit for that infringement? *Turrell v. Spaeth et al.*, 2 Bann. & Ard. 315.—NIXON, 1876.

172. After a decree is made, application for rehearing on the ground of newly-discovered evidence must be by a petition to the court for leave to file a supplemental bill setting forth the newly-discovered evidence, and for a rehearing of the case at the time when the supplemental bill may be ready for hearing. *Reeves v. Keystone Bridge Co.*, 2 Bann. & Ard. 256.—McKENNAN, 1876.

173. A cross-bill filed without notice or leave obtained will be stricken from the files on motion. *Webster Loom Co. v. Short et al.*, 10 O. G. 1019.—NIXON, 1876.

174. "Whether a case shall be first tried at law is a matter of discretion and not of jurisdiction; and, in this matter, the courts of the United States, sitting as courts of equity in patent cases, are much less disposed than the English courts are to send parties to a jury before assuming to decide upon the merits." *Cochrane et al. v. Deener et al.*, 94 U. S. 780.—SUP. CT. 1876.

175. It is within the discretion of circuit courts to send a patent case to a jury, or to refuse so to do, and the action is not a ground of appeal.—*Id.*

176. An answer was sworn to September 4th, 1874. The replication was filed, and the complainant's proofs were taken, and were closed on October 9th in that year. On December 30th, 1875, defendants gave notice of a motion to amend their answer, setting up a new alleged anticipating patent; this patent defendants had known of for a number of years, and the application was refused. *Webster Loom Co. v. Higgins et al.*, 13 Blatch. 349.—JOHNSON, 1876.

177. An interference case in court "having been presented by a 'bill in equity,' and notice given as prescribed, the 'due proceedings' to follow must be such as pertain to equity causes." And "all the proceedings had before the Patent Office should be received, together with such testimony as may be taken in the progress of this suit." Furthermore, "the court will receive all the proceedings had before the Patent Office, and when an appeal lies to the Supreme Court of the District of Columbia, all the proceedings had before that court, together with all new and additional testimony taken in the equity

proceedings." *Squire, John J., in re*, 3 Bann. & Ard. 183.—TREAT, 1877.

178. Where a master has erred in departing from the construction of the patent, as settled by the court, the case will be sent back to the master for further and proper procedure. *Ruggles v. Eddy et al.*, 2 Bann. & Ard. 627.—WHEELER, 1877.

179. "Where a replication is put into a plea, the parties proceed to the examination of witnesses in the same way as in a case of a replication to an answer. The force of the replication in such a case is the admission that the plea is sufficient in itself, but is not true in fact, and the testimony is to be taken as to its truth. If found true on the weight of evidence, a dismissal of the bill on the hearing is a matter of course." *Reissner et al. v. Anness et al.*, 13 O. G. 7.—MILAN, 1877.

180. When notice is given in an answer of an intention to insert additional names upon the defence of prior use, it is proper subsequently to grant a motion letting in such names. *Roemer v. Simon et al.*, 95 U. S. 214.—SUP. CT. 1877.

181. "The examination of an adverse party as a witness, before trial, in a common law suit, cannot be had. . . But a suit in equity, to obtain a discovery under oath in aid of the prosecution or defence of a suit at law, is not abolished in the courts of the United States." *Beardsley v. Littell et al.*, 14 Blatch. 102.—BLATCHFORD, 1877.

182. "The distinction between suits in equity and actions at common law exists in the courts of the United States. Such distinction is recognized by the Constitution, and cannot be abolished by Congress."—*Id.*

183. Where there are a number of equity causes involving the same question, it is proper to stipulate that the trial of one case shall stand as a trial of all. *Andrews et al. v. Spear*, 4 Dillon, 472.—NELSON, 1877.

184. "Rule 18 does not require special notice of an application for a decree when no answer is filed." *Andrews et al. v. Denslow et al.*, 14 Blatch. 182.—BENEDICT, 1877.

185. A bill for a discovery will not lie against a corporation, although in order to compel a discovery on oath, the officers of the corporation must be made parties, otherwise the answer is put in under the common seal. *Vaughan v. East Tenn., Virginia & Georgia R. R. Co.*, 1 Flippin, 621.—BROWN, 1877.

186. "Interlocutory orders and decrees are subject to revision until a final decree is made." *Magic Ruffle Co. v. Elm City Co.*, 14 Blatch. 109.—SHIPMAN, 1877.



187. Where, pending a suit against him, respondent dies, under Rule 56 the suit is not revived unless order to that effect is made. *Atterbury et al. v. Gill*, 2 Flippin, 289.—WELKER, 1877.

188. At a hearing, upon pleadings and proofs, defendant may be permitted to amend his answer, "motion for leave so to do having been made before final argument;" and set up two years' public use. In making this order, the court ordered the case to stand open sixty days for the taking of evidence solely on this issue. *Snow v. Tapley*, 3 Bann. & Ard. 228.—SHEPLEY, 1878.

189. "Equity Rule 82 requires a master to file his report whether his fees are paid or not, and provides for an attachment to compel payment. There is no rule requiring an examiner to file testimony taken by him without payment of his fees. Doubtless he has a lien as against the party for whom testimony is taken, upon the testimony, for his fees. . . . If the party who has caused the testimony to be taken is willing, or prefers to have his cause heard without it, the opposite party does not seem to have any just cause for complaint. If, however, he deems the testimony of sufficient value to him to be paid for by him, he may be entitled to have it filed on making the payment." *Freese v. Budenfeld*, 3 Bann. & Ard. 205.—WHEELER, 1878.

190. Defendants cannot escape an accounting in damages and profits by showing that they have ceased to infringe, and by showing that there have been no profits. *Bullock Printing Press Co. v. Jones et al.*, 3 Bann. & Ard. 195.—WHEELER, 1878.

191. If a cross-bill is appropriate to the original bill, it must relate to the subjects of it and embrace a part, at least, of the litigation introduced by it, so that, in filing the cross-bill, the orator in that has merely met the orator in the original where he was called upon to do so. "For this reason a plea of jurisdiction in another court is not a good plea to a cross-bill." *Brandon M'fg Co. v. Prime et al.*, 14 Blatch. 371.—WHEELER, 1871.

192. Where a cross-bill relates to the subject of the original bill, in some respects some of the cross-bill is proper to be answered in some form by some of the parties; and that some of it may not be, is no good reason for not answering what should be answered, and in such case where demurrer is made to the whole cross-bill, and a part of it should clearly be answered, demurrer must be overruled.—*Id.*

193. Where there are different parties on the

same side in a suit, and all are called upon to make answer, some properly and some improperly, those who are properly called upon must answer.—*Id.*

194. Where a cross-bill sets forth that defendants have a record title to the patent and the orator has the equitable title to it, and that the orator in the original bill acquired title with notice of such outstanding equity, and is endeavoring to assert the legal against the equitable title, it is unquestionably the proper office of the cross-bill to afford relief in such a case if the case is made out.—*Id.*

195. After a cause was at issue, and a preliminary injunction had been ordered, respondent asked for leave to file an amendment to his answer attacking the novelty of the patented invention. In a former suit between the same parties the patent had been sustained and defendant found an infringer. Moreover, in a written agreement the respondent had acknowledged the validity of the patent. The amendment was denied. *Pentlarge v. Beeston*, 15 Blatch. 347.—BENEDICT, 1878.

196. "Nothing can be assigned for error which contradicts the record, nor can an appellant be allowed to assign for error the ruling of the court in respect to any defence not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow that to be accomplished by an assignment of error." *Bates et al. v. Coe*, 98 U. S. 31.—SUP. CT. 1878.

197. "The only authority for attacking the originality or validity of a patent is that given by the act of Congress, and consequently the attack must be made in the mode the patent act prescribes."—*Id.*

198. "More than one patent may be included in one suit, and more than one invention may be secured by the same patent, in which case the several defences may be made to each patent in suit and to each invention included in the bill of complaint."—*Id.*

199. Where a bill of complaint sets forth the original and reissued patents, the question of the identity of the two patents is examinable upon demurrer. *Giant Powder Co. v. California Powder Works et al.*, 96 U. S. 128.—SUP. CT. 1878.

200. In equity the bankruptcy of a party and an appointment of an assignee, does not abate pending suit, but calls for a supplementary bill citing in the assignee. This can be avoided by a reconveyance to the complainant in suit. *Gear v. Fitch*, 3 Bann. & Ard. 573.—LOWELL, 1878.

201. "Masters charged with that duty may examine the respondent, and, if necessary, inspect his books, but it is incumbent upon the

complainant to furnish proof of whatever else is necessary to enable the master to make the proper computation." *Brady v. Atlantic Works*, 3 Bann. & Ard. 577.—CLIFFORD, 1878.

202. Where there is no actual contest between the parties before a court, the court will not proceed to make a decision upon the merits. *Am. Middlings Purifier Co. v. Vail et al.*, 15 Blatch. 315.—BLATCHFORD, 1878.

203. After a case was at issue and preliminary injunction ordered, defendants applied for leave to amend their answer. The court held that the application should be denied; among other reasons was this, that in a former action between the same parties, upon the same patent, in the same court, by the consent of the defendants, a decree was rendered wherein complainant's patent was adjudged valid and defendants found infringers. *Pentlarge v. Beeston et al.*, 4 Bann. & Ard. 23.—BENEDICT, 1878.

204. When the proofs are closed, and at the final hearing, the complainant is permitted to specify the claims of the patent on which he will ask for a decree. *Thatcher Heating Co. v. Carbon Stove Co.*, 4 Bann. & Ard. 68.—NIXON, 1878.

205. Issues of fact, in civil cases, in the circuit courts, may be tried and determined without a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing consenting to that mode of trial. *Judson v. Bradford et al.*, 3 Bann. & Ard. 539.—CLIFFORD, 1878.

206. Where, upon the coming in of a case from a master, the court awards only nominal damages, the case will not be sent back to the master in the absence of evidence showing good reason therefor. *Garretson v. Clark et al.*, 15 Blatch. 70.—BLATCHFORD, 1878.

207. "More than one patent may be included in a suit, and more than one invention may be secured in the same patent, in which cases the several defences authorized by the patent act may be pleaded to each patent in suit and to each invention included in the charge of infringement." *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

208. "Questions of infringement are questions of fact, in respect to which the parties are chiefly interested in the court's conclusions, and in that view it is not usually deemed necessary to enter much into the details of the evidence."—*Id.*

209. "A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial." *Watt v. Starke*, 17 O. G. 1092.—SUP. CT. 1879.

210. The complainant, on a motion for a new

trial, may have the evidence or the substance of it stated and made part of the record, and then an appellate court can see whether the court below had before it sufficient grounds for being satisfied with the conclusions of the jury. "This is the proper course in such a case."—*Id.*

211. "Where a court of chancery suspends proceedings in a cause in order to allow the parties to bring an action at law to try the legal right, it does not assume to interfere with the course of proceedings in the court at law, and a motion for new trial must be made to that court; but when it directs an issue to be tried at law a motion for a new trial must be made to the Court of Chancery, and for that purpose the party applying for a new trial must procure notes of the proceedings, and of the evidence given at the trial, for the use of the chancellor. This is done either by having the proceedings and evidence reported with the verdict or by moving the chancellor to send to the judge who tried the issue, for his notes of trial, or procuring a statement of the same in some other proper way."—*Id.*

212. "The verdict of a jury upon an issue out of chancery is only advisory, and never conclusive upon the court. It is intended to inform the conscience of the chancellor. It may be disregarded and a decree rendered contrary to it."—*Id.*

213. "A bill of exceptions is not the proper mode of reviewing the trial of an issue out of chancery."—*Id.*

214. Where, in a hearing in damages and profits, the counsel employed are not experienced in such matters, and overlook material points, it is proper that the court call attention thereto, and allow the case to be recommitted on the application of the other party. *Star Salt Caster Co. et al. v. Crossman et al.*, 4 Bann. & Ard. 566.—LOWELL, 1879.

215. Where a bill of complaint is demurred to, and the bill is maintained, the demurrer will be overruled, with costs to the complainant, and leave to defendants to answer over. *Perry v. Littlefield et al.* 17 Blatch., 272.—BLATCHFORD, 1879.

216. Where two suits are pending for infringement, one against the maker of the infringing article, and the other against the seller, accounting will only be ordered in the case against the maker. *Harper v. Cooke et al.*, 5 Bann. & Ard. 50.—LOWELL, 1879.

217. "The initial litigation, for the purpose of asserting and sustaining the validity of a patent, should be between the patentee and infringing manufacturer. After a patent has been ju-

dicially sustained in a suit, then the patentee should have the full aid of the courts to suppress the sales of infringing goods." *Irwin et al. v. McRoberts et al.*, 4 Bann. & Ard. 411.—BLONGETT, 1879.

218. Defendant moved for leave to amend his answer so far as to deny certain allegations of the complainant which, not being denied in the answer, stood as admitted. To the complaint, defendant had before interposed a pleading which combined demurrers to each count in the complaint, with pleas of the statute of limitations, and matter in defence, which could only be urged in mitigation of damages; the demurrers were overruled and the pleadings permitted to stand as an answer. Defendant then moved to amend the answer and the motion was granted, but upon the hearing of that motion it was first discovered that the answer, as amended, did not contain a denial of the allegations in the complaint. The court held that complainant could have had stricken out the matter in defence, or the demurrers on motion, but instead it preferred to notice the demurrers for hearing; by doing this it elected to treat the demurrers as a regular pleading; upon a decision overruling the demurrers, unless leave had been given to defendant to answer, there would have been no answer in the case; this motion was considered as though there had been no answer until leave was given, and the position of the complainant to be the same as though defendant had for the first time served the answer he now moved to amend. *Goodyear Dental Vulcanite Co. v. White*, 17 Blatch. 5.—WALLACE, 1879.

219. The defence of abandonment cannot be made at a hearing on the merits unless the same was set up in the answer. *Williams v. Boston & Albany R. R. Co.*, 17 Blatch. 21.—WALLACE, 1879.

220. "The court has power to set aside the report of a master for any manifest error either in law or fact, and to recommit it for further proceedings, or to correct it, if the means of correction are furnished." *Steam Stone Cutter Co. v. Windsor M'fg Co. et al.*, 17 Blatch. 24.—WHEELER, 1879.

221. It is "not the province of the master, nor is it the province of the court, to suggest any specific line of proof, either as proper or necessary. The burden is on the plaintiff to lay a basis, by evidence, for ascertaining the proper profits or damages. If he produces certain evidence and lays a certain basis, all that the master and the court are to do is to say whether he has made out his case or not. If he has not made out his case, that is all there is to be said."

*Garretson v. Clerk et al.*, 4 Bann. & Ard. 536.—BLATCHFORD, 1879.

222. A bill and answer having been filed, complainants filed an affidavit; complainants moved for a decree pursuant to the prayer of the bill, "upon the bill and answer filed herein and the annexed affidavit and the papers therein referred to." The court held that this motion, in the way in which it was made, coupled with the affidavit, was not in accordance with the practice of the federal courts; and the court proceeded to hearing upon the bill and answer without reference to the affidavit. *Evory et al. v. Candee et al.*, 17 Blatch. 200.—SHIPMAN, 1879.

223. "In equity, the objection may be taken by demurrer, if the want of the parties appears on the face of the bill, or by plea, or answer, or orally at the hearing. Rule 53, in equity, limits the right to this extent, that if the objection is taken for the first time at the hearing, the court shall be at liberty, if it thinks fit, to make a decree saving the rights of the absent parties." *Hammond v. Hunt et al.*, 4 Bann. & Ard. 111.—LOWELL, 1879.

224. If a complainant omits to file a replication, and the defendants proceed to take testimony without objection, defendants cannot finally object to the lack of replication. *Fischer v. Wilson et al.*, 16 Blatch. 220.—BLATCHFORD, 1879.

225. Defendant made application for an order dismissing complainants' bill for want of a replication. It appeared that complainants had failed to file the replication because negotiations for settlement were pending between the parties. The court allowed complainants to file replication *nunc pro tunc*. *Robinson et al. v. Randolph*, 4 Bann. & Ard. 317.—NIXON, 1879.

226. A proposed amendment to an answer setting up in new defence after the case has gone to a master on accounting, where the same defence may be practically used before the master, is to be denied. *Evory et al. v. Candee & Co.*, 5 Bann. & Ard. 67.—SHIPMAN, 1879.

227. "The right to file a bill of revivor is confined to cases of representation of the party deceased by the mere appointment and operation of law. . . . On the other hand, there may be a priority of right and title, under the deceased, by a transfer or conveyance of that right to a person who is not in by mere operation of law, and is not the heir or personal representative of the deceased, and in such a case a bill of revivor will not lie." *Metal Stamping Co. v. Crandall*, 18 O. G. 1531.—WALLACE, 1880.

228. As regards a partnership, neither a bill of revivor nor a supplemental bill can be prose-

cuted except in the names of the individual partners.—*Ib.*

229. For rules for proceeding on reference to a master, for an accounting in damages and profits, see —. *Kerosene Lamp Heater Co. v. Fisher*, 1 Fed. Rep. 91.—LOWELL, 1880.

230. There being different complainants, and conflict of claims between them, defendants were ordered to pay the amount found due as damages into court. *Campbell v. James et al.*, 18 Blatch. 92.—WHEELER, 1880.

231. While a *bona fide* motion to strike an answer from the files is pending, the suit will not be dismissed on the motion of defendant for lack of replication. *Allis et al. v. Stowell*, 10 Blatch. 57.—DYER, 1880.

232. Motion to strike an answer from the files is a proper mode of objecting thereto, as much as the filing of exceptions thereto.—*Ib.*

233. Where an amended answer has been filed, preparatory to a rehearing, upon special leave of court, exceptions to such an answer cannot be filed without leave of court, but a motion to strike the answer from the files may be made without special leave.—*Ib.*

234. By the court: "The petition contains what purports to be a copy of my opinion, but it is a copy of the opinion before it was revised. The opinion should not have been published until it had received my revision, as counsel very well knew." *Giant Powder Co. v. Cal. Vigorit Powder Co. et al.*, 5 Fed. Rep. 197.—FIELD, 1880.

235. After entry of final decree, in a circuit of original jurisdiction, a petition for rehearing cannot be considered *ex parte*.—*Ib.*

236. By the court: "Nothing can be gained by the strong language expressed by counsel in presenting the petition as to the supposed errors of the court, nor by the statement as to what may have been said of the decision by other counsel, who have neither examined, studied, nor understood the case."—*Ib.*

237. A corporate board of education of New York City was sued for infringement; the Legislature provided a successor to the board under a new name, and then another; meanwhile the cause proceeded to hearing on the merits and decree. Then the final successor filed an answer as if it were a new party. The answer was ordered off the files. *Allen v. New York*, 18 Blatch. 239.—WHEELER, 1880.

238. "The rules in equity are framed for bringing a cause to a hearing, and do not apply after a cause has been heard unless some proceedings are taken to bring it within their operation again, and to start it anew toward a hearing. When a cause is heard without objection

by either party, all steps not taken by either which the other had a right to insist upon for the orderly bringing the cause to a hearing, must be considered as waived."—*Ib.*

239. "An interlocutory decree is always open to amendment and correction." It is proper, during an accounting, to have the answer and decree amended to let in a prior foreign patent to the same inventor, for the same invention, to get its limiting effects in the home patent. *De Flores et al. v. Raynolds et al.*, 17 Blatch. 436.—BLATCHFORD, 1880.

240. A replication filed after the allowed time, and testimony taken by complainant more than three months thereafter, may stand as regular, if the court so order. *Fischer v. Hayes*, 19 Blatch. 26.—BLATCHFORD, 1881.

241. "The general power of the court over its own judgments, orders, and decrees in civil and criminal cases, during the existence of the term at which they are first made is undeniable." "The power to vary a final judgment or order, at least in a case where there was jurisdiction to make it, does not exist after the term at which it was made."—*Ib.*

242. Where a prior suit on the same patent is pending in another court—which a party is otherwise entitled to maintain—and the later suit might unduly affect the rights of the parties in the earlier suit, action in the later suit will be stayed and the parties required to prosecute the earlier suit with despatch. *Müller et al. v. Liggett & Myers Tobacco Co.*, 2 McCrary, 375.—MCCRARY, 1881.

243. When a plea is overruled the defendants must have leave to answer. *Wooster v. Blake et al.*, 7 Fed. Rep. 816.—BLATCHFORD, 1881.

244. A master's report having been made, a final decree ordered, and appeal claimed, complainant moved to recommit to master, to take account of infringement of later date than covered by his report. Motion was denied without prejudice to complainant's right than to renew it after decision by Supreme Court. *Union Met. Cartridge Co. v. U. S. Cartridge Co.*, 8 Fed. Rep. 446.—LOWELL, 1881.

245. By the court: "As . . . has appeared generally in the suit, he has waived his right to object that he is not named as a defendant in the prayer for a subpoena, and he has no concern with the naming of others in such prayer." *Buerk v. Imhaeuser et al.*, 8 Fed. Rep. 457.—BLATCHFORD, 1881.

246. Defendant being sued for infringement, justified under license, by plea, and at the trial of the plea offered affidavits taken prior to the filing of the plea. The court doubted whether

*ex parte* affidavits were receivable at all, and held that if they could be offered at all, "it must be on notice to the adverse party and the tender of the affiant for cross-examination." *Lillienthal et al. v. Washburn*, 8 Fed. Rep. 707.—PARDEE, 1881.

247. Where defendants sought to have their answer amended to let in a new patent, but they did not show its materiality, or why it could not have been set up before, the application was denied. *Richardson v. Croft et al.*, 20 O. G. 372.—BLATCHFORD, 1881.

248. Where both parties acquiesced in going on in a federal court under a complaint and answer filed in a state court, without the filing of a new bill of equity in the federal court, and where complainant treated the answer of defendants as a general denial of the agreement set up in the complaint, the court so treated it. *Gardner v. Crossman et al.*, 21 O. G. 204.—BLATCHFORD, 1881.

249. An order of court allowed respondents to give notice of a motion for leave to renew their motion to amend their answer. Instead of giving notice of a motion for leave to renew such motion, they gave notice only of a motion for leave to amend their answer; but, as both parties agreed to treat the motion argued as one for leave to amend, and not for leave to renew, the court so treated it. *Richardson v. Croft et al.*, 20 O. G. 526.—BLATCHFORD, 1881.

250. Where a replication has not been filed, but both parties have treated it as filed, the court will also so treat it. *Tilghman v. Proctor et al.*, 102 U. S. 707.—SUP. CR. 1881.

251. For a discussion of the rights of the United States Circuit and District courts to adopt and vary the laws, process, forms, and procedure of the states, see —. *Steam Stone Cutter Co. v. Sears*, 20 Blatch. 23.—WHEELER, 1881.

252. The United States Circuit Court for the District of Vermont, in its Rule 11, provided that "the creation, continuance, and termination of liens and rights created by attachment of property, or the arrest of a defendant, shall be governed by the laws of this state." *Held*, that it had the right, in an equity cause, to issue a writ of sequestration, in the nature of an attachment, to create a lien for satisfying a decree pending the taking of an account of damages and profits in a patent suit.—*Id.*

253. After hearing on a motion for a provisional injunction, a party cannot take *ex parte* affidavits and have them considered. *Illingworth v. Spaulding et al.*, 9 Fed. Rep. 154.—NIXON, 1881.

254. In a part of a series of cases, using the same evidence, defendant had no just claim to further time for taking testimony but, because of the other part of such series, the time was extended. *Wooster v. Howe Mach. Co.*, 10 Fed. Rep. 666.—BLATCHFORD, 1882.

255. The fees of the master are to be borne in the first instance by complainant. *Macdonald v. Shepard*, 10 Fed. Rep. 919.—LOWELL, 1882.

256. A party on whom improper service of process is made must in the first motion based thereon show the facts which evidence the impropriety of the service, if such facts are then within his knowledge; and it will not avail him to make a showing of such facts in a second motion. *Matthews v. Puffer et al.*, 20 Blatch. 233.—BLATCHFORD, 1882.

257. By the court: "The examiner had no power to rule on the admissibility of the evidence and the defendant had the right, upon a question which, to say the least, was not free from doubt, to take the opinion of the court. Had he answered, the mischief which he seeks to avoid would have been accomplished and he would have been left remediless. He acted under the advice of counsel, apparently in good faith, and even though he acted mistakenly, it is not a case where he should be punished." *Roberts v. Walley*, 14 Fed. Rep. 167.—COXE, 1882.

258. After interlocutory decree, respondent will not be permitted to impeach the decree on the ground that complainant's patent was void by reason of not being limited on its face to expire with a prior foreign patent for the same subject-matter. *Bate Refrigerating Co. v. Gillett*, 22 O. G. 1205.—NIXON, 1882.

259. By the court: "It is never too late at any time during the pendency of the proceedings for the court to examine into its right and power to make a decree or a judgment in a case." Nor need the objection be raised in the pleadings. *Spring et al. v. Domestic Sewing Mach. Co.*, 13 Fed. Rep. 446.—NIXON, 1882.

260. A variance between an original patent and its reissue may be availed of by a plea in a bar which sets out the original and reissued patents and also pertinent intermediate patents. *Hubble et al. v. De Land*, 11 Bissell, 382.—DYER, 1882.

261. A suit for infringement having been brought upon a patent, the answer alleged invalidity of the patent by reason of prior invention by another person. There being a suit in another court pending for the purpose of determining the question of priority, the decision was reserved in the infringement suit for the

determination of the other suit. *Lockwood v. Cutter Tower Co.*, 11 Fed. Rep. 724.—LOWELL, 1882.

262. Some of the defendants' evidence was taken and filed out of time. No motion to suppress was filed. The orator objected to its consideration. As no motion to suppress was filed, the testimony was allowed to stand and was considered. *Matthews v. Spangenberg et al.*, 20 Blatch. 482.—WHEELER, 1882.

263. Complainants, upon an accounting, having testified as to complainants' cost of manufacture and their profits, defendant was held entitled, upon cross-examination, to have complainants' books produced; but it was held also that a production of the books at complainants' office would answer. *Wisner et al. v. Dodds*, 14 Fed. Rep. 655.—BAXTER, 1883.

264. Where counsel made verbal exceptions to the master's draft report, but not written ones, he was allowed by the court, and after the hearing by the court, to file the written exceptions *nunc pro tunc*. *Fischer v. Hayes*, 16 Fed. Rep. 469.—SHIPMAN, 1883.

265. Where the court was of the opinion that the master's award of nominal damages was not a satisfactory disposal of the case, and that further pertinent evidence was capable of production, the case was sent back to the master for further hearing.—*Id.*

266. Where the defendant, on a hearing in damages, refuses to produce his books, and complainant takes no steps to produce their production, complainant will have no remedy in the premises thereafter.—*Id.*

267. By the court: "Objections to the jurisdiction are usually taken in the first instance, but a plain defect of jurisdiction may be insisted upon at the hearing." *Burdell v. Comstock*, 15 Fed. Rep. 395.—BAXTER, 1883.

268. A suit for infringement of a patent having gone to an accounting, defendant asked that complainant be enjoined from prosecuting other suits on the same patent until the determination of the suit first mentioned. These other suits having been prepared for final hearing on proofs, the court refused to interfere. *Allis v. Stowell*, 16 Fed. Rep. 783.—DYER, 1883.

269. "To prevent a multiplicity of suits, the court may, in a proper case and upon proper showing, require the prosecution of suits between the patentee and the mere user of the patented machine to be suspended, and to await the result of a suit pending between the patentee and the principal infringer from whom the user purchased the machine. Undoubtedly the court has the power to exercise restraining control

over the litigation where the principal parties are before it. The important question in such a case would seem to be, 'When may the power be rightfully and properly exercised?' It will not be exercised where it is not fully shown that the user purchased his machines of the defendant, and that they are the same as those involved in the suit against the defendant.—*Id.*

270. If an objection urged to a bill involves only a question of pleading, and the bill is not defective in a matter of substance, such an objection will not be available at a hearing on the merits. Such objection must be taken by demurrer. And even where there is a defect of parties appearing upon the face of the bill, the defendant must resort to a demurrer or the court is at liberty to make a decree saving the rights of the parties. *Pelham v. Edelmeyer*, 21 Blatch. 188.—WALLACE, 1883.

271. An instance of the master's fees upon the accounting ordered to be paid by the defendant in the first instance. *Urner v. Kayton et al.*, 21 Blatch. 428.—WHEELER, 1883.

272. In filing an exception to a report of a master, it is not necessary to state exactly therein the exception taken before the master. *Marks v. Fox*, 18 Fed. Rep. 713.—WALLACE, 1883.

273. Where, of different defendants, only part have been served with subpoena, the appearance of a solicitor for the defendants generally is only the appearance for such defendants as have been served with process. *Lewis v. Standard Steam Laundry Machinery Co. et al.*, 21 Blatch. 184.—WHEELER, 1883.

274. Where a defendant named in a bill of complaint has not been served with process, but answers to the bill, he becomes a party to the suit.—*Id.*

275. Special permissions to take testimony are only granted where there is a reasonable prospect of securing the desired testimony. *Hicks v. Otto et al.*, 17 Fed. Rep. 539.—WHEELER, 1883.

276. Where a master's finding omits finding on a material point, the case will be recommitted in order to obtain such finding. *McKay v. Jackman*, 17 Fed. Rep. 641.—WHEELER, 1883.

277. Where a decree for infringement rests on the consent of parties—the patent never having been construed—such decree does not form a basis for deciding, on motion, that some structure not before in question in the former suit, comes within the decree, and a new bill must be filed. *Higby v. Columbia Rubber Co.*, 18 Fed. Rep. 601.—LOWELL, 1883.

278. The Supreme Court will not interfere, on motion, with injunctions granted by the Circuit Court except in cases appealed before the

adoption of Equity Rule No. 30. *White et al. v. Dunbar et al.*, 26 O. G. 353.—SUP. CT. 1883.

279. "The appearance of the solicitor for the defendants would of itself alone be an appearance only for defendants who had in some manner been served with process." *Smith v. Stand and Laundry Mach. Co.*, 19 Fed. Rep. 826.—WHEELER, 1883.

280. When a defendant named in the bill of complaint answers the bill, he becomes personally by his own act a party defendant to the cause made by the bill.—*Id.*

281. Where a plaintiff brought suit for the United States, as well as for himself, to recover the penalty given by the statute which forbids the stamping of unpatented articles as patented, and pleaded some special damage, the plea to such special damage was held to be irrelevant and subject to be stricken out, on motion, under the New York code of procedure which regulates the practice in common law actions, in the district where the suit was brought. This pleading was not, however, objectionable on demurrer. *Winne v. Snow*, 19 Fed. Rep. 507.—BROWN, 1884.

282. Where a suit is brought by a patentee for the annulment of an interfering patent, it is not pertinent for the defendant to attempt to show the invalidity of complainant's patent; and a plea to that effect will be overruled. *Pentlarge v. Pentlarge et al.*, 22 Blatch. 10.—BENEDICT, 1884.

283. By the court: "In passing upon the novelty of the alleged improvement, covered by this patent, we are permitted to consider matters of common knowledge or things in common use." *Phillips et al. v. City of Detroit*, 111 U. S. 604.—SUP. CT. 1884.

284. The court may dismiss a bill on the ground of want of patentability without looking into the answer, and to that end may read complainants' patent in view of the state of the art. *Nicodemus et al. v. Frazier*, 19 Fed. Rep. 260.—MORRIS, 1884.

285. Where complainant bases his claim of infringement upon one of the claims of his patent, defendant cannot put other claims in issue. *Havemeyer v. Randall*, 21 Fed. Rep. 404.—NIXON, 1884.

286. "The defence of unreasonable neglect or delay in filing a disclaimer must be set up in the answer before it can be considered by the court." *Worden et al. v. Searls*, 21 Fed. Rep. 406.—NIXON, 1884.

287. It seems that the question whether two patents interfere with each other may be properly raised by demurrer to the bill. *Morris v.*

*Kempshall M'fg Co.*, 20 Fed. Rep. 121.—SHIPMAN, 1884.

288. Where defendants' answer was irregular in its form, and complainant "did not move to have the answer taken off the file for irregularity, nor to have the bill taken *pro confesso* for want of an answer, as if the answer was void, nor except to the answer for insufficiency—by replying to it, he admitted it to be sufficient, however imperfect it might be. The issue, joined upon the answer by the traverse, was upon its allegations and denials as they were, and the orator by joining that issue placed himself where he must overcome the denial and maintain his bill." *Wooster v. Muser et al.*, 20 Fed. Rep. 162.—WHEELER, 1884.

289. "An answer in equity is required for discovery and evidence as well as for grounds of defence, and evidence cannot be given by attorney; therefore an answer cannot be made by an attorney," and an answer thus made is irregular.—*Id.*

290. "The orator is entitled only to a decree settling his own rights." *Werner v. Reinhardt et al.*, 20 Fed. Rep. 163.—WHEELER, 1884.

291. In an accounting "Rule 77 gives the master very general discretion in the conduct of the investigation before him. He occupies, for the time being, the position of the court, and is not to be continually interfered with while discharging his duties to the best of his ability. It would create intolerable delays and confusion, besides putting an unnecessary burden upon the court, to hold that each time the master makes a ruling the aggrieved party may, by special motion, have it reviewed. The orderly, and it seems the generally accepted, procedure is to present all questions arising before the master by objections and exceptions to his report." *Lull v. Clark et al.*, 22 Blatch. 207.—COXE, 1884.

292. In an accounting before a master, the question as to whether the orator shall be allowed, in rebuttal, to introduce evidence that is not strictly rebutting to defendant's evidence, but tends to prove the orator's case, as made in his opening, more freely and specifically than his opening did, must in the first instance, at least, rest in the sound discretion of the master, and the court will not upon application decide this question for the master. *Wooster v. Gumbirner*, 20 Fed. Rep. 167.—WHEELER, 1884.

293. After delivery of the court's opinion, but before the signing of the interlocutory decree, complainant moved to amend the bill by the insertion of averments to the effect that the assignment whereby complainant derived its title con-

veyed to complainant the right of recovery for previous infringements. The amendment was allowed. *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co. et al.*, 22 Blatch. 182.—SHIPMAN, 1884.

294. "Interlocutory decrees remain under the control of the court and subject to its revision until the master's report comes in, and is finally acted upon by the court, and the whole of the matters in controversy are disposed of by a final decree." *Wooster v. Handy*, 22 Blatch. 307.—BLATCHFORD, 1884.

295. Although there may be an interlocutory decree for the complainant, still if the master's report shows that the complainant is not entitled to recover, a final decree for the defendants is proper. *Steam Stone Cutter Co. v. Sheldons et al.*, 22 Blatch. 484.—WHEELER, 1884.

296. Where it is sought to sue a receiver as an infringer, if he be sued as an infringer, whereby the assets in his hands must respond to the judgment, permission to sue him must be first had of the court under which he is administering the assets intrusted to him. On the other hand, where he has taken possession of the property not rightfully belonging to his trust, in an administrative capacity, whether as United States marshal, sheriff, administrator, or otherwise, he is personally responsible for the trespass committed. Where the alleged infringement was committed by defendant under positive orders of the state court, the United States court will withhold its action for the making of an application to the state court for the proper modification of its order. *Curran v. Craig*, 22 Fed. Rep. 101.—TREAT, 1884.

297. It seems that when a case is before a court for final hearing and decision, the court will, in its discretion, permit further evidence to be taken as to the true meaning of the specification and drawings of the patent in question. *Frazer et al. v. Gates & Scoville Iron Works*, 22 Fed. Rep. 439.—BLODGETT, 1884.

298. "The statutory defences are not the only defences which may be made against a patent. Where it is evident that the Commissioner, under a misconception of the law, has exceeded his authority in granting or reissuing a patent, there is no sound principle to prevent a party sued for its infringement from availing himself of illegality, independently of any statutory permission to do so." *Mahn v. Harwood et al.*, 102 U. S. 354.—SUP. CT. 1884.

299. "In cases of patents for inventions, a verbal defence not given by the statute often arises, where the question is whether the thing patented amounts to a patentable invention; this

being a question of law, the courts are not bound by the decision of the Commissioner, although he must necessarily pass upon it."—*Id.*

300. "The pending of a prior suit in a state court is not a bar to a suit in a circuit court of the United States, although between the same parties and for the same cause of action." *Washburn & Moen M'g Co. et al. v. H. B. Scutt & Co.*, 22 Fed. Rep. 710.—ACHESON, 1884.

301. Complainant brought a suit on its patent and secured a provisional injunction. Before defendants' answer was filed, complainant brought another suit, on the same patent, for an alleged subsequent act of infringement, and sought provisional injunction, which was denied on the ground that the second suit would not lie, with the first suit pending in the manner stated. *Gold & Stock Tel. Co. v. Pearce et al.*, 22 Blatch. 69.—WHEELER, 1884.

302. Where a bill of complaint is brought for the infringement of a patent, and fewer parties are named as complainants than ought to have been, and an objection to the non-joinder is not taken by the answer, and the case proceeds to a final decision, and it is possible to save the rights of the non-joined parties, the case will not be interfered with by reason of an objection to the non-joinder not made until a hearing is reached. *Adams et al. v. Howard et al.*, 23 Blatch. 27.—WALLACE, 1884.

303. By the court: "No objection having been taken by demurrer, or the answer, to the non-joinder of the other two owners of this license, such non-joinder cannot now be insisted on to defeat a decree." *Adams v. Howard et al.*, 22 Blatch. 47.—WALLACE, 1884.

304. "Interlocutory decrees remain under the control of the court and subject to its revision until the master's report comes in, and is finally acted upon by the court, and the whole of the matters in controversy are disposed of by a final decree." *Wooster v. Handy*, 22 Blatch. 307.—BLATCHFORD, 1884.

305. The act of March 13th, 1879, forbade the appointment of clerks and deputy clerks of district and circuit courts as masters, except for special reasons. The consent of both parties to the appointment of such a clerk is sufficient special reason. Where such an appointment has been made without a specification of the reason, the appointment can afterward be amended by making such insertion, thus saving any nullification of the reference. *Fischer v. Hayes*, 22 Blatch. 505.—BLATCHFORD, 1884.

306. A case may be referred back to a master, with liberty to complainant to reopen proofs on the question of damages. *Porter Needle Co. v.*



*Nat'l Needle Co. et al.*, 22 Fed. Rep. 829.—COLT, 1885.

307. "Undoubtedly a corporation cannot be compelled to answer under oath to a bill in equity. It answers only under the seal of a corporation. It is for this reason that the practice has obtained of making the officers of the corporation parties to the bill, and requiring them to answer interrogatories. This, however, does not excuse a corporation from answering, and the complainant is entitled to an answer from a corporation as well as from an individual, although the value of the answer may not be worth the expense of the experiment. Although no officer or agent is made a party to the bill, it is still the duty of the corporation to cause diligent examination to be made, and give in its answer all the information derived from such examination; and if it alleges ignorance without excuse, a disposition on its part to defeat and obstruct the course of justice may be inferred which will justify the court in charging it with the costs of the suit." *Colgate v. Campagne Française du Telegraphe & Co.*, 23 Fed. Rep. 82.—WALLACE, 1885.

308. There is nothing in the fact that a defendant is a corporation to defeat a complainant's right to maintain a bill of discovery.—*Ib.*

309. "The plain implication of the equity rules is that pleas and demurrers may be disposed of at rule day." *Gordon et al. v. St. Paul Harvester Works et al.*, 23 Fed. Rep. 147.—NELSON, 1885.

310. In an equity suit for infringement of a patent, where the facts concerning the infringement in question are peculiarly within the knowledge of the defendant, an inspection of the alleged infringing device should be granted.—*Ib.*

311. When during a term of court a demurrer and plea are filed, and notice of an argument thereon is served by the opposite party, the sufficiency of the plea and demurrer can be called up and tested without formal notice, in term, in presence of counsel, or by proper notice in his absence.—*Ib.*

312. Where different suits are brought for the infringement of different patents, and the alleged infringements are all embodied in one kind of machine made by defendants, the suits may, upon motion, be consolidated. *Deering v. Winona Harvester Works et al.*, 24 Fed. Rep. 90.—NELSON, 1885.

313. "To take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and . . . a decree *pro confesso* is a decree based on such statements, assumed to be true,

and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. 'It cannot be impeached collaterally only upon a bill of review or [a bill] to set it aside for fraud.'" *Thompson et al. v. Wooster*, 114 U. S. 104.—SUP. CT. 1885.

314. "By our practice a decree *pro confesso* is not a decree as of course, according to the prayer of the bill, nor merely such as the complainant chooses to make it; but it is made [or should be made] by the court according to what is proper to be decreed upon the statements of the bill assumed to be true. This gives it the greater solemnity and accords with the English practice as well as with that of New York."—*Ib.*

315. "Our rules do not require the cause to be set down for hearing at a regular term, but after the entry of the order to take the bill *pro confesso*, Rule 18 declares that thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from the entry of such order, if it can be done without answer and is proper to be decreed. This language shows that the matter of the bill ought, at least, to be opened and explained when the decree is applied for, so that the court may see that the decree is a proper one. The binding character of the decree, as declared in Rule 19, renders it proper that this degree of caution should be taken."—*Ib.*

316. "From the authorities cited and the express language of our own rules in equity, it seems clear that the defendants, after the entry of the decree *pro confesso*, and while it stood unrevoked, were absolutely barred and precluded from alleging anything in derogation of or in opposition to the said decree, and that they are equally barred and precluded from questioning its correctness here on appeal, unless on the face of the bill it appears manifest that it was erroneous and improperly granted. The attempt on the hearing before the master to show that the reissued patent was for a different invention from that described in the original patent, or to show that there was such unreasonable delay in applying for it as to render it void, under the recent decision of this court, was entirely inadmissible, because repugnant to the decree. The defendants could not be allowed to question the validity of the patent which the court had declared valid."—*Ib.*

317. The introduction of an original patent into the evidence, pending an appeal, is clearly irregular.—*Ib.*

318. Evidence offered to a master, on an ap-

plication to reopen proofs, cannot be considered in determining upon the propriety of the master's finding.—*Ib.*

319. "New evidence, discovered after the hearing before the master is closed, may in proper cases be a ground for a bill of review, on which issue may be joined and evidence adduced by both parties in the usual way. The defendants are not precluded by the refusal of the court, on mere affidavits, to refer the cause back to the master."—*Ib.*

320. *Query.* Whether when a case is referred to a master for an accounting under a decree *pro confesso*, defendant is entitled to appear before the master and to have notice of and to take part in the proceedings.—*Ib.*

321. After a decree *pro confesso*, the patent on which the suit is brought must be held valid for the purposes of the case, as against a defendant who would attack it on the ground that, from the nature of its claims, it is void on its face. *Dobson et al. v. Hartford Carpet Co.*, 114 U. S. 439.—*SUP. CT.* 1885.

322. After a decree *pro confesso* defendant is not entitled to make the objection that the patent is for an aggregation.—*Ib.*

323. A licensor brought an equity suit against the licensee, praying disclosure of license fees, "and for such other and further relief as the case may require." Thereupon the court said: "So far as the bill is one for relief, it is clear that this court has no jurisdiction to grant it. The action is brought to enforce a contract, and there exists a plain, adequate, and complete remedy at law. So far as the bill seeks a discovery it is open to the objection that there is no allegation that a suit at law has been brought or is about to be brought. In order to support a bill of discovery, it must appear that the discovery is asked for the purpose of some suit brought, or intended to be brought, otherwise it will not be entertained, as courts of equity grant discovery to aid some legal proceeding. . . . The defendant may demur to the whole bill, if it does not aver that a suit at law is pending in which a discovery may be material." *Perkins v. Hendryx et al.*, 23 Fed. Rep. 418.—*COLT*, 1885.

324. Where, after a decree against a defendant in one circuit, the defendant infringes in another circuit, said last infringement creates a new cause of action, and complainant can proceed at law or in equity therein. His right to do this is not impaired by the circumstance that he can also, if he chooses, proceed against the defendant for contempt in violating the injunction awarded him by the decree in the former suit. One case cannot be made to abate the

other. *Roemer v. Neuman*, 23 Fed. Rep. 447.—*WALLACE*, 1885.

325. There are five special defences enumerated by Section 4920 of the Revised Statutes, which may be pleaded in a suit for infringement. "If Congress had intended that the validity of patents might be assailed collaterally for other reasons, it would have said so in explicit terms." *Railway Register M'fg Co. v. No. Hudson C. R. R. Co. et al.*, 23 Fed. Rep. 593.—*NIXON*, 1885.

326. A question of infringement of a patent, when the same is a mixed question of law and fact, cannot be certified to the United States Supreme Court by a lower court for the decision of the former court. "The 'question' referred to must be a question of law and must be capable of being presented in a single point." *Cal'f. Art. Stone Paving Co. v. Moliter*, 5 Sup. Ct. Rep. 618.—*SUP. CT.* 1885.

327. Where a circuit court is divided on the question of infringement, the finding and decree must be for the defendant.—*Ib.*

328. Where, after an injunction granted, defendant makes a change which raises a real question as to whether the change is a violation of the injunction and an infringement of the patent, the bringing of a new suit is the proper course. "Process of contempt is a severe remedy, and should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct."—*Ib.*

329. Certain causes were pending for the purposes of an accounting before a master, pursuant to an interlocutory decree made upon hearing in chief. A motion was made for a rehearing on the merits. The motion was granted upon the condition and order that in case there should afterward be a decree in the case for an accounting, the testimony already taken before the master should stand for use before the same or any other master in the case, as if taken by the parties respectively upon such accounting. *Am. Diamond Rock Boring Co. v. Sheldons et al.*, 23 Blatch. 286.—*WHEELER*, 1885.

330. Defendant attempted to settle the question of novelty and patentability on demurrer. The court said: "Cases may arise where the question of patentability is so clear that it may be examined and safely decided on demurrer, but I think this is not such a case." *Dick et al., Rec'v'r, etc. v. Oil Well Supply Co.*, 25 Fed. Rep. 105.—*ACHESON*, 1885.

331. Where a suit for infringement had been pending in one circuit for more than four years, and in another circuit a decree had been entered in favor of the defendant, dismissing the bill, the

court in the circuit first mentioned refused complainant's application to the effect that the case might stand open until an appeal from the said decree should be heard and determined in the Supreme Court. *Grain Drill M'fg Co. v. Reinstedler*, 25 Fed. Rep. 198.—BREWER, 1885.

332. Where defendant would defend on the ground of a former recovery, the pleading must show a satisfaction of the judgment. *Fisher v. Con. Amador Mine, etc.*, 25 Fed. Rep. 201.—SAWYER, 1885.

333. The weight of authority is in favor of the conclusion that if a complainant intends to rely upon an objection to a plea, as not being the proper remedy, he should set the plea down for argument and not file a replication. *Cottle v. Krementz et al.*, 25 Fed. Rep. 494.—COXE, 1885.

334. It is not wise for the court to instruct the master in advance as to the course he shall pursue. Both parties have the privilege of excepting to the report, and the master can at any time apply to the court for instructions. *Albany Steam Trap Co. v. Felthousen*, 26 Fed. Rep. 318.—COXE, 1886.

335. Pending suit on a patent, a disclaimer was filed, and motion for provisional injunction made. Defendants contended that a supplemental bill should have been filed and another motion for provisional injunction made. The court sustained complainant's mode of procedure. *Libbey v. Mt. Washington Glass Co. et al.*, 26 Fed. Rep. 757.—COLT, 1886.

336. In an action on the case, after the evidence was in, the judge instructed the jury to return a verdict for the defendants, which was done, the defence being that the patent had been anticipated. The Supreme Court held this action to be erroneous, saying that there were obvious differences between the prior device and that of the patent; that, in such a case, it was not a matter of law, that they were identical, and that the question should have been submitted to the jury; wherefore a new trial was ordered. *Keyes et al. v. Grant et al.*, 118 U. S. 25.—SUP. CT. 1886.

337. In a suit upon a reissued patent, defendant offered no evidence and did not appear at the hearing. At the accounting in damages defendant offered the original patent in evidence, "for the purpose of showing that there was no infringement of the reissue upon any construction of it that would be valid on comparison with the original. The master rejected this evidence, and took an account of the damages due to the extent of what was shown by the orator's evidence in chief." The master's finding was

sustained. *Wooster v. Thornton*, 34 O. G. 560.—WHEELER, 1886.

338. Where the court of one circuit has decided against the patentable novelty of a patented improvement upon one state of facts, and another circuit court has sustained the patent upon another state of facts, the latter court will not suspend accounting to await the decision of the Supreme Court upon an appeal taken in the former case. *Celluloid M'fg Co. v. Comstock & Cheney Co.*, 27 Fed. Rep. 358.—SHIPMAN, 1886.

339. Complainant's patent was within two months of expiration when bill of complaint was filed. Proof of infringement was held not to be sufficiently accurate, and the case was dismissed without prejudice. *Racine Seeder Co. v. Joliet Wire Check Rover Co.*, 27 Fed. Rep. 367.—BLODGETT, 1886.

340. In preparing for a motion for provisional injunction, affidavits cannot be filed out of order and after the proper time. *Am. Paper Barrel Co. v. Laraway*, 28 Fed. Rep. 141.—SHIPMAN, 1886.

341. It is expressly provided by Section 31 of the judiciary act of 1789 that the court is authorized to hear and determine the cause and to proceed to judgment therein for or against an executor or administrator, as the case may be, after the death of the party, and a bill of revivor is the proper measure of preserving and continuing the original suit. *Kirk v. Du Bois*, 28 Fed. Rep. 460.—MCKENNAN, 1886.

342. A bill was filed against the Commissioner of Patents and the Secretary of the Interior for the purpose of obtaining a patent for certain improvements alleged to have been made by Samuel Strong, which patent had been refused by the Commissioner in 1874, and finally refused in 1875. At various intervals down to the year 1885 there were irregular applications to successive commissioners to review the action of the preceding Commissioner, and finally there was another application of the same sort made by Samuel Strong in the year 1885. The court refused the application, holding that it was the duty of the applicant to have taken some one of the steps which the law provides for him within the two years after the final refusal in 1875, or otherwise and in default thereof the application was abandoned. *Kirk v. Commissioner of Patents et al.*, 37 O. G. 451.—MERRICK, 1886.

343. "There are classes of cases to which different remedies are applicable, so far as the final action of the Commissioner is concerned. They are, first, the cases called 'cases of interference,' where the action of the Commissioner

is final ; and, secondly, the cases of *ex parte* applications, where his action is not final, but where an appeal lies to the Supreme Bench of the District of Columbia, by virtue of Section 4911 of the Revised Statutes. After these respective remedies have been exhausted the patent law, in its supreme indulgence to the claims of inventors, by Section 4915 of the Revised Statutes, allows a further proceeding by way of bill in equity.

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"The party must have exhausted, before he applies for that ultimate redress, each of the successive stages, for the perfection of his application, which are provided by law. So far as the interference is concerned, the previous stages have been exhausted by the final refusal of the Commissioner ; but so far as the *ex parte* application is concerned, his redress is not exhausted until after he has taken an appeal from the decision of the Commissioner."—*Id.*

344. In an accounting in profits and damages, the master has the right and authority to have testimony taken abroad. *Bate Refrigerating Co. v. Gillett et al.*, 28 Fed. Rep. 673.—WALES, 1886.

345. "The master is a judicial officer, acting as the representative and substitute of the court which appointed him, and while there can exist no doubt of the power of the court for sufficient cause to vacate or modify any order made by him, it is not the general practice for the court to interfere with his acts and proceedings *in limine*, but to wait until the coming in of his report before hearing exceptions, by either party to the cause, to any irregularity or excess of authority on his part."—*Id.*

346. A master is not to be governed in every case by the estimated cost of different ways of taking testimony abroad ; "he should choose the best under all the circumstances of the case, and if the cheapest plan is as good as any other, that plan should be adopted."—*Id.*

347. It seems that there are circumstances which warrant the master in refusing to report the evidence to the court. *Loud v. Stone*, 28 Fed. Rep. 749.—COLT, 1886.

348. "In the course of a trial before a jury, the plaintiff having closed, the court is at liberty, at that stage of the case, to instruct a verdict for the defendant." *Royer v. Schultz Belling Co.*, 28 Fed. Rep. 850.—TREAT, 1886.

349. A bill in equity was brought for infringement of patent. One question in issue was whether complainant's inventor or the respondents' was the first inventor. The court held that this question presented a simple issue of fact,

proper for the determination of a jury, and ordered it submitted to the jury. *Gray v. Halkyard et al.*, 28 Fed. Rep. 854.—COLT, 1886.

350. "Where the invalidity, irregularity, or defect in the service of the writ appears on the face of the return, a motion to quash the service or abate the writ is the proper mode of bringing the matter to the attention of the court ; but where the objection does not appear upon the face of the papers, the better rule of practice, where it is sought to question or dispute the facts stated therein, it is to do so by plea in abatement, on which an issue may be regularly taken and tried." "Objections to the regularity or validity of the service, not appearing on the face of the return, are sometimes taken by motion to dismiss or set aside the service." *United States v. Am. Bell Telephone Co. et al.*, 29 Fed. Rep. 17.—JACKSON, 1886.

351. Where in an equity cause defendants offer a plea in abatement, as, for instance, to the jurisdiction of the court under Rule 33 of equity practice, the complainant is at liberty either to take issue on this plea or to set it down for argument. If the latter course is taken, all the statements of the plea are to be taken as absolutely true, however inconsistent with or contradictory of the bill or the statements and recitals in the returns of service.—*Id.*

352. A plea in abatement began by saying : "This defendant, appearing specially and solely to object to the jurisdiction of this court, pleads to the jurisdiction of this court over it, and for the cause of plea says that this defendant is not compellable to appear in response to said writs, and does not accept or waive service thereof." Defendant prayed in conclusion not for the dismissal of the writ, but as follows : "Wherefore this defendant prays the judgment of this honorable court whether it ought to be required to appear in accordance with any writ of subpoena issued in said suit." It was held that this plea could not properly be construed as raising or presenting an issue upon the merits of the bill such as would operate as an appearance on the part of the defendant.—*Id.*

353. In proceedings before a master on an accounting, although the record of the case is not put in evidence before the master, he is at liberty to refer to it in making his report, for any legitimate purpose. *Reed et al. v. Lawrence et al.*, 29 Fed. Rep. 915.—SEVERNS, 1886.

354. Where a judge affirms a master's report on an accounting in damages, the judge then dies, and another judge, acting in the matter, makes a decision opposite to that made by the

deceased, it is proper to recommit the case to the master for another accounting.—*Ib.*

355. Although a judge is called upon to pass upon the same question which has been decided by a judge who is deceased, it is not consistent with his duty to abdicate the function of exercising independent judgment or to refuse to suitors, on the score of mere sensibility, the equitable rights to which the conscience of the court thinks them entitled.—*Ib.*

356. The provisions of Section 2610 of the Code of Iowa, requiring the presentation of unliquidated demands to the board of supervisors before suit can be brought thereon against the counties of Iowa, are applicable to actions for infringements of patent rights: *May v. Cass Co.*, 30 Fed. Rep. 762.—SHIRAS, 1887.

357. When a complainant takes issue upon a plea, the only inquiry is whether the proofs establish the facts alleged in the plea. *Bean v. Clark et al.*, 40 O. G. 1454.—WALLACE, 1887.

358. The state constitution of Michigan vested in the boards of supervisors of counties "exclusive power . . . to adjust all claims against their respective counties, and the sum so fixed and defined shall be subject to no appeal." It was held that this provision had no application to claims for infringements of patents, and that even if it had, it could have no application to non-residents suing in the federal courts. *May v. Saginaw Co.*, 32 Fed. Rep. 629.—BROWN, 1887.

359. Where in an accounting before a master, the testimony is not in writing, no order can be made that the master shall report the evidence. *Hammacher et al. v. Wilson*, 32 Fed. Rep. 796.—COLT, 1887.

360. It seems that in an action at law for the infringement of a patent, it is proper for the court to instruct the jury to find a verdict for the defendant. *Royer v. Shultz Belting Co.*, 29 Fed. Rep. 281.—TREAT, 1886.

362. "The laws of New York [Section 1104, ch. 410, Laws 1882], respecting the presentation of claims against the city of New York to the comptroller for adjustment before bringing suit, only apply to such claims as can be prosecuted in the state courts by the actions or proceedings mentioned in Section 1103; and [2] if this enactment were intended to apply to actions at law brought in the federal courts, it would not apply to suits in equity. The equity jurisdiction of the courts of the United States is subject neither to limitation nor restraint by the state authorities, and is uniform throughout the different states of the Union." *Garnettell Fire Alarm Tel. Co. v. The Mayor, etc.*, 31 Fed. Rep. 312.—WALLACE, 1887.

## PROCESS.

The "process" of this title is the "art" of the statutes defining patentable subject-matter.

## CASES.

1. "A patent may be for a mode or method of doing a thing." *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

2. "He who produces an old result by a new mode or process is entitled to a patent for that mode or process." *Howe v. Abbott*, 2 Story, 190.—STORY, 1842.

3. When Morse claimed as the essence of his invention the use of the motive power of the electric or galvanic current, however developed, for making or printing characters at any distance, he described and justly claimed a new art. *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—KANE, 1851.

4. "The act of Congress places a 'new and useful art' among the discoveries it purposes to protect, and assigns to it the first place on the list."—*Ib.*

5. "A process, *eo nomine*, is not made the subject of a patent in our act of Congress. It is included under the general term 'useful art.' An art may require one or more processes or machines in order to produce a certain result or manufacture. The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of discovery; a machine of invention." *Corning et al. v. Burden*, 15 Howard, 252.—SUP. CT. 1853.

6. "It is when the term *process* is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combination."—*Ib.*

7. Where a claim is made to a new process there must be dismissed from the inquiry all consideration either of the novelty or utility of the arrangement of the machinery described in the specification. *Henry, G. G., in re*, 1 MacArthur's P. C. 467.—MERRICK, 1856.

8. It is essential to the validity of a process, as an invention, to show how it may be adapted to practical use. *Tilghman v. Mitchell*, 2 Fish. P. C. 519.—NELSON, 1864.

9. In considering a process patent upon the question of infringement, it is not material to

inquire whether the vessel or machinery used by the defendant is or is not similar to that described in the complainant's patent.—*Ib.*

10. Complainant's process patent had two claims, in one of which a certain temperature was specified as essential. The inventor was not a pioneer in the art. Defendants used a less temperature, and were held not to infringe. *Am. Wood Paper Co. v. Heft et al.*, 3 Fish. P. C. 316.—*GRIER*, 1867.

11. A process patent described the use of a temperature of from two degrees to three degrees. Defendant's temperature was proved to be less than three and one half degrees, and defendant was held to infringe. *Am. Wood Paper Co. v. Fibre Disintegrating Co.*, 6 Blatch. 27.—*BENEDICT*, 1868.

12. The claim in complainant's patent for a new and useful "means for rendering joints steam tight" was: "'I claim the method described of causing steam to become a packing to itself in steam cylinders, or other parts of steam machinery, by allowing the steam to act in one or more grooves, substantially as specified.'" The grooves were old and had been used for a substantially similar purpose in air-blowing engines. The court held this to be a claim for an art or process, and sustained the patent. *Poillon v. Schmidt*, 6 Blatch. 299.—*BLATCHFORD*, 1869.

13. "'Process' or 'method,' when used to represent the means of producing a beneficial result, are in law synonymous with 'art,' provided the means are not effected by mechanism or mechanical combinations." *Piper v. Brown et al.*, 1 Holmes, 20.—*SHEPLEY*, 1870.

14. "The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain result; when effects are produced by chemical action, or by the application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes."—*Ib.*

15. "Where a result or effect is produced by mechanical action, the patent can ordinarily only be for the mechanical appliances or means employed; where the result is attained or effect produced by chemical action, by the operation or application of some element or power of nature, or of some property in matter, or of one substance to another, then the patent may be for the art, process, or method."—*Ib.*

16. "It is essential to the validity of the process as an invention to show how it may be adapted to practical use. In showing this, the inventor may describe the mechanical means of applying, or peculiarly shaped vessels for con-

taining any of the ingredients used in his process or art. But they constitute no part of the invention. Another person may discover new and useful means of applying or using the inventor's process, and be entitled to a patent for that improvement, without the right to use the process. So the inventor himself may discover such new means or invent new appliances, which may be the subjects of a patent to him, separate and apart from his patent for the art itself."—*Ib.*

17. Where a patent is for a process, it is not sufficient to show that a previously existing apparatus could have been used to practise the complainant's process. It must appear affirmatively and satisfactorily that the application was put to such prior use.—*Ib.*

18. Complainant's claim was: "'Preserving fish or other articles in a close chamber, by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber, substantially as set forth.'" Thereof the court said: "The claim appears to the court to describe clearly and in language incapable of misconstruction what is claimed as the new and useful art or method."—*Ib.*

19. If an inventor "had discovered the practical mode and contrived the practical means of accomplishing the result, he might be entitled to a patent for his new and useful art, although ignorant of the philosophical or abstract principle which was involved in the exercise of the art itself."—*Ib.*

20. The claim in a patent, for a method of increasing the capacity of oil wells, was: "The above-described method of increasing the productiveness of oil wells by causing an explosion of gunpowder, or its equivalent, substantially as described above." Defendant contended that the claim was void as being for a principle, but the court held otherwise, and said that the claim was for the employment of specified means, or their equivalents, for the accomplishment of a desired end—a novel adaptation of things, not themselves claimed as novel, to a novel and beneficial use." *Roberts v. Dickey*, 4 Brews. 260.—*STRONG*, 1872.

21. "It is not to be doubted that a novel process or method of operation, that amounts to a successful application of known things to a practical use, is patentable as an art."—*Ib.*

22. A patentable process may be wrought out by a machine. *Waterbury Brass Co. v. E. Miller & Co.*, 9 Blatch. 77.—*WOODRUFF*, 1871.

23. "A process may be patentable irrespective of the peculiar form of the instrumentalities used." "A process is a mode of treatment of

certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable, while the process itself may be altogether new and produce an entirely new result. The process requires that certain things should be done with certain substances and in a certain order; but tools to be used in doing this may be of secondary consequence." *Cochrane et al. v. Deener et al.*, 94 U. S. 780.—Sup. Ct. 1876.

24. Where the last step in a process of manufacture is new, it impresses upon the whole method the character of novelty. *Klein v. Park et al.*, 3 Bann. & Ard. 145.—McKENNAN, 1877.

25. A claim of the patent in suit was: "Uniting the parts employed in forming combination billiard cushions, by placing the harder and more dense and less elastic substances in a mould, and allowing the melted rubber to flow against, around, or into the harder and more dense and less elastic substances, or causing the plastic rubber, by pressure, to unite with the same, and then vulcanizing the india-rubber, substantially as and for the purpose set forth." This was held to be a claim for a process; and articles having the same resulting construction, but not made by the process in question, were held not to infringe. *Collender v. Bailey*, 3 Bann. & Ard. 217.—SHEPLEY, 1878.

26. "A process patent . . . has no concern with the specific mechanical devices or contrivances by which the process is worked." *Down-ton v. Yaeger Milling Co.*, 3 McCrary, 414.—DILLON, 1879.

27. Complainant patented a process consisting of two steps, for forming boot and shoe counters. Defendants practised the process, by passing the blanks through two machines, each designed for use in making counters. Held, that the claim could not be sustained. *Moffitt v. Rogers et al.*, 8 Fed. Rep. 147.—LOWELL, 1881.

28. "That a patent can be granted for a process there can be no doubt. The patent law is not confined to new machines and new compositions of matter, but extends to any new and useful art or manufacture. A manufacturing process is clearly an art within the meaning of the law." *Tilghman v. Proctor et al.*, 102 U. S. 707.—Sup. Ct. 1880.

29. "A machine is a thing. A process is an art or mode of acting. The one is visible to the

eye—an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result. The mixture of certain substances together or the heating of a substance to a certain temperature is a process. If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough in the patent to point out the process to be performed without giving supererogatory directions as to the apparatus or method to be employed. If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is, then, a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure himself the exclusive right to the process, if he is really its inventor or discoverer."—*Id.*

30. By the court: "I am not aware that a patent has ever been sustained for a process or method which consisted of employing an old machine for the very purpose for which it was made. If any person discovers how to use an old machine to the very best advantage, he is only a skilful workman, not an inventor." . . . "I do not mean to say that a patent cannot possibly be supported for a process or method which consists only of applying an old machine to a new use. Many of the ablest writers and jurists assert that such a claim is possible. . . . If one is ever supported, it will be when the new use is so remote from the old use that a court or jury can say that a new idea has been discovered." *Moffitt v. Rogers et al.*, 8 Fed. Rep. 147.—LOWELL, 1881.

31. The claim in the "driven well" patent was: "The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as in boring, substantially as described." The process was construed by the court to consist, in the case of a flowing well, of making the hole by forcing the rod or pipe downward, and lining the hole with a tube; and in the case of a non-flowing well, to consist of the same steps plus the addition of a pump to the top of the tube. The use of the pump was held to be a use of the process. *Andrews et al. v. Cross*, 19 Blatch. 294.—BLATCHFORD, 1881.

32. The patent in suit was for a process for preserving meats, "a combination comprising

two elements : [1] Enveloping the meats in a covering of fibrous or woven material ; and [2] subjecting the same to the action of a continuous current of air of suitably low or regulated temperature. Neither was new." The result was an improvement in the appearance of the meat, and the improvement was held patentable. *Bate Refrigerating Co. v. Gillett et al.*, 9 Fed. Rep. 387.—NIXON, 1881.

33. Where a method is in question, it is not patentable if the same method has before been applied to other material, for the same purpose. *Dederick v. Cassell et al.*, 9 Fed. Rep. 306.—BUTLER, 1881.

34. In a patent for a process, every step of the process is essential ; and the omission of a step renders defendants non-infringers. *Hammer-schlag v. Garrett et al.*, 10 Fed. Rep. 479.—BUTLER, 1882.

35. "After knowledge of a machine to make a shoe in a particular manner, there would be no room for an invention of the manner of making a shoe, or of a shoe made in that manner, and there would be no more room for the inventor of the machine than for any one else. It may be doubtful whether such a process as this is by itself patentable." *McKay et al. v. Jackman*, 20 Blatch. 466.—WHEELER, 1882.

36. For a discussion of the definition of a patentable process, see — *Id.*

37. Complainant's patent was for a process of curing fish, in which the membrane or tissue between the flesh and the skin was removed during the process, and before the article was in a condition to be packed and boxed for the market. Defendants bought the article fully cured, and removed the membrane, with the outer skin, to prepare it for market. Defendants were held not to infringe. *Boneless Fish Co. v. Roberts et al.*, 12 Fed. Rep. 647.—WALLACE, 1882.

38. "Mere mechanical operations like the loops and drawing thread to form stitches in sewing either by machinery or by hand, . . . apart from the means of performing them, do not appear to be within the reach of protection by the patent laws." *McKay et al. v. Jackman*, 20 Blatch. 466.—WHEELER, 1882.

39. By the court : "The description on which it was founded was in the original, and the process, if patentable at all, might have been claimed there ; but it was not. According to numerous former cases it might have been claimed in the reissue as well. As it is, however, it comes within the principle of *Miller v. Bridgeport Brass Co.* [21 O. G. 201] and *Campbell v. James* [*ibid.* 337], and cannot be upheld now." *New v. Warren*, 22 O. G. 587.—WHEELER, 1882.

40. By the court : "This process is the mere operation of the machine for holding liquid asphalt, retaining it in a liquid condition, and transporting it as described in the original patent. It is not a chemical process, nor any other for transforming the subject of it into a different state. For this mere operation of the machine it does not seem that there can be a patent in addition to a patent on the machine."—*Id.*

41. Complainant produced an article of manufacture (a silver plated steel spoon), which was commercially and practically successful, by a succession of old processes, which, though separately old, had not been practically grouped together in the order in which he used them. The patent for his process was sustained. *Wallace v. Noyes et al.*, 21 Blatch. 83.—SHIPMAN, 1882.

42. A process claim which is a claim to the ordinary mode of using a machine can only be supported as a claim for the mechanism. *Goss et al. v. Cameron et al.*, 11 Bissell, 389.—BLDGGETT, 1882.

43. By the court : "There can be no patent for a mere principle. The discoverer of a natural force or a scientific fact cannot have a patent for that ; but if he invents for the first time a process by which a certain effect of one of the forces of nature is made useful to mankind, and fully describes and claims that process, and also describes a mode or apparatus by which it may be usefully applied, he is, within the meaning of the very words of the patent law, 'a person who has invented or discovered any new and useful art,' and he is entitled to a patent for the process of which he is the first inventor, and is not restricted to the particular form of mechanism or apparatus by which he carries out that process." . . . "The opinion in *Spencer's* case clearly points out that 'Bell discovered a new art—that of transmitting speech by electricity—and has a right to hold the broadest claim for it which can be permitted in any case,' and 'the invention is nothing less than the transfer to a wire of electrical vibrations like those which a sound has produced in the air,' and that his patent, while not covering the abstract principle, without regard to means of transmitting speech by electricity, yet is not limited to a particular form of apparatus, but includes the process or method [using the two words as equivalent], the essential elements of which are the production of what the patent calls 'undulatory vibrations of electricity to correspond with those of the air,' and transmitting them to a receiving instrument capable of showing them. The evidence in this case clearly shows that Bell discovered that articulate sounds could be transmitted



by undulatory vibrations of electricity, and invented the art or process of transmitting such sounds by means of such vibrations. If that art or process is [as the witnesses called by the defendants say it is] the only one by which speech can be transmitted by electricity, that fact does not lessen the merit of his invention or the protection which the law will give to it." *Am. Bell Tel. Co. v. Dolbear et al.*, 23 O. G. 535.—*SUP. CT.* 1883.

44. "A process is patentable provided that it is new and useful. By process is meant the application or operation of some element or power of nature of one subject to another. As examples of patentable processes, the art of dyeing, smelting ores, and the like may be mentioned. In this and in other similar cases the merit of the invention consisted not in the discovery of any new law of nature, or principles of science or natural philosophy, but in the application of old and well-known principles to new and useful purposes." *Boyd v. Cherry*, 4 McCrary, 70.—*MCCRARY*, 1883.

45. Where defendants infringe complainant's claim for a process, it is unnecessary for the purposes of the case in hand to consider whether defendants' apparatus is a substantial equivalent of the plaintiff's, or whether it embodies a patentable improvement. *Am. Bell Tel. Co. v. Dolbear et al.*, 23 O. G. 535.—*GRAY*, 1883.

46. Complainants' patent was for a process of surfacing woodwork, consisting of a number of steps, each of which was set out as essential. Defendants used neither the first nor last step, and were held not to infringe. *Heller et al. v. Bauer et al.*, 19 Fed. Rep. 96.—*TREAT*, 1884.

47. By the court: "The fifth claim is merely for feeding the blanks under the table which supports the gum-box instead of over it. The machinery described, some of which is the subject of other claims, does not feed the blanks under the table. The claim is merely for that function or mode of operation of that machinery. As such, this function or mode of operation does not seem to be patentable apart from the machinery." *Child v. B. & F. H. Iron Works*, 19 Fed. Rep. 258.—*LOWELL*, 1884.

48. For an example of a claim for a product defined by reference to the process by which it was produced, see —. *Globe Nail Co. v. U. S. Horse Nail Co.*, 19 Fed. Rep. 819.—*NIXON*, 1884.

49. For a discussion of what constitutes a process, see —. *New Process Fermentation Co. v. Maus et al.*, 20 Fed. Rep. 725.—*DRUMMOND*, 1884.

50. By the court: "The essential parts of the apparatus used by the patentee were known be-

fore, and the same controllable pressure had been applied at various stages of the manufacture, and the application at one stage of the condition of the beer, instead of another, would seem not to involve anything more than a mere mechanical change, which could be employed by any one skilled in the art."—*Id.*

51. "If we assume that the invention of a process always authorizes a patent, irrespective of the means by which the result is produced, it would seem to be attended with very important and far-reaching consequences, and to involve substantially a monopoly of the principle, or of the discovery of a new scientific fact; and in this way would impair, if not destroy, the effect given by the Supreme Court to the various rules which have been heretofore referred to as established by that court, one of which has always been held to be firmly fixed—namely, that a person should only have a patent for the means by which the result is produced, and not for the result itself."—*Id.*

52. Where complainant's patent was for a process, and defendant proved a prior apparatus which might be used in practising the patented process, but the process was not described, complainant's patent was held not anticipated. *Everest v. Buffalo Lubricating Oil Co.*, 20 Fed. Rep. 848.—*COXE*, 1884.

53. By the court: "In order to constitute an infringement of a process, a person must be shown to have followed substantially the same process, the same mode of reaching the result as is described in the specifications." *Royer v. Chicago M'fg Co.*, 20 Fed. Rep. 853.—*DRUMMOND*, 1884.

54. Complainant's process for treating oleaginous seeds consisted of three steps. There was a previous process of four steps, involving these same three steps. The omission of a step from the previous process was held not to amount to an invention. *Lawther v. Hamilton et al.*, 29 O. G. 449.—*DYER*, 1884.

55. Although a patented process may be more perfect than a prior process which is substantially the same, a patent therefor cannot be sustained. *Alden Evaporating Fruit Co. v. Bowen*, 32 O. G. 1355.—*BLATCHFORD*, 1885.

56. A process does not become patentable through practising it by machinery instead of by hand. *Marchand v. Emken*, 23 Blatch. 435.—*COXE*, 1886.

57. The patent in suit was for an improvement in the art of making beer, and the claim in issue was: "The process of preparing and preserving beer for the market, which consists in holding it under controllable pressure of car-

bonic acid gas from the beginning of the krausen stage until such time as it is transferred to kegs and bunged, substantially as described." Thereof the Supreme Court said: "The Circuit Court in its opinion [20 Fed. Rep. 725, 733] held that the most that could be claimed by the patentees was that they applied the controllable pressure created by the carbonic acid gas in a state of fermentation at an earlier stage than was before known; that the essential parts of the apparatus used were known before; that the same controllable pressure had been applied at various stages of the manufacture; that the application at one stage of the condition of the beer instead of another would not seem to involve anything more than a mere mechanical change which could be employed by any skilled in the art, and that the claim of the patent for a particular process, irrespective of the mechanical devices claimed [which the defendant had not used], could not be sustained. But we think that in this view the court erred, and that the third claim of the patent is a valid claim for the process covered by it and described in the specification." *New Process Fermentation Co. v. Maus et al.*, 121 U. S. 413.—SUP. CT. 1887.

58. "That a process may be patentable, irrespective of the particular form of instrumentalities used, cannot be disputed." *Eastern Paper Bag Co. et al. v. Standard Paper Bag Co. et al.*, 30 Fed. Rep. 63.—COLT, 1887.

59. "The use of an old material in place of another, when the substituted material performed no new function, and is an improvement because it is more durable, does not appear to amount to patentable invention." *J. L. Mott Iron Works v. Cassidy et al.*, 31 Fed. Rep. 47.—WHEELER, 1887.

60. "Under the patent laws, a process may be patented as well as a machine or device, and when so patented gives the inventor the benefit thereof, in the same way as a machine or device." *Byerly v. Cleveland Linseed Oil Works*, 31 Fed. Rep. 73.—WELKER, 1887.

61. The claim in suit was as follows: "The method herein set forth of waxing paper, consisting of spreading wax upon its surface, and heating the paper from the opposite side to spread and fuse the wax into the fabric of the paper, substantially as set forth." The court described defendant's process as follows: "The paper is passed from a supply reel over and in contact with a heated cylinder, which revolves partly submerged in a vat containing melted paraffine, thus receiving the wax, to and over a heated roller, which diffuses the wax equally, then to and over a scraper, which removes the

surplus wax, and finally to and over a polishing roller. A scraper is also attached to the cylinder that takes up the melted paraffine and applies it to the paper. This scraper is applied between the wax trough and the place of contact with the paper, for the purpose of removing the surplus wax and distributing the remaining wax uniformly over the cylinder." Defendant was held not to infringe. *Hammerschlag M'fg Co. v. Bancroft*, 40 O. G. 1339.—GRESHAM, 1887.

62. Complainant's patent in suit was for producing a bronze-like surface on iron; it consisted in coating the iron with a thin film of oil and oxidizing it by high heat. The claim was to "the process of ornamenting iron in imitation of bronze by the application of oil and heat, substantially as described." Respondent first oxidized the surface of the iron and then baked on a coat of copal varnish. Respondent was held not to infringe. *Plummer v. Sargent*, 120 U. S. 442.—SUP. CT. 1887.

63. A process claim which is merely a claim to an inevitable function of a machine is not a patentable one. *Chicopee Folding Box Co. v. Rogers*, 32 Fed. Rep. 695.—WALLACE, 1886.

## PUBLIC USE—TWO YEARS.

### "PUBLIC USE—TWO YEARS" IN THE PATENT ACTS.

Act approved February 21st, 1793.

SECTION 1. This section provides that a thing in order to be patentable must be "not known or used before the application" for patent. [Repealed July 4th, 1836.]

Act approved April 17th, 1800.

SEC. 1. . . . Every person petitioning for a patent for any invention, art, or discovery, pursuant to this act, shall make oath or affirmation before some person duly authorized to administer oaths before such patent shall be granted, that such invention, art, or discovery hath not, to the best of his or her knowledge or belief, been known or used either in this or any foreign country, and that every patent which shall be obtained pursuant to this act, for any invention, art, or discovery, which it shall afterward appear had been known or used previous to such application for a patent, shall be utterly void. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 6. This section provides that a thing in order to be patentable to an inventor must be "not at the time of his application for patent in public use or on sale with his consent or allowance, as the inventor or discoverer."

SEC. 15. This section provides as a defence to an action for infringement the fact that the patented thing "had been in public use or on sale with the consent and allowance of the patentee before his application for a patent." [Repealed July 8th, 1870.]

Act approved March 3d, 1839.

SEC. 7. *And be it further enacted*, That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter prior to the application by the inventor or discoverer for a patent shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid, by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use had been for more than two years prior to such application for a patent. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 24. This section provides that a thing in order to be patentable to an inventor must be "not in public use or on sale for more than two years prior to his application" for patent.

SEC. 61. This section provides as a defence to an action for infringement:

"Fifth. That it [the patented thing] had been in public use or on sale in this country for more than two years before his [the inventor's] application for a patent." [Repealed June 22d, 1874.]

Act approved June 22d, 1874

SEC. 4886. This section provides that a thing in order to be patentable to an inventor must be "not in public use or on sale for more than two years prior to his application" for patent.

SEC. 4920. This section provides as a defence to an action for infringement:

"Fifth. That it [the patented thing] had been in public use or on sale in this country for more than two years before his [the inventor's] application for a patent."

#### CASES.

1. Sale of invention means a sale of the thing invented and not a sale of the abstract discovery. *Pennock et al. v. Dialogue*, 2 Peters' C. C. 1.—SUP. CT. 1829.

2. The use in question has always been understood to be a public use, and not a private or surreptitious use in fraud of the inventor.—*Ib.*

3. The first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use or to be publicly sold for use before he makes application.—*Ib.*

4. "Unless the invention has been used more or less by others, or publicly communicated by the patentee, his patent will be sustained." *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

5. The duration of the use is not material, the criterion is its public not its private or surreptitious use, but use with the consent of the inventor, expressed or implied from the circumstances.—*Ib.*

6. An inventor may disclose his secret to those he wishes to consult or to aid him if a patent is taken out in a reasonable time.—*Ib.*

7. As to public use, citizens and aliens stand on the same footing. [Invention made in 1832.] *Shaw v. Cooper*, 7 Peters' C. C. 292.—McLEAN, 1833.

8. It is a necessary condition that the invention be neither known nor used by the public before the application for patent.—*Ib.*

9. A knowledge of the invention surreptitiously obtained and communicated to the public does not affect the right of the inventor.—*Ib.*

10. "No matter by what means an invention may be communicated to the public, . . . any acquiescence in the public use by the inventor will be an abandonment of the right."—*Ib.*

11. "If the right were asserted by him who fraudulently obtains it, perhaps no lapse of time could give it validity."—*Ib.*

12. "The acquiescence of an inventor in the public use . . . can in no case be presumed when he has no knowledge of such use." Acquiescence is presumed where the public use is known or might be known to the inventor.—*Ib.*

13. "A strict construction of the act, as regards the public use of an invention before it is patented, is required not only by the letter and spirit, but also by sound policy."—*Ib.*

14. Foreign public use invalidates a patent.—*Ib.*

15. The use or sale "must be a public use or sale by others with his" (the inventor's) "knowledge and consent before his application for patent. If merely experimental, to ascertain success or utility, it does not affect the inventor's right." *Ryan et al. v. Goodwin et al.*, 3 Sumner, 514.—STORY, 1839.

16. Use between application and patent is not statutory public use.—*Ib.*

17. The use, to be invalidating, "should have been a public use of his machine, substantially as it was patented, with his consent. If it was

merely used occasionally by himself in trying experiments, or if he allowed only a temporary use thereof by a few persons, as an act of personal accommodation or neighborly kindness, for a short and limited period, that would not take away his right to a patent. To produce such an effect, the public use must be either generally allowed or acquiesced in, or at least be unlimited, in time, or extent, or object. On the other hand, if the use were without Wyeth's consent, and adverse to his patent, it was a clear violation of his rights, and could not deprive him of his patents." "The circumstances ought to be very clear and cogent before the court would be justified in adopting any conclusion so subversive of private rights when the party has subsequently taken out his patent." *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

18. Defendants used the invention of the complainants' inventor for four months before his application for a patent; this use was public, and not only with the express consent and allowance of the inventor, but he himself made the afterward patented rollers; and public use was held to have taken place. *McClurg et al. v. Kingsland et al.*, 1 Howard, 202.—SUP. CT. 1843.

19. The defence of two years' public use must be satisfactorily made out. *Hovey v. Henry*, 3 West. L. J. 153.—WOODBURY, 1845.

20. The allowance of two years' public use prior to application applies to design patents. *Root v. Ball et al.*, 4 McLean, 177.—MCLEAN, 1846.

21. "Under . . . the act of 1836, the intervening use, in order to defeat a prior invention, must be public and with the consent of the inventor, and continue two years." *Allen v. Blunt et al.*, 2 W. & M. 121.—WOODBURY, 1846.

22. The allowance of two years' public use prior to application for patent applies to design patents. *Booth v. Garelly et al.*, 1 Blatch. 247.—NELSON, 1847.

23. Where there are different applications from time to time by the same person for patent on the same improvement, the two years' public use prior to application allowed by law, runs from the first application, if it was not abandoned, but not otherwise. *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

24. "Public use is opposed to private use. If a man has an invention and uses it privately, and nobody knows of it, then the use of it cannot debar another person from inventing or patenting it. What is the evidence of a public use as opposed to a private use? It need not be a general use by the community; but it must be

an open use, however, so that the structure and *modus operandi* are apparent."—*Ib.*

25. "One evidence of a public use is the manufacture of an article, publicly and openly for sale; not universally, but still publicly—not by one person alone, and for his own private use, but the manufacture of it publicly—the offering of it for sale publicly."—*Ib.*

26. "A man is not to lie by and let the public—several persons—use his invention without objection. He is not to lie by and let persons manufacture the article for sale as if not to be patented; because he then misleads them. He is not to lie by and let them be sold in public stores."—*Ib.*

27. The public use must be a use of the afterward patented machine in all essential particulars.—*Ib.*

28. "The law of 1839 applies, on all trials since, to previous cases as well as to subsequent cases."—*Ib.*

29. If one man alone keeps such an article, as a safe, for himself, in his counting-room or his cellar, that constitutes a private and not a public use.—*Ib.*

30. Subsequent to the act of 1839, a plea in bar alleged that the patented improvement was in public use at the time of the application for patent. Plea held defective because the law permitted such use for two years. *Smith v. Ely et al.*, 5 McLean, 76.—MCLEAN, 1849.

31. "There may be an abandonment by the inventor at any time, even within the two years before the application for his patent." *Pitts v. Hall*, 2 Blatch. 230.—NELSON, 1851.

32. "The patentee may forfeit his right to the invention if he constructs it and vends it to others to use, or if he uses it publicly himself in the ordinary way of a public use of a machine, at any time prior to the period of two years before he makes his application for a patent—that is, he is not allowed to derive any benefit from the sale or the use of his machine without forfeiting his right, except within two years prior to the time he makes his application."—*Ib.*

33. A public use more than two years prior to an application, for experiment, or with a view of remedying defects, is not fatal.—*Ib.*

34. "If the machine was complete when it was constructed, . . . and if the patentee put it into public use, or put it in operation himself publicly, deriving profit from it, and having no view of further improvements or of ascertaining its defects, then, this use having occurred anterior to the two years, the effect would be to work a forfeiture."—*Ib.*

35. "This ground of forfeiture is not favored

of law, but is regarded as being somewhat harsh in its operation on individual rights. The evidence, therefore, should be quite clear that the use was not by way of experiment or for the purpose of perfecting the machine, in order to justify the conclusion that the patentee had forfeited his right to the improvement."—*Ib.*

36. "An abandonment or dedication may occur within the two years and at any time down to the procurement of the patent. The mere use or sale, however, of the machine, within the two years, will not alone or of itself work an abandonment. There must be something more, because Section 7 of the act of 1839 permits the sale or use by the patentee at any time within two years before his application, without its operating to invalidate his right. The use or sale must be accompanied by some declarations or acts going to establish an intention on the part of the patentee to give to the public the benefit of his improvement."—*Ib.*

37. Where the patented improvement was an improvement in railroad cars, it was held that the use of the improvement upon a railway for experiment and trial was not the invalidating public use of the statute. *Winans v. Schenectady & Troy R. R. Co.*, 2 Blatch. 279.—NELSON, 1851.

38. "By 'public use' is meant a use in public—that is, if the inventor himself makes and sells the thing to be used by others, or if it is made by one other person only, with his knowledge and without objection before application for a patent, *a fortiori*, if he suffers it to get a general use, it will have been in public use." *Rich et al. v. Lippincott et al.*, 2 Fish. P. C. 1.—GRIER, 1853.

39. Although an inventor may make different applications, from first to last, before his patent is allowed, yet if there is a reasonable continuity between the applications, the two years' public use runs backward from the date of the first application.—*Ib.*

40. "If the use be experimental, to ascertain the value, or the utility, or the success of the thing invented, by putting it into practice by trial, such use will not deprive the patentee of his right to the product of his genius." *Winans v. New York & Harlem R. R. Co.*, 4 Fish. P. C. 1.—NELSON, 1855.

41. The use of a newly invented railroad truck on a railroad, for the purpose of testing the same, is not such a use as constitutes the public use of the statute.—*Ib.*

42. "A public use as meant by the statute is a use in public. It need not be generally adopted by the public. Public is not equivalent to

general, but distinguished from secret use—used in a public manner." *Hunt v. Howe*, 1 MacArthur's P. C. 366.—MORSELL, 1855.

43. "If the plaintiffs, after their invention was perfected, knowingly allowed it to be used in public for more than two years before they applied for letters-patent, it is conclusive evidence of a dedication of such invention to the public, and their patent is void." *Ransom et al. v. N. Y.*, 1 Fish. P. C. 252.—HALL, 1856.

44. The filing of a caveat does not prevent the running of time as regards the defence of two years' public use. *Bell v. Daniels et al.*, 1 Bond, 212.—LEAVITT, 1858.

45. "If the jury find the invention was used by others, or even by one person, with the consent or allowance of the inventor publicly, and for more than two years before the application for a patent," then the defence of two years' public use is established.—*Ib.*

46. An inventor made application for his patent in January, 1838, which application was rejected. In March, 1840, he filed another specification and claim without withdrawing his first application, and his patent issued June 10th, 1840. It was held that two years' public use must run from the application of January, 1838.—*Ib.*

47. "The act of 1839, chapter 88, Section 7, . . . is intended to relate to the case of a use, sale, or license to use, given or made and claimed under the inventor who admits and claims the privilege." *Ellithorp v. Robertson*, 1 MacArthur's P. C. 535.—MORSELL, 1858.

48. By the terms "in public use or on sale," as used in the statute, is not meant that every one must know and have a right to use the invention or that even generally there must be such a right or use.—*Ib.*

49. The two years' public use which constitutes a defence must be prior to the application, not simply prior to the patent. *Adams v. Jones et al.*, 1 Fish. P. C. 527.—GRIER, 1859.

50. The improvement in question was an improvement in bustles. The wife of the inventor wore such a bustle; also a friend of hers, to whom she communicated the improvement, and two others wore the same with her knowledge. This was held to be an invalidating public use. *Blackington v. Douglass*, 1 MacArthur's P. C. 622.—MERRICK, 1859.

51. "Wilful omission to apply for a patent within two years after" an inventor "became aware that another was using and claiming the invention, and his interposing no warning or objection whatsoever, shuts him out entirely from

any right to a patent." *Justice v. Jones*, 1 MacArthur's P. C. 635.—MERRICK, 1859.

52. Wickersham made application for patent for improvement in sewing-machines February 13th, 1850. On the 20th the papers were returned to him for correction. March 15th he returned amended papers. April 5th, 1850, the papers were returned to him for further amendment. May 28th, 1851, he withdrew his application and took back the \$20 allowed by law. From that time to October 2d, 1858, he made no movement in the matter, and then filed another application. Meantime Singer procured patents covering the same subject-matter and put the improvements into use. During this interval of delay Wickersham applied for five different patents in this country and one in England, and made a visit to England in 1854. Wickersham was held to have abandoned his invention; two years' public use was found against him, and priority of invention was found in favor of Singer. *Wickersham v. Singer*, 1 MacArthur's P. C. 645.—MERRICK, 1859.

53. Complainant made his first machine embodying the invention in 1844, and put it to work in a mill. In 1845 and 1846 he and his partners put other machines of the same kind into other mills. The patent was applied for November 30th, 1848. Complainant claimed that these early uses were experimental uses, but the court held that they were clearly otherwise, and that two years' public use before application had taken place. *Sanders v. Logan et al.*, 9 Am. Law Reg. 475.—GRIER, 1861.

54. An inventor filed his application for patent January 31st, 1855, and from that time it was constantly before the office until the patent issued, March 2d, 1855, except that on April 24th, 1857, it was withdrawn and refiled on the same day with an amended specification. It was held that two years' public use must be computed from January 31st, 1855. *Godfrey v. Eames*, 1 Wall. 317.—SUP. CT. 1863.

55. Under the act of 1836 and the prior legislation of Congress, "the public use or sale by the inventor of the thing invented, at any time before the application, was fatal to his claim for a patent. The act of 1839 relieved him from this consequence and introduced a new and more liberal policy. It gave him the right to apply for a patent at any time within two years after the use and sale of his invention." The new provision of the act of 1839 was wholly independent of the act of 1836, and, by necessary implication, it repealed the conflicting provisions upon the same subject in the earlier act.—*Id.*

56. "If a party choose to withdraw his appli-

cation for a patent, and pay the forfeit, intending at the time of such withdrawal to file a new petition, and he accordingly do so, the two petitions are to be considered as parts of the same transaction, and both constituting one continuous application within the meaning of the law."—*Id.*

57. Where there is a reasonable continuity between different applications for the same patent, the two years' use before application allowed by statute runs back to the date of the first application. *Howe v. Newton*, 2 Fish. P. C. 531.—LOWELL, 1865.

58. Complainants sold their afterward patented engine in the summer of 1855. The first application for patent was filed May 3d, 1856. September 22d, 1856, amended specification was filed. March 5th, 1857, complainants made a second affidavit of the originality of the invention. May 2d, 1857, the application was rejected. June 15th, 1857, it was again rejected on appeal. May 26th, 1858, the last application was filed, and patent was granted thereon. It was held that in attempting to prove two years' public use the application of 1856 was the one to take into consideration. *Blandy et al. v. Griffith et al.*, 3 Fish. P. C. 609.—SWAYNE, 1869.

59. "The statute [act of 1839, Section 7] is inflexible as to the time when the patent is to be applied for, with reference to the prior use and sale of the invention. The neglect to apply within two years after such sale or use is inevitably fatal. Whenever this fact appears the patent falls. Whatever the circumstances, the courts have no dispensing power. But beyond this the provision of the statute is silent."—*Id.*

60. "If we are the original and first inventors, the law secures to us a monopoly of the invention for a given number of years, upon certain conditions, and one of those conditions is that we shall not put this invention on sale or in public use, and then after the lapse of more than two years treat as infringers everybody else who has it in public use or on sale, and who may not have it by grant from us." *Am. H. & L. S. & D. M. Co. v. Am. T. & M. Co. et al.*, 1 Holmes, 503.—SHEPLEY, 1870.

61. On the question of public use more than two years prior to application, a question for consideration is, "whether such machines were put on sale or into public use as matters of profit and gain, or whether it was for the mere purpose of experiment and perfecting the invention."—*Id.*

62. If the use of the afterward patented machine was "for the mere purpose of experiment,

to see whether it would work, and with the view of perfecting it as a separate invention, and not for the purpose of rendering the machine which had been sold perfect as an operative machine, that would not be such a public use or sale as would invalidate his patent or deprive him of the right to a patent.”—*Id.*

63. Upon the question of two years’ public use, the question is not whether the whole machine “was or was not a perfect machine in the sense in which ‘perfect’ is usually understood.” The question is whether the machine was or was not a perfect machine so far as the patented device is concerned, and the question for consideration is not “whether it was perfect in mechanical execution as you might expect a machine to be in its most highly finished state of mechanical perfection. A perfect machine, in the sense of the word ‘perfect,’ means a perfected invention; not a perfectly constructed machine, but a machine so constructed as to embody all the essential elements of the invention, in a form that would make them practical and operative so as to accomplish the result. But it is not necessary that it should accomplish that result in the most perfect manner and be in a condition where it was not susceptible of a higher degree of perfection in its mere mechanical construction.”—*Id.*

64. Under the act of March 3d, 1839, “the burden of proof is always on the defendant who sets up such prior sale or use, and he must show it to have been with the knowledge and consent of the inventor, and to have been in public in the ordinary way of a public use or sale of a machine, and not to have been a use for the mere purpose of experiment. But if it is in public use or on sale with the consent or allowance of the inventor more than two years prior to his application for a patent, and not in use merely for the purposes of experiment, then . . . the patent is void.”—*Id.*

65. “Public use, within the statute applicable to this branch of the defence, may be by the inventor himself of one machine, or with his knowledge and consent or approval.”—*Id.*

66. “The jury are authorized, if they find one machine to have been in public use or on sale, with the knowledge and consent of the inventor, more than two years prior to his application for a patent, to find that sufficient to make the patent void.”—*Id.*

67. “‘Use and sale with the consent and allowance of the inventor’ does mean use and sale of the perfected invention, and not of the invention in an imperfect, inchoate, and experimental condition. But . . . distinguish between the

invention and the machine which embodies it. The invention may be perfect, and the machine which embodies that invention may be an imperfect machine.”—*Id.*

68. An application for patent was filed December 14th, 1850, and rejected March 6th, 1851. A new application was filed June 10th, 1853; was rejected April 11th, 1854, and amended as finally granted September 24th, 1856; the patent issued November 4th, 1856. It was held that two years’ public use must be computed from December 14th, 1850, and that it was not a material fact that the original application did not have the same claims as the patent. *Singer et al. v. Braunsdorf et al.*, 7 Blatch. 521.—BLATCHFORD, 1870.

69. “While the object of the law was to protect the public against the exclusive claim of an inventor who had dedicated his invention to their use by allowing its practical employment in public, it was, at the same time, designed to require of him reasonable diligence in applying for his patent. As it is the public use of a completed invention against which this provision of the law is directed, it could scarcely have been intended to authorize such use by the inventor himself, which, if employed by another, with his consent, would work a forfeiture of his right to a patent. His own direct act is just as significant of an intended abandonment of his inchoate right as is that of another, with his consent. Indeed, it is difficult to comprehend that a use in public by an inventor himself is not as effectually ‘a public use, with his consent and allowance,’ as that where his invention is permissively so employed by another.” *McMillin et al. v. Barclay et al.*, 3 Pittsb. 377.—MCKEN-  
NAN, 1871.

70. June 9th, 1855, an inventor filed his caveat in the Patent Office. July 23d, 1855, he made application for patent, which application, after several rejections and renewals, was granted April 16th, 1867. April 25th, 1865, he made second application for another patent referring to the same general subject-matter, which was granted February 20th, 1866; this earlier patent, last applied for, claimed features which were shown in the earlier application and later patent. From June, 1855, until after the first patent was granted complainants used the invention in the ordinary and practical way on their steam-boat. It was held that the invalidating two years’ public use had occurred as regarded the earlier patent, but not as regarded the later patent.—*Id.*

71. If public use is allowed more than two years prior to the application for patent, then

"however great the hindrances to such application, and want of pecuniary means, or other misfortune, the right to the future exclusive use was lost. This may be a great hardship, and so may properly induce a court to require very clear proof, and dispose them to give full weight to the *prima facie* evidence which the granting of the patent itself imports, in support of the patentee's title; but if such use and sale be nevertheless established, there is no alternative—the court has no discretion." *Sisson et al. v. Gilbert et al.*, 9 Blatch. 185.—WOODRUFF, 1871.

72. Where public use of an invention is permitted more than two years before application for patent, and the only changes afterward made in the device are those of a purely mechanical and formal nature, the said use cannot be considered merely experimental.—*Id.*

73. "It is settled that a merely experimental use, made in good faith, and not in such wise as to amount to fraud upon the public, misleading them into a use, in the belief that it is free, does not destroy the exclusive right of an inventor."—*Id.*

74. "Consent and allowance may be inferred from acquiescence."—*Id.*

75. An inventor made application for patent in January, 1852, which application was rejected the following April. From this rejection no appeal was taken or re-examination applied for. In May following the inventor took his application and all the other papers, except one drawing, from the Patent Office. In April, 1862, the inventor filed a new application, without making reference to the former. Meanwhile he and others residing in his village had put the invention into common and public use. After various rejections and actions the patent was granted in 1869. The court held that there was not a reasonable continuity between the two applications, that the latter application must be taken in considering two years' public use, and that the invalidating two years' public use had occurred. *Bevin v. East Hampton Bell Co.*, 9 Blatch. 50.—SHIPMAN, 1871.

76. "Permission to put an invention in public use for two years prior to the application does not make it the duty of the inventor to do so for that or any other period before he applies." *Russell & Erwin Mfg Co. v. Mallory et al.*, 10 Blatch. 140.—WOODRUFF, 1872.

77. "Apart from the question of abandonment, the mere fact that, prior to the application for the patent, some one has obtained knowledge of the invention, and placed the thing invented on sale, whether innocently or fraudulently, does not cut off the prior right."—*Id.*

78. Where there were successive applications for patent upon the same general subject-matter, with a reasonable continuity between them, the first application is the one to be considered in considering the question of two years' public use. *Smith v. O'Connor*, 2 Sawyer, 461.—SAWYER, 1873.

79. "An agreement for the transfer of an invention for the joint benefit of the inventors and those who will advance money for the manufacture or use of the machine invented, not carried into execution, and unaccompanied by any public use of the machine, but being prospective in its character, not consummated until within the said two years, does not . . . affect the validity of the patent." *Elm City Co. v. Wooster*, 6 Fish. P. C. 452.—WOODRUFF, 1873.

80. "If the sale or use is without the consent or allowance of the inventor, or if the use is merely experimental, to ascertain the value, utility, or success of the invention by putting it in practice, that is not such a sale or use as will deprive the inventor of his title." *Jones et al. v. Sewall*, 3 Clifford, 563.—CLIFFORD, 1873.

81. "Nor is the inventor to be estopped by allowing a few persons to use his invention to ascertain its utility, or by any such acts of use or indulgence to others to use the same as are not inconsistent with the clear intention to hold the exclusive privilege, and to secure the same by letters-patent."—*Id.*

82. "Where the party has subsequently taken out a patent, the court is not authorized to give effect to such a defence to a charge of infringement, except in cases where the proof is clear and cogent."—*Id.*

83. "Public use of an invention, unless by the patentee himself, for profit, or by his consent and allowance, will not work a forfeiture of his title, as such forfeiture is not favored, unless it clearly appear that the use was solely for profit, and not with a view of further improvements or of ascertaining its defects, or for any other purpose of experiment in reducing the invention to practice."—*Id.*

84. "Inventors have a right to employ all means necessary and proper to enable them to perfect their inventions and to reduce the same to practice, and it is clear that no such experimental act can justly be viewed as legitimate evidence to support the defence of a prior unauthorized public sale or use of the invention."—*Id.*

85. "Public use in good faith for experimental purposes and for a reasonable period, even before the beginning of the two years of limita-



tion, cannot affect the rights of the inventor. The objection rests upon the principles of forfeiture, and is not to be favorably regarded. Every reasonable doubt should be raised against it. But where either of the facts of this class, specified in the statutes, is clearly made out, the result is as if there had been the failure of the condition precedent, and the effect is fatal to the patent." *Birdsell v. McDonald et al.*, 1 Bann. & Ard. 165.—SWAYNE & WELKER, 1874.

86. The application of a newly invented truck to a railroad engine, to see how it will work, is not the public use of the statute. *Locomotive Engine Safety Truck Co. v. Penn. R. R. Co.*, 1 Bann. & Ard. 470.—STRONG, 1874.

87. "There is an obvious distinction between a public use, or a use by the public, and an experimental use in public. . . . A use in public for test or experiment is not such a public use as was contemplated by the act of Congress, nor such a use as can be held evidence of dedication to the public."—*Id.*

88. An inventor filed an application for patent in the Patent Office February 14th, 1857, and correspondence ensued. His papers were returned for correction, and after correction the application was rejected April 15th, 1857. January 13th, 1859, he filed a new petition, renewing the first petition, whereupon his patent issued February 1st, 1859. It was held that under such circumstances the date of the application for the patent was to be considered the date of his first application. *Henry v. Francestown Soapstone Stove Co.*, 2 Bann. & Ard. 221.—SHEPLEY, 1876.

89. To save a forfeiture a court may, if necessary, give the applicant the benefit of his first application for patent, although not correct in form.—*Id.*

90. "The fact of a public use or sale more than two years prior to the application, when clearly proved, is fatal to the patent. But the objection rests upon the principle of forfeiture, and is not to be so favorably regarded as to dispense with the necessity of strict proof. Public use in good faith for experimental purposes, while the inventor is perfecting his invention, and for a reasonable period even before the beginning of the two years of limitation, cannot affect the rights of the inventor."—*Id.*

91. An application for patent was filed February 14th, 1857. Defendant urged the defence of two years' public use. There was only one case of a sale clearly proved before February 14th, 1855, and no evidence tending to show more than two or three sales before that time, all of them accompanied by a notice of an intent to

apply for a patent, and all of these were during a time when the inventor was experimenting upon and before he had perfected his invention and attained sufficient perfection in his castings to satisfy him that his invention was practically useful. In most, if not all of these instances, the articles were delivered on trial, to be returned if the invention did not work satisfactorily. These were held to be regarded rather in the light of such practical tests as the law permits an inventor to make, than as such public sales as would tend to show abandonment or mislead the public into a belief that the inventor had made a dedication to the public.—*Id.*

92. On December 31st, 1859, Weston filed a caveat for his invention, which remained in force until December 31st, 1861. December 6th, 1860, Doyle filed his application for patent for the same invention, and his patent was issued in January, 1861, without notice being given to Weston. December 14th, 1861, Weston made his application for patent, which was refused December 18th, 1861, on reference to Doyle's patent. In July, 1862, Weston, who had been in England since 1858, first heard of the rejection of his application; in March, 1863, he took measures, through his attorneys, who were also Doyle's attorneys, to obtain a patent. These attorneys, July 14th, 1863, asked the Patent Office to declare an interference, which was declared July 16th, 1863, and the first Monday of September, 1863, appointed for hearing. The attorneys gave no notice to Weston of this interference, and it went by default in favor of Doyle, but no notice of this result was given to Weston, who was still in England. Early in 1865 Weston, through his attorneys, asked for a second interference, which was declared November 20th, 1865, and hearing appointed for the first Monday of May, 1866. No steps were taken on the behalf of Weston by his attorneys, who were still the attorneys of Doyle. In July, 1866, Weston returned to this country, employed other counsel, and asked for a postponement of the hearing, which request was granted. Weston was obliged to let the case go by default, and October 17th, 1866, judgment *pro forma* was given for Doyle. December 1st, 1866, Weston made another application for patent, and on January 1st, 1867, a new interference was declared and a decision rendered June 10th, 1867, in favor of Weston. It was held that in attempting to prove two years' public use prior to application the time must run from Weston's first application. *Weston v. White et al.*, 13 Blatch. 447.—SHIPMAN, 1876.

93. "The continuity of . . . two applications

is a question of fact, to be determined in each case upon an examination of its own circumstances. In order to ascertain this fact, the trier will find whether the inventor has abandoned his original application, either by his own will or by his acts, and whether the new application is substantially for the same invention which was originally claimed. If the two applications are found to be continuous, and it has been therefore proved that the delay in making the new application, after the rejection of the first, has not been unreasonable, under the circumstances of the case, and if the invention has not been abandoned to the public, the public use, in order to invalidate the patent, must be a use prior to the original and continuing application. Public or common use subsequent to the date of the original application, if that has been a continuing one, and the two patents are 'parts of the same transaction,' will not avoid the patent."—*Ib.*

94. The patent in suit was dated June 8th, 1869. The date of the original application for patent was December 6th, 1849. This application was filed in the Patent Office March 1st, 1850, accompanied by a specification and by a model on March 5th, 1850; was rejected April 9th, 1850, and was withdrawn May 4th, 1850. It was afterward repeatedly renewed, and resulted in the allowance of said patent. In computing two years' public use, the date of the first application for patent was taken as the proper date. *Howard v. Christy*, 2 Bann. & Ard. 457.—McKENNAN, 1876.

95. A single instance of the sale or of the use by the patentee more than two years prior to the application for patent may be fatal to his right. *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92.—SUP. CT. 1877.

96. "A use for the mere purpose of competitive examination, experiment, and test is not a public use." *U. S. Rifle & Cartridge Co. et al. v. Whitney Arms Co. et al.*, 14 Blatch. 94.—SHIPMAN, 1877.

97. Complainants' patent for improvement in car-seats was dated March 5th, 1872, and applied for August 9th, 1869. In November, 1866, the inventor entered into a contract with Graham & Stebbins with reference to making the car-seats; two were partly made when the contract was put an end to, and Stebbins retired; Graham alone completed the seats. The court held that the mere making of the seats without anything more was immaterial. It appeared that Graham sold one of the seats after they were completed. It was not clear, on the evidence, that this sale was before August 9th, 1867. It was held that

the invalidating two years' public use had not been proved. *Comstock et al. v. Sandusky Seat Co. et al.*, 3 Bann. & Ard. 188.—WELKER, 1878.

98. "Doubt, it is well settled, should be resolved against the respondents, upon whom rests the burden of proof. . . . This rule is founded in justice and good sense. The patent is *prima facie* valid. It is the muniment of title. He who would overcome it must do so by a clear preponderance of evidence."—*Ib.*

99. The use for four years of a newly invented pavement, put down at an inventor's expense, upon a public street, to determine its utility and durability, is not a public use which will bar a patent. *Elizabeth v. Pavement Co.*, 97 U. S. 126.—SUP. CT. 1878.

100. "An abandonment of an invention to the public may be evinced by the conduct of the inventor at any time, even within the two years named by law. The effect of the law is, that no such consequence will follow from the invention being in public use or on sale, with the inventor's consent and allowance, at any time within the two years before his application."—*Ib.*

101. "While the supposed machine is in . . . experimental use, the public may be incidentally deriving a benefit from it. If it be a grist mill or a carding machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour or their wool into rolls, and still it will not be in public use, within the meaning of the law. But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale, within the meaning of the law."—*Ib.*

102. "It is not a public knowledge of his invention that precludes an inventor from obtaining a patent for it, but a public use or sale of it."—*Ib.*

103. There is nothing in the act of 1839, "requiring that the sale or use shall be with the consent or allowance of the inventor, but as that qualification is found in all three of the sections of the act of 1836, to which this is an amendment, and is reasonable, it has always been understood to apply to the sale or use mentioned in this section." *Draper et al. v. Wattles*, 3 Bann. & Ard. 618.—LOWELL, 1878.

104. "The sale or use, to defeat the patent, must have been of the thing patented; and . . . in order to defeat the patent, it is not enough to prove that the inventor has sold an earlier and less perfect article—that is, less perfect in the sense of the patent law, even if the thing sold

would be within the claim of the patent. In other words, the test is not, necessarily, whether the article sold would infringe the invention, by embodying a part of it, but whether it is the invention—that is, embodies the whole of it. The law does not intend to say that a patentee dedicates to the public whatever he sells more than two years before he applies for a patent, but that he dedicates his invention if he sells it for that period.”—*Ib.*

105. An inventor applied for his patent April 2d, 1849, and was rejected September 7th, 1849. He took no appeal. On June 20th, 1851, the application was withdrawn, and from that date he took no steps to secure a patent until November 15th, 1858, when he wrote a letter to the Patent Office. He filed a second application December 24th, 1858, and it was rejected December 29th, 1858, and again rejected January 14th, 1859. February 2d, 1859, appeal was made to the Commissioner in person. October 8th, 1859, the inventor made another application. During the years of 1860–65 the inventor was persistent in urging his application upon the attention of the commissioners of patents. May 4th, 1866, the inventor filed the application on which the patent was granted. It was held that the two years’ public use was to be computed from the date of the first application. *Colgate v. Western Union Telegraph Co.*, 15 Blatch. 365.—BLATCHFORD, 1878.

106. An inventor made his improvement in corset steels in the year 1855. At that time he gave a pair to a lady, who wore them. They lasted a long time. He made another pair for her in 1858, which she wore a long time. She knew about 1863 of his making another pair for another lady. The first two pairs were made for a lady who in 1863 became the inventor’s wife; after her marriage to him, and in 1863, she ripped these steels out of the corset and showed and explained them to one Sturges. Patent was applied for in March, 1866. It was held that two years’ public use before application had taken place. *Egbert v. Lippman et al.*, 15 Blatch. 295.—BLATCHFORD, 1878.

107. As to a patent issued when the act of 1839 was in force, “the effect of that act is to require that an inventor shall not permit his invention to be used in public at a period earlier than two years prior to his application for a patent, under the penalty of having his patent rendered void by such use. Consent and allowance by the inventor are not necessary to such validity.” The policy of the act of 1839 is continued in the act of 1870.—*Ib.*

108. Letters-patent were granted July 31st,

1866, on application filed December 19th, 1865. The invention was for a machine for swaging the heads of screw augers. During nearly each month, from February, 1859, to 1865, in the intervals of his experiments, the inventor headed bits upon the machine, which, when made perfect, were delivered with other hand-made bits. Prior to November, 1863, a great many of the bits were imperfect and wasted. The inventor worked the machine himself in a room where there were other workmen. Between November 1st, 1864, and July 10th, 1865, the dies were nearly perfected. It was held that there had been no two years’ public use. *Jennings v. Pierce et al.*, 15 Blatch. 42.—SHIPMAN, 1878.

109. “Acts of an inventor, to determine the value, utility, or success of his invention, are to be liberally construed, if the acts are not inconsistent with the clear intention to hold the exclusive privilege.”—*Ib.*

110. “It would be a harsh limitation of the statutory rights of an inventor which should give to a naked infringer the privilege of using an invention, because the patentee had attempted, in good faith and secrecy, to incidentally make his experiments of some pecuniary benefit, while he was patiently endeavoring, amid many failures, to remedy the defects of the machine, test its value, and ascertain whether it could be used advantageously, and whether it would be of any benefit either to himself or to the public.”—*Ib.*

111. An application for patent was withdrawn in June, 1856; a new application was filed in February, 1858. Under the circumstances, the two applications were held to be one continuous application. *Howes et al. v. McNeal*, 15 Blatch. 103.—BLATCHFORD, 1878.

112. In considering the question of two years’ public use, a party cannot be made to suffer for the neglect of his attorney.—*Ib.*

113. “It is sufficient to defeat the right of applicant to a patent if it be shown that his invention had been in public use or on sale more than two years prior to his application, without proving that it was with his consent and allowance.” *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

114. To plead, in an answer, that so much of the invention as is claimed in a certain claim was in public use and on sale more than two years prior to the subsequent application is not properly pleading the defence of two years’ public use.—*Ib.*

115. “Inventors may, if they can, keep their inventions secret; but if they do not, and suffer the same to go into public use for a period ex-

ceeding what is allowed by the patent act, they forfeit their right to a patent." *Parks et al. v. Booth*, 102 U. S. 96.—SUP. CT. 1879.

116. "Public use means not only a use by the public, but a use in public—that is to say, one which is not secret, and, therefore, one from which, so far as the inventor is concerned, the public may, by any of the chances of life, acquire the knowledge." *Manning et al. v. Cape Ann Isinglass Co. & Glue Co. et al.*, 4 Bann. & Ard. 612.—LOWELL, 1879.

117. "The non-existence of public use being a condition precedent to the validity of the grant, the intent of the inventor not to abandon the invention, or his reasons for not applying for a patent, though of a most potent character, such as illness, are immaterial."—*Ib.*

118. "Evidence that any one has copied the invention which is . . . brought, presumptively, to the knowledge of mankind, is not necessary to the success of this defence. Such a fact would be difficult to prove or disprove, and the use itself in any of the modes above explained works a forfeiture, without more."—*Ib.*

119. "By the provisions of the act of July 4th, 1836, . . . it was only a public use, or being on sale, with the consent of the patentee, before the application for a patent, that would defeat the patent. Section 7 of the act of March 23d, 1839, did not change the character of the public use, or being on sale, that would defeat a patent, but provided that no patent should be held valid by reason of them, unless such purchase, sale, or prior use has been for more than two years prior to such application for a patent." *Campbell v. James et al.*, 17 Blatch. 42.—WHEELER, 1879.

120. The defence of two years' public use, in order to prevail, must be made out by clear proof.—*Ib.*

121. For an instance of disputed testimony held sufficient to prove two years' public use, see —. *Monce v. Woodworth*, 4 Bann. & Ard. 307.—CLARK, 1879.

122. "Sales [more than two years before application], in the usual course of business, whether absolute or conditional, if they are sales of the patented thing, work a forfeiture. A single sale has this effect as well as a hundred sales." That the inventor was meanwhile experimenting with other articles embodying the invention is not pertinent. "That particular transaction must be experimental, or it is within the forfeiture of the statute." "The evidence should be unequivocal that the test of the invention was one of the purposes of the seller."

*Henry v. Frankestown Soapstone Store Co.*, 2 Fed. Rep. 78.—LOWELL, 1880.

123. "Application in this connection includes the paper, or some written paper, and its presentation to the Commissioner."—*Ib.*

124. "The fact that the original mechanical patent was issued more than two years after the design patent is of no importance," the latter covering shape, the former mechanical combination, and the former being applied for within two years after the date of the latter. *Collender v. Griffith et al.*, 18 Blatch. 110.—BLATCHFORD, 1880.

125. A patentee made a machine containing his invention in 1857, and in 1863 substituted another, differing in form but not in principle, and applied for patent in 1876. Meanwhile the patentee used the machine "in the ordinary way of business" in a room where was other machinery and other workmen, all of whom had keys to the shop, which was kept locked. None of the workmen appear to have divulged a knowledge of the machine until 1876. Held, that this was a public use, fatal to the patent. *Perkins v. Nashua Card & Glazed Paper Co.*, 2 Fed. Rep. 451.—LOWELL, 1880.

126. "Because of the difficulty of ascertaining the amount of knowledge which may have been derived from the exhibition, publication, or use of the invention, it has always been held that when the public have had means of knowledge they have had knowledge of the invention. Thus, if a book has been published describing the invention, it is not important that no one has read it. If a pier has been placed in the bed of a river or a pipe under ground, it is conclusively presumed to be known to all men."—*Ib.*

127. "Actual knowledge of the invention need not have been derived by any one interested to practise it; it is enough that any one or more persons, not under a pledge of secrecy, saw the invention practised or even might have seen it, if they had used their opportunities, provided it was in fact practised in the ordinary way after being completed."—*Ib.*

128. By the court: "It must be held either that the workman and visitors were a part of the public, or that they were persons from whom the public might have acquired the art without a breach of trust."—*Ib.*

129. A machine which, whether entirely satisfactory or not, has been run in the ordinary course of business for twenty years or thirty years, and which is patented precisely as it was used, cannot properly be called an experimental machine.—*Ib.*

130. B exhibited publicly to a committee and

certain inhabitants, "more than two years before the application for complainant's design patent," "a drawing of a lamp-post, which he was ready to sell them, and which is like the patented and the infringing design." "B testified that he had made others like it, excepting the ornament on top, which forms no part of the plaintiff's claim," some months previous. The lamp-posts complained of were put up twenty months before such application. Public use was held to be established. *Burton v. Greenville*, 3 Fed. Rep. 642.—LOWELL, 1880.

131. "The law since 1870 . . . has avoided a patent, if any one has publicly used or sold the same invention, by whomsoever discovered, for more than two years before the patent was applied for." *Am. Whip Co. v. Hampden Whip Co. et al.*, 4 Fed. Rep. 536.—LOWELL, 1880.

132. Where an invention is used in the manufacture of an article, but does not appear in and is not suggested by the completed article, a sale of the completed article is not a sale of the invention.—*Ib.*

133. Where a patentee attempts to impeach a patent he has sold to others, his evidence will have little weight except when corroborated. *Sinclair et al. v. Backus*, 4 Fed. Rep. 539.—LOWELL, 1880.

134. The difficulties inherent in the subject, where it is attempted to attack the validity of a patent by evidencing matters occurring many years before, must be fully overcome in order to succeed.—*Ib.*

135. Where no sale is proven, uses which go to test the degree of patentability are experimental uses.—*Ib.*

136. "Inventors may, if they can, keep their inventions secret, and if they do it is a mistake to suppose that any delay to apply for a patent will forfeit their right to the same, or present any bar to a subsequent application. Nor does any different rule prevail in the case of a design patent. Delay less than for a period of two years constitutes no defence in any case." *Miller et al. v. Smith et al.*, 5 Fed. Rep. 359.—CLIFFORD, 1880.

137. An applicant for a patent withdrew two claims from the application and made them the subject-matter of a new application. A patent was then granted on the first application, and subsequently one on the second. Held, that the second patent was valid; that it was not a case for the reissue of the first patent; and that in computing two years' public use, as to the later patent, the computation must run from the earlier application. *Graham v. Geneva Lake Crawford Mfg Co.*, 11 Fed. Rep. 138.—DYER, 1880.

138. By the court: "The only machine made in 1863 by Graham, the inventor, which is clearly proved to have been sold, was delivered on trial; and the transactions of the inventor in that year, by which his unperfected invention was brought into notice, as was stated by the court in *Graham v. McCormick*, should be regarded rather in the light of a use of the invention for such practical tests as the law permits the inventor to make than as such a public sale or use as is contemplated by the statute."—*Ib.*

139. "This . . . defence rests upon a claim of forfeiture of rights secured by the patent. To justify the court in sustaining it, the proof should be clear and satisfactory. The right of the infringer to invalidate the patent for this cause should be undoubted."—*Ib.*

140. More than two years before the application for complainant's patent, he sent a machine embodying the invention to a party to be tried and to be brought by the party if satisfactory. The trial was not satisfactory. Public use was held established. *Kells v. McKenzie et al.*, 9 Fed. Rep. 284.—BROWN, 1881.

141. The use of a fire engine containing a patented device, for a year or two, prior to the two years allowed by law, at the request of the inventor, but (apparently) without remuneration, is not a public use. *Campbell v. N. Y.*, 20 Blatch. 67.—WHEELER, 1881.

142. A use for more than two years prior to application, by others than the inventor of the afterward patented invention, must be with the consent and allowance of the inventor in order to be a bar to the patent. (Said of a patent granted May 21st, 1864.)—*Ib.*

143. "To constitute the public use of a patent it is not necessary that more than one of the patented articles should be publicly used," provided the use is "without restriction or limitation." *Egbert v. Lippmann et al.*, 104 U. S. 333.—SUP. CT. 1881.

144. "If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee without limitation, or restriction, or injunction of secrecy, and it is so used, such use is public within the meaning of the statute, even though the use and the knowledge of the use may be confined to one person."—*Ib.*

145. "A use necessarily open to the public, if made in good faith, solely to test the qualities of the invention and for the purpose of experiment, is not a public use within the meaning of the law."—*Ib.*

146. The inventor of a corset steel, patented in 1866, in 1855 gave a pair to a woman to use, and another pair in 1858. They were so used,

under no obligation of secrecy or any restriction whatever; the use was not for experiment or to test their qualities. Before the patent was applied for, the invention had gone into general use. *Found* that a two years' public use existed.—*Ib.*

147. Worley reduced his invention, a mode of finishing plug tobacco, to successful practice in 1871; it was adhered to without change from that date; thousands of pounds of tobacco were made and sold in the market under it, with no precaution of secrecy. The patent, taken out in 1876, was held invalid. *Worley et al. v. Loker Tobacco Co. et al.*, 104 U. S. 340.—SUP. CT. 1881.

148. "Public use in the sense of the patent law is proved by a single use by any person not the inventor, or by the inventor in an open way, provided the use is not experimental." *Jones v. Barker et al.*, 11 Fed. Rep. 597.—LOWELL, 1882.

149. The statute, allowing two years' public use, refers to original applications and not to reissues. *Shaw v. Colwell Lead Co.*, 20 Blatch. 417.—WHEELER, 1882.

150. By the court: "It is not true that the inventor cannot safely use for profit such a machine in its imperfect state, lest two years should escape before the invention is completed and the patent is applied for." *Sprague v. Smith & Griggs M'f'g Co.*, 12 Fed. Rep. 721.—SHIPMAN, 1882.

151. By the court: "If the price list was published in May it would be immaterial that no skates were sold before August 19th because they were 'on sale.'" *Plimpton v. Winslow*, 14 Fed. Rep. 919.—LOWELL, 1883.

152. By the court: "There is . . . no foundation for the argument of the learned counsel for the complainant that design patents are not void from being in public use or on sale for more than two years prior to the application for a patent." *Theberath v. R. & C. Harness Trimming Co.*, 15 Fed. Rep. 246.—NIXON, 1883.

153. By the court: "I am much inclined to think that the new fact that a new article is shown in the drawings of a patent for a machine would not of itself be an abandonment of the new article, which would properly be the subject of a different patent, until the statutory forfeiture of use for two years had been incurred." *Hatch et al. v. Moffitt*, 15 Fed. Rep. 252.—LOWELL, 1883.

154. Where two of the patented safes were exhibited at fairs and the two were sold to bankers for use, it was held that such a state of facts constitutes the public use which is fatal to a patent. *Hall v. Macneale et al.*, 107 U. S. 90.—SUP. CT. 1883.

155. The fact that the patented construction was hidden from view in the safes above referred to does not prevent said use from being a public use.—*Ib.*

156. Patents granted under Section 7 of the patent act of 1839 are invalid if two years' public use preceded the application, although that use was without the inventor's consent and allowance. *Andrews et al. v. Hovey*, 5 McCrary, 181.—SHIRAS, 1883.

157. Where machinery is used in the regular course of business, without material change afterward, and two years before the patent is applied for, it amounts to the public use intended by the statute. *Manning et al. v. Cape Ann Isinglass & Glue Co. et al.*, 2 Sup. Ct. Rep. 860.—SUP. CT. 1883.

158. Use abroad has no bearing on United States patents. *Cornely v. Marckwald*, 21 Blatch. 367.—WHEELER, 1883.

159. The patentees filed a caveat on their improvement December 9th, 1870, and renewed it December 20th, 1871. They applied for a patent June 30th, 1873. From the fall of 1870 and onward, they experimented on their machine at great expense, but finally came back to the device described in the caveat. During this time the machine was used incidentally for profit. Held, not to be the public use of the statute. *Emery et al. v. Cavanaugh*, 17 Fed. Rep. 242.—SHIPMAN, 1883.

160. Use abroad has no bearing on a home patent. *Worswick M'f'g Co. v. Steiger*, 17 Fed. Rep. 250.—WELKER, 1883.

161. The invention in dispute being a velvet surfaced rubber eraser, and the question at issue being that of public use, one Holten testified that more than two years before the application for complainant's patent he gave some samples of such erasers to his friends. This was found to be an experimental use merely. *Lockwood v. Cutter Tower Co.*, 18 Fed. Rep. 653.—LOWELL, 1883.

162. Under the acts of 1836 and 1839, a two years' public use of the invention prior to the application for patent, without the allowance and consent of the inventor, invalidates the patent. *Andrews et al. v. Hovey*, 5 McCrary, 181.—SHIRAS, 1883.

163. By the court: "The orator showed his invention to one Raw and gave him a scoop embodying it, and afterward another at his request, but not to sell: Without the orator's knowledge he gave them to others, who commenced making them for sale, so that they were in public use and on sale, but without his consent or allowance, more than two years prior to his ap-

plication. It is not considered that this being in public use and on sale, without the consent and allowance of the inventor, invalidates the patent, under the acts of 1836 and 1839, by force of which it was granted." *Davis v. Fredericks*, 21 Blatch. 556.—WHEELER, 1884.

164. "The law permits an inventor to construct a machine which he is engaged in studying upon and developing, and place it in friendly hands for the purpose of testing it, and ascertaining whether it will perform the functions claimed for it; and if these machines are strictly experiments, made solely with a view to perfect the device, the right of the inventor remains unimpaired; but when an inventor puts his incomplete or experimental device upon the market and sells it, as a manufacture, more than two years before he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it." *Lyman v. Maypole et al.*, 19 Fed. Rep. 735.—BLODGETT, 1884.

165. When an inventor puts an incomplete machine on the market more than two years before he applies for a patent, meanwhile perfecting his machine, he cannot regain by his patent that form of device which he put upon the market.—*Ib.*

166. The defence to a suit for the infringement of a patent on an electric lamp, being more than two years' public use, the fact shown was that the user made a single lamp, used it a few times in the ordinary way of using a lamp, then discontinued the use, and subsequently adopted another and improved form of lamp. These facts were held sufficient to constitute public use. *Brush et al. v. Condit et al.*, 22 Blatch. 246.—SHIPMAN, 1884.

167. "Great latitude should be allowed to a person for completing the invention for which he seeks protection under the law." *Royer v. Chicago M'fg Co.*, 20 Fed. Rep. 853.—DRUMMOND, 1884.

168. Where the question was one of two years' public use, the patented thing being a railroad frog, and at a certain date railroad frogs were shown to be kept for sale, and sold, and put in use on several railroads, the court said: "The court will presume that in the due course of business it took at least some months before that time to devise and produce the frogs." *Wier v. Morden*, 21 Fed. Rep. 243.—BLODGETT, 1884.

169. Complainant filed his application for patent October, 1877, and on December 2d, 1877, the patent was allowed; but, as was claimed, by neglect of his solicitor, the final fee to the pat-

ent office was not paid, and the right to the patent lapsed. Sometime in February, 1879, he renewed his application, and asked that the original specification and drawings might be considered as a part of the renewed application, and thereon his patent was granted, May 30th, 1879. Thereupon the court said: "The application made by Weir in February, 1879, must, as it seems to me, be considered as his first application, the former application going for naught, and leaving him to stand upon that application, as made at the time he renewed it, upon his old specification and drawings."—*Ib.*

170. A use of the patented device by thousands in the regular course of business can never be regarded as a use simply for experiment. *Matthews v. Iron Clad M'fg Co.*, 22 Blatch. 247.—BLATCHFORD, 1884.

171. A use of a fare register upon a street car, for the purpose of experiment, is not the public use which destroys the right to a patent. *Railway Register M'fg Co. v. Broadway & Seventh Ave. R. R. Co.*, 30 O. G. 180.—WALLACE, 1884.

172. "Doubtless a single sale, by an inventor, in the ordinary course of business, of a machine embodying his complete invention, more than two years before his application for a patent, will defeat his right thereto, and may be shown in bar of a suit for infringement. And it may well be that such consequence will not be averted by the mere condition in the contract of sale, that the purchaser shall have the right to return the machine and take back the price should it fail to work satisfactorily." *Innis v. Oil City Boiler Works*, 22 Fed. Rep. 780.—ACHESON, 1885.

173. Where a single sale only is shown, and that at an under price, without profit to the seller, and the court is persuaded that the sale was made for the purpose of securing a fair test of the invention, a public use is not proven.—*Ib.*

174. "It being once shown that the use was experimental, then, upon the question of its reasonableness in the point of duration, every presumption should be made in favor of the inventor."—*Ib.*

175. An invention may be in public use for more than two years before application for the purpose of ascertaining its completeness, without invalidating a patent obtained therefor afterward. *Railway Register M'fg Co. v. Broadway & Seventh Ave. R. R. Co.*, 34 O. G. 921.—WHEELER, 1886.

176. Where defendants set up two years' public use prior to application for patent, "the party asserting such a defence assumes the burden of proof, and is bound to sustain it by clear and con-

vincing testimony." *Adams & Westlake M'fg Co. v. Rathbone et al.*, 26 Fed. Rep. 262.—BLODGETT, 1886.

177. The patent in question was for an improvement in making celluloid. "During the experiments which resulted in the discovery of the patented process, some poor dental plates were sold." This was evidently more than two years prior to the application for a patent. It was held not to constitute the defence of two years' public use. *Celluloid M'fg Co. v. Am. Zylonite Co. et al.*, 23 Blatch. 444.—SHIPMAN, 1886.

178. The publication of laudatory advertisements, by over sanguine inventors, does not necessarily amount to public use. *Celluloid M'fg Co. v. Am. Zylonite Co. et al.*, 27 Fed. Rep. 750.—SHIPMAN, 1886.

179. Where, for more than two years prior to application for patent, the afterward patented machine has been manufactured for sale, actually sold, and publicly used, a claim that such sale and use was merely experimental cannot be maintained. *Newark Mach. Co. v. Hargett et al.*, 36 O. G. 692.—BOND & MORRIS, 1886.

180. An inventor is not entitled to a patent for a combination which has been in public use for more than two years, even though, by reason of superior mechanical construction, he may have been the first to obtain from its use the most successful results.—*Id.*

181. A single well-proved instance of two years' public use suffices to establish that defence. *Detroit Lubricator Co. v. Lunkenheimer*, 38 O. G. 331.—BROWN, 1886.

182. The Green "driven-well" patent was dated January 14th, 1868. Green appears to have first made such a well in 1861. For a condition of facts which excused him as regards abandonment and as regards public use, see —. *Beetle v. Bennett et al.*, 122 U. S. 71.—SUP. CT. 1887.

183. "The act of 1839, as has repeatedly been held, has no effect to invalidate a patent, unless there be proof of abandonment of a use of the invention for more than two years prior to the application for the patent."—*Id.*

184. For a doubtful state of facts held not to constitute two years' public use, see —. *Eastern Paper Bag Co. et al. v. Standard Paper Bag Co. et al.*, 30 Fed. Rep. 63.—COLT, 1887.

185. Two applications for patents are continuous when they describe substantially the same thing, although they may vary somewhat. *International Tooth Crown Co. v. Richmond et al.*, 30 Fed. Rep. 775.—WALLACE, 1887.

186. A use which is a successful use does not

become merely an experimental use by reason of an addition thereto of supplementary improvements.—*Id.*

187. Where a patent has various claims covering different combinations in a machine, there may have been a two years' public use of some of the combinations without such use of the whole machine. *Smith & Griggs M'fg Co. v. Sprague*, 8 Sup. Ct. Rep. 122.—SUP. CT. 1887.

188. "A use by the inventor for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change the character; but where the use is mainly for the purpose of trade and profit, and the experiment is merely incidental to that, the principle and not the incident must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for the purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition."—*Id.*

189. "In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defence is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing."—*Id.*

190. The use of a machine may be a public use, although it is afterward improved in matters not vital to its operation, which make it more useful and more successful.—*Id.*

191. "Section 6 of the act of 1836 provided for the issuing of a patent to an inventor for an invention not known or used by others before his invention or discovery thereof, 'and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer.' Section 7 of the same act provided for the issuing of a patent if, on examination, it should not appear to the Commissioner that the invention had been made by any other person in this country prior to its being made by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, 'or had been in



public use or on sale, with the applicant's consent and allowance, prior to the application.' Section 15 of the same act provided that the defendant, in an action for the infringement of a patent, might show, among other things, that the thing patented 'had been in public use or on sale, with the consent and allowance of the patentee, before his application for a patent;' and that, if that was shown, judgment should be rendered for the defendant. Section 7 of the act of 1839 was in these words: 'That every person or corporation who has or shall have purchased or constructed any newly-invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and to vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in said invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent, as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or use prior has been for more than two years prior to such application for a patent.' The act of July 8th, 1870, repealed the act of 1839. Section 24 of the act of 1870, now embodied in Section 4886, Revised Statutes, was in these words: 'That any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned may, upon payment of the duty required by law, and other due proceedings had, obtain a patent therefor.' Section 37 of the act of 1870, now embodied in Section 4899, Revised Statutes, provided as follows: 'That every person who may have purchased of the inventor, or with his knowledge and consent may have constructed any newly invented or discovered machine, or other patentable article, prior to the application of the inventor or discoverer for a patent, or sold or used one so constructed, shall have the right to use, and vend to others to be used, the specific thing so purchased, without liability therefor.' In Section 61 of the act of 1870 it was enacted that, in any action for infringement, the defendant might prove on the trial, as a defence, among

other things, that the thing patented 'had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public,' and that, if such special matter alleged should be found for the defendant, judgment should be rendered for him. This provision is now found in Section 4920, Revised Statutes." *Andrews et al. v. Hovey*, 8 Sup. Ct. Rep. 101.—SUP. CT. 1887.

192. "In view of the fact that Section 37 of the act of 1870 re-enacts the first part of Section 7 of the act of 1839, with the addition, *ex industria*, of the requirement, in order to confer the right to use the specific thing in question, that the purchase of it should have been made from the inventor or the construction of it should have been with his knowledge and consent, and of the further fact that Section 24 of the act of 1870 re-enacts the second part of Section 7 of the act of 1839, and does not contain a requirement that the public use or sale for more than two years prior to the application shall have been with the consent or allowance of the patentee, in order to invalidate the patent, it may fairly be said that it was the view of Congress that Section 7 of the act of 1839 did not require, as an element, the knowledge, consent, or allowance of the applicant."—*Id.*

## RECORDING.

### "RECORDING" IN THE PATENT ACTS.

Act approved February 21st, 1793.

SECTION 4. *And be it further enacted*, That it shall be lawful for any inventor, his executor or administrator, to assign the title and interest in the said invention at any time, and the assignee, having recorded the said assignment in the office of the Secretary of State, shall thereafter stand in the place of the original inventor, both as to right and responsibility, and so the assignees of assigns, to any degree. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 11. *And be it further enacted*, That every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right, under any patent, to make and use, and to grant to others to make and use the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof, for which the as-

signee or grantee shall pay to the Commissioner the sum of three dollars. [Repealed July 8th, 1870.]

Act approved March 3d, 1837.

SEC. 6. *And be it further enacted*, That any patent hereafter to be issued may be made and issued to the assignee or assignees of the inventor or discoverer, the assignment thereof being first entered of record, and the application therefor being duly made, and the specification duly sworn to by the inventor. [Repealed July 8th, 1870.]

Act approved May 27th, 1848.

SEC. 2. *And be it further enacted*, That hereafter the Commissioner of Patents shall require a fee of one dollar for recording any assignment, grant, or conveyance of the whole or any specified part of the interest in letters-patent, or power of attorney, or license to make and use the thing patented, when such instrument shall not exceed three hundred words; the sum of two dollars when it shall exceed three hundred words; and the sum of three dollars when it shall exceed one thousand words; which fees shall in all cases be paid in advance. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 36. *And be it further enacted*, That every patent or any interest therein shall be assignable in law, by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States; and said assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4898. Every patent, or any interest therein, shall be assignable in law, by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof.

#### CASES

1. A failure of an assignor to record a previous assignment made to him does not avoid his

assignment. *Holden v. Curtis*, 2 N. H. 61.—WOODBURY, 1819.

2. Recording is essential to the validity of an assignment. *Higgins v. Strong*, 4 Blackford, 182.—DEWEY, 1836.

3. Under the patent act of 1793, chapter 55, Section 4, an assignment must be recorded before the assignee can bring suit. *Wyeth et al. v. Stone et al.*, 1 Story, 273.—STORY, 1840.

4. "A license is not required by law to be recorded in the Patent Office in order to give it effect and validity." *Brooks v. Bryan et al.*; 2 Story, 525.—STORY, 1843.

5. The statutory provision as to "recording within three months is merely directory, and . . . except as to intermediate *bona fide* purchasers, without notice, any subsequent recording of an assignment will be sufficient to pass the title to the assignee."—*Ib.*

6. The statutory provision as to recording "is merely directory, for the protection of purchasers." If the assignee "fails to record within three months, then every subsequent *bona fide* purchaser has a right to presume that no assignment had been made within that period. If the assignment has not been recorded until after the three months, a prior purchaser ought, upon the ground of laches, to be preferred to the assignee. If he purchases after the assignment has been recorded, although not within the three months, the purchaser may be postponed upon the ground of *mala fides*, or constructive notice of the assignment." *Pitts v. Whitman*, 2 Story, 609.—STORY, 1843.

7. "Assuming that the recording within three months is not a prerequisite to the validity of the assignment, it seems . . . immaterial [even admitting that a recording at some time is necessary] that it is not made until after the suit is brought."—*Ib.*

8. An assignment takes effect from its date, and if it be not recorded within three months, the law imposes no forfeiture, and there is no reversion in such case to the assignor. *Boyd v. McAlpin*, 3 McLean, 427.—MCLEAN, 1844.

9. "The act of Congress of February 21st, of 1783, requires an assignment of the patentee to be recorded in the Secretary's office to give validity to the title of the assignee." *Mulliken v. Latham*, 7 Blackford, 136.—SULLIVAN, 1844.

10. "Recording is no constituent part of a conveyance, and is required only to get interest. Actual interest has the same effect so far as the party for such interest is concerned." *Peck v. Bacon*, 18 Conn. 377.—ELLSWORTH, 1847.

11. A declaration is not demurrable because it does not allege the recording of assignments.

*Case v. Redfield et al.*, 4 McLean, 526.—HUNTINGTON, 1849.

12. Within the terms of Section 6 of the act of 1837, an assignment may be recorded at any time before the issue of the patent. *Gay v. Cornell*, 1 Blatch. 506.—NELSON, 1849.

13. The statute providing for the recording of assignment, etc., is merely directory. *Olcott v. Hawkins*, 2 Am. L. J. 317.—MILLER, 1849.

14. "No reason can be given why the assignment should not be valid as between the parties without being recorded. It is only when the rights of third persons are concerned that the step becomes important in guarding against frauds." *Gibson v. Cook*, 2 Blatch. 144.—NELSON, 1850.

15. A conveyance carrying "an exclusive right under a patent to construct and use, and to grant to others to construct and use, the six machines within a special territory," falls within the class to be recorded.—*Id.*

16. Where an interest, in respect to which parties are contracting, is not in existence at the time of contracting, it is not such a contract or conveyance as falls within the statute in reference to recording.—*Id.*

17. The statute providing for the recording of assignments and grants is merely directory. *Loudon v. Burt*, 4 Ind. 566.—PERKINS, 1853.

18. Recording is not essential to the validity of an assignment. *McKernan v. Hite*, 6 Ind. 428.—GOOKINS, 1855.

19. Recording is not necessary to the validity of a grant. *Black v. Stone*, 33 Alabama, 327.—WALKER, 1856.

20. "Licenses to make and use a machine for the purposes for which it is constructed, when derived from the patentee, or from one holding a territorial right by virtue of a valid conveyance from him, are not required to be recorded, and consequently need not be in writing. Contracts not required by law to be in writing may be proved by parol evidence; and therefore a mere license to make and use the thing patented, when derived from an authorized source, may be proved in that way." *Baldwin v. Sibley et al.*, 1 Clifford, 150.—CLIFFORD, 1858.

21. The statute providing for the recording of assignments and grants is merely directory. *Sone v. Palmer*, 28 Missouri, 539.—RICHARDSON, 1859.

22. The statute providing for the recording of assignments and grants is merely directory in its nature. *Moore v. Bore*, 11 Iowa, 198.—BALDWIN, 1860.

23. A prior unrecorded assignment is good against subsequent assignments without valuable

considerations. *Saxton v. Aultman*, 15 Ohio St. 471.—WELCH, 1864.

24. Licenses do not need to be recorded. *Far-ington et al. v. Gregory*, 4 Fish. P. C. 221.—LONGYEAR, 1870.

25. "The act of Congress makes no provision for the recording of a mere license, and therefore it is not required." If recorded, the recording affects no legal rights of any one. *Chambers v. Smith et al.*, 5 Fish. P. C. 12.—MCKENNAN, 1870.

26. As regards a conveyance under a patent which is required to be recorded, "the omission to record the instrument within three months does not render it invalid, as between the parties thereto; [2] the unrecorded instrument is of no validity, after the expiration of three months, as against a subsequent purchaser from the patentee, for a valuable consideration, acting in good faith without notice." *Perry v. Corning et al.*, 7 Blatch. 195.—WOODRUFF, 1870.

27. "As against a purchaser in good faith, for value, without notice of any prior assignment, an assignment not recorded within the time limited in the act is not valid, and will not affect his rights acquired from the patentee before such record is made; and, . . . on the other hand, the instrument, though not recorded, is a perfectly valid instrument, and effectual, according to its purport, as against the assignor and all others except third persons who, in good faith, for value, without notice, became purchasers or acquired rights or interests in, to, or under the patent."—*Id.*

28. "An agreement which operates as a transfer of a patent is good against the patentee and those who purchase with notice, though not recorded." *Continental Windmill Co. v. Empire Windmill Co.*, 8 Blatch. 295.—WOODRUFF, 1871.

29. "Under Section 11 of the act of Congress of 1836, as between the parties, the assignment by the patentee, of the right under the patent, would be valid, without recording." *Turnbull et al. v. Weir Plough Co.*, 6 Bissell, 225.—DRUMMOND, 1874.

30. "The only object of the law . . . in requiring the assignment to be recorded was to protect *bona fide* purchasers, without notice of prior assignment of a right under the patent."—*Id.*

31. "The record is intended for the benefit of the public. *Bona fide* purchasers look to it for their protection." *Littlefield v. Perry*, 21 Wallace, 205.—SUP. CT. 1874.

32. Where A has an assignment under a patent which is of record, that record is constructive notice of A's rights, although the assignor

may have conveyed her title as administratrix when she was, in fact, an executrix. *Newell et al. v. West et al.*, 13 Blatch. 114.—WALLACE, 1875.

33. The conveyance of the right to maintain a suit upon a patent after the patent has expired does not need to be recorded. *Gear v. Fitch*, 3 Bann. & Ard. 573.—LOWELL, 1878.

34. Licenses need not be recorded. Recording them has no legal effect. *Hamilton v. Kingsbury et al.*, 17 Blatch. 264.—BLATCHFORD, 1879.

35. "The bankrupt law, Revised Statutes U. S., Section 5046, vested all patent rights at once in the assignee. His title was like that which the administrators would have acquired if the bankrupt had died without bankruptcy proceedings being in force. It accrued by the operation of the law, and such titles need not be recorded." *Prime et al. v. Brandon Mfg Co.*, 16 Blatch. 453.—WHEELER, 1879.

36. "Fees are prescribed by Section 4934 for recording every assignment agreement, power of attorney, or other paper;" but it does not follow from this that the record of every paper which may happen to be recorded is to be taken as constructive notice of its contents to every person subsequently dealing with a party to it in respect to its subject-matter. The record of an instrument is not constructive notice to a subsequent purchaser, unless the statute requires the instrument to be recorded." *Wright, Jr., v. Randel et al.*, 19 Blatch. 495.—BLATCHFORD, 1881.

37. "No assignment of an unpatented invention is required by Section 4895 to be recorded, unless it is an assignment on which a patent is to be issued to the assignee; and, in such case, the invention must be so identified in the assignment—by reference to a specification, or an application, or otherwise—that there can be no mistake as to what particular invention is intended."—*Ib.*

38. The recording of a paper, which is not by law required to be recorded, carries with it no legal notice. *N. Y. Paper Bag Mach. Co. v. Standard Paper Bag Mach. Co.*, 32 Fed. Rep. 783.—BUTLER, 1887.

## REISSUE.

### "REISSUE" IN THE PATENT ACTS.

Act approved July 3d, 1832.

SECTION. 3. *And be it further enacted*, That whenever any patent which has been heretofore, or shall be hereafter, granted to any inventor in

pursuance of the act of Congress entitled "An act to promote the progress of useful arts, and to repeal the act heretofore made for that purpose," passed on the twenty-first day of February, in the year of our Lord one thousand seven hundred and ninety-three, or of any of the acts supplementary thereto, shall be invalid or inoperative, by reason that any of the terms or conditions prescribed in the third section of the said first-mentioned act have not, by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, been complied with on the part of the said inventor, it shall be lawful for the Secretary of State, upon the surrender to him of such patent, to cause a new patent to be granted to the said inventor for the same invention for the residue of the period then unexpired, for which the original patent was granted, upon his compliance with the terms and conditions prescribed in the third section of the said act. And, in case of his death, or any assignment made by him of the same patent, the like right shall vest in his executors and administrators, or assignee or assignees: *Provided, however*, That such new patent so granted shall, in all respects, be liable to the same matters of objection and defence as any original patent granted under the said first-mentioned act. But no public use or privilege of the invention so patented, derived from or after the grant of the original patent, either under any special license of the inventor, or without the consent of the patentee that there shall be a free public use thereof, shall in any manner prejudice his right of recovery for any use or violation of his invention after the grant of such new patent as aforesaid. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 13. *And be it further enacted*, That whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention more than he had or shall have a right to claim as new; if the error has or shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the Commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor, for the same invention, for the reissue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification. And in case of his death

or any assignment by him made of the original patent, a similar right shall vest in his executors, administrators, or assignees. And the patent so reissued, together with the corrected description and specification, shall have the same effect and operation in law, on the trial of all action hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing out of the original patent. And whenever the original patentee shall be desirous of adding the description and specification of any new improvement of the original invention or discovery which shall have been invented or discovered by him subsequent to the date of his patent, he may, like proceedings being had in all respects as in the case of original applications, and on the payment of fifteen dollars as hereinbefore provided, have the same annexed to the original description; and the Commissioner shall certify, on the margin of such annexed description and specification, the time of its being annexed and recorded; and the same shall thereafter have the same effect in law, to all intents and purposes, as though it had been embraced in the original description and specification. [Repealed July 8th, 1870.]

Act approved March 3d, 1837.

SEC. 5. *And be it further enacted*, That whenever a patent shall be returned for correction and reissue under the thirteenth section of the act to which this is additional, and the patentee shall desire several patents to be issued for distinct and separate parts of the thing patented, he shall first pay, in manner and in addition to the sum provided by that act, the sum of thirty dollars for each additional patent so to be issued: *Provided, however*, That no patent made prior to the aforesaid fifteenth day of December shall be corrected and reissued until a duplicate of the model and drawing of the thing as originally invented, verified by oath as shall be required by the Commissioner, shall be deposited in the Patent Office.

Nor shall any addition of an improvement be made to any patent heretofore granted, nor any new patent be issued for an improvement made in any machine, manufacture, or process, to the original inventor, assignee, or possessor of a patent therefor, nor any disclaimer be admitted to record, until a duplicate model and drawing of the thing originally intended, verified as aforesaid, shall have been deposited in the Patent Office, if the Commissioner shall require the same; nor shall any patent be granted for an invention, improvement, or discovery, the model or drawing of which shall have been lost, until another model and drawing, if required by the

Commissioner, shall in like manner be deposited in the Patent Office.

And in all such cases, as well in those which may arise under the third section of this act, the question of compensation for such models and drawings shall be subject to the judgment and decision of the Commissioners, provided for in the fourth section, under the same limitations and restrictions as are therein prescribed.

SEC. 8. *And be it further enacted*, That whenever application shall be made to the Commissioner for any addition of a newly-discovered improvement to be made to an existing patent, or whenever a patent shall be returned for correction and reissue, the specification of claim annexed to every such patent shall be subject to revision and restriction, in the same manner as the original applications for patents; the Commissioner shall not add any such improvement to the patent in the one case, nor grant the reissue in the other case, until the applicant shall have entered a disclaimer, or altered his specification of claim in accordance with the decision of the Commissioner; and in all such cases, the applicant, if dissatisfied with such decision, shall have the same remedy, and be entitled to the benefit of the same privileges and proceedings as are provided by law in the case of original applications for patents. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 53. *And be it further enacted*, That whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of a patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error had arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such a patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or, in the case of his death or assignment of the whole or any undivided part of the original patent, to his executors, administrators, or assigns, for the unexpired term of the original patent, the surrender of which shall take effect upon the issue of the amended patent; and the Commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon the demand of the applicant, and upon payment of the required fee for a reissue for each of such reissued letters-patent. And the specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. And the

patent so reissued, together with the corrected specification, shall have the same effect and operation in law on the trial of all actions for causes thereafter arising, as though the same had been originally filed in such corrected form ; but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except by each other ; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid. [Repealed June 22d, 1874.]

Act approved March 3d, 1871.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That that part of section thirty-three of an act entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyrights," approved July eighth, eighteen hundred and seventy, which required that, in case of application by assignee or assignees for reissue of letters-patent, the application shall be made and the specification sworn to by the inventor or discoverer, if living, shall not be construed to apply to patents issued and assigned prior to July eighth, eighteen hundred and seventy. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4895. Patents may be granted and issued or reissued to the assignee of the inventor or discoverer ; but the assign must first be entered of record in the Patent Office. And in all cases of an application by an assignee for the reissue of a patent, the application shall be made and the specification sworn to by the inventor or discoverer ; and in all cases of an application for a reissue of any patent, the application must be made and the corrected specification signed by the inventor or discoverer, if he is living, unless the patent was issued and the assignment made before the eighth day of July, eighteen hundred and seventy.

SEC. 4916. Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, in accordance with the corrected specification, to be issued to the pat-

entee, or, in case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the reissue of the amended patent. The Commissioner may in his discretion cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a reissue of each of such reissued letters-patent. The specification and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so reissued, together with the corrected specification, shall have the same effect and operation in law, in the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form ; but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except by each other ; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid.

#### CASES.

1. A patentee cannot void his own patent by his own declaration simply. It may be voided by adversary proceedings in court or by a surrender or vacatur entered on the records, and if not vacated for fraud, a new patent may be issued for the unexpired term. *Morris v. Huntington*, 1 Paine, 348.—THOMPSON, 1824.

2. The patent granting offices may receive the surrender of a patent in which the defect of specification arose from inadvertence or mistake, and without any fraud or misconduct, and without any misconduct on the part of the patentee, and may reissue an amended patent for the balance of the unexpired term—though the statute does not, in terms, provide for such surrender and reissue. *Grant et al. v. Raymond et al.*, 6 Peters's, 218.—SUP. CT. 1832.

3. "The holder of a defective patent may surrender it . . . and obtain a new one which shall have relation to the emanation of the first." *Shaw v. Cooper*, 7 Peters's, 292.—SUP. CT. 1833.

4. "Under Section 13 of the patent law, the second patent has relation back to the emanation of the first patent, as fully for every purpose, as to causes subsequently accruing, as if

the second patent had been issued at the date of the first one." *Stanley v. Whipple*, 2 McLean, 35.—MCLEAN, 1839.

5. A patent reissued under the act of 1836 relates back to the date of the original patent. *Smith v. Pearce et al.*, 2 McLean, 176.—MCLEAN, 1840.

6. A patentee is not entitled to correct by reissue any error, unless the error arose from inadvertence, accident, or mistake, or unless he proceeded to correct such error within a reasonable time after he discovered it. *Knight v. Baltimore & Ohio R. R. Co.*, Taney's Dec. 106.—TANEY, 1840.

7. A patentee is not entitled to a reissue "except for the purpose of giving a more perfect description of the invention intended to be claimed by him in the patent . . . or of narrowing his claim so as to leave out parts of the machinery claimed as new in the first patent, and which he afterward found to be the invention of others." But he is not bound to include in the reissue all the improvements which he originally claimed, nor all to which he was entitled.—*Ib.*

8. Where a patentee has a reissued patent, he is not entitled by another reissue therefor "to enlarge, change, or modify the improvement intended to be protected by the" first reissue.—*Ib.*

9. A reissued patent is *prima facie* evidence that the original was lawfully surrendered and a new one granted.—*Ib.*

10. Where a patent in suit is a reissue, damages are not recoverable prior in date to the reissue.—*Ib.*

11. If an original patent claims too much, the defect may be cured by a reissue. "An inventor is always at liberty in a renewed patent to omit a part of his original invention, if he deems it expedient, and to retain that part only of his original invention which he deems it fit to retain." *Carver v. Braintree M'g Co.*, 2 Story, 432.—STORY, 1843.

12. By the court (patent being for improvement in cotton-gins): "If the description of the combination of the thickness and the slope of the front and back surfaces of the rib were a part of the plaintiff's original invention [as the objection itself supposes], and were not fully stated in the specification, that is exactly such a defect as the patent acts allow to be remedied. A specification may be defective not only in omitting to give a full description of the mode of constructing a machine, but also in omitting to describe fully in the claim the nature and extent and character of the invention itself. Indeed, this latter is the common defect for which most renewed patents are granted."—*Ib.*

13. "The specification may be defective or insufficient, either by a mistake of law, as to what is required to be stated therein, in respect to the claim of the inventor, or by a mistake of fact, in omitting things which are indispensable to the completeness and exactness of the description of the invention, or of the mode of constructing, or making, or using the same." *Allen v. Blunt et al.*, 3 Story, 742.—STORY, 1845.

14. *Doubted*, whether the decision of the Commissioner of Patents, as to the identity of invention in an original and a reissued patent, is "re-examinable in another place, or in another tribunal, at least unless his decision is impeached on account of gross frauds or connivance between him and the patentee; or unless his excess of authority is manifest upon the very face of the papers. . . . In other cases the law having intrusted him with the authority to ascertain the facts and to grant the patent, his decision, *bona fide* made, is conclusive."—*Ib.*

15. "It may be laid down as a general rule, that where a particular authority is confided to a public officer, to be exercised by him in his discretion upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of these facts. . . . The grant of the . . . amended patent by the Commissioner of Patents is conclusive as to the existence of all the facts which were by law necessary to entitle him to issue it; at least, unless it was apparent on the very face of the patent itself, without any auxiliary evidence, that he was guilty of a clear excess of authority, or that the patent was procured by a fraud between him and its patentee."—*Ib.*

16. If a patent is reissued while a suit thereon is pending, the suit must fall. *Woodworth et al. v. Stone*, 2 Story, 749.—STORY, 1845.

17. "It is not in the power of the patentee, by a surrender of his patent, to affect the rights of third persons, to whom he had previously, by assignment, passed his interest in the whole or a part of the patent, without the consent of such assignees."—*Ib.*

18. Where a patent has been reissued, it has the same effect on the owners in the patent who consent thereto as if it were their personal act.—*Ib.*

19. "Where the Commissioner of Patents accepts a surrender of an old patent and grants a new one, under the act of 1836, chapter 357, his decision, being an act expressly confided to him by law, and dependent upon his judgment, is not re-examinable elsewhere; and . . . the

court must take it to be a lawful exercise of his authority, unless it is apparent upon the very face of the patent that he has exceeded his authority, that there is a clear repugnancy between the old and the new patent, or that the new one has been obtained by collusion between the Commissioner and the patentee."—*Ib.*

20. For the purposes of a provisional injunction, a reissued patent may be taken to be for the same invention as the original, upon the authority of the Commissioner.—*Ib.*

21. An administrator may lawfully surrender a patent for reissue. *Smith et al. v. Mercer et al.*, 3 Penn. L. J. Rep. 526.—KANE, 1846.

22. The benefits of a reissue inure to the assignees and grantees, if they adopt the reissue.—*Ib.*

23. "Under Sections 13 and 14 of the act of 1836, referring to reissues, there are four classes of persons interested—original patentees, their executors or administrators, their assignees, and their grantees of territorial right." *Sloat et al. v. Plympton et al.*, 4 West. L. J. 49.—KANE, 1846.

24. William Woodworth's planer patent of December 27th, 1828, was extended, under the patent act of July 4th, 1836, to William W. Woodworth, administrator, for seven years from December 27th, 1842. By act of Congress, the patent was further extended for seven years from December 27th, 1849. The patent thus extended was issued for the term of twenty-eight years from December 27th, 1828. This reissue was held proper. *Gibson v. Harris*, 1 Blatch. 167.—NELSON, 1846.

25. "No prior use of the defective patent can authorize the use of the invention after the emanation of the renewed patent. . . . To give the patentee the fruits of his invention was the object of the provision; and this object would be defeated if a right could be founded on a use subsequent to the original patent and prior to the renewed one." *Stimpson v. Westchester R. R. Co.*, 4 Howard, 380.—SUP. CT. 1846.

26. Whether a reissued patent is substantially for a different invention from its original is a question for the jury on evidence.—*Ib.*

27. The grant of a reissued patent is *prima facie* evidence that the reissue is within the statute. But this would not be conclusive against fraud in the surrender and reissue. The inquiry in regard to the surrender is limited to the fairness of the transaction. "In whatever manner the mistake or inadvertence may have occurred is immaterial. The action of the government renewing the patent must be considered as closing this point, and as leaving open for inquiry

before the court and jury the question of fraud only."—*Ib.*

28. A proper mode of curing unintelligibility in a specification is by reissue. *Hovey v. Stevens*, 1 W. & M. 290.—WOODBURY, 1846.

29. A patent may be reissued during its extended term. *Wilson v. Rousseau et al.*, 4 Howard, 646.—SUP. CT. 1846.

30. The Commissioner of Patents has power to correct clerical errors without resigning and resealing the patent. But it would seem necessary in such case to have his superior officer sign anew or assent to the amendment. *Woodworth et al. v. Hall et al.*, 1 W. & M. 248.—WOODBURY, 1846.

31. Where a correction of a clerical error is made in a patent by the Commissioner, it should be resigned by his superior officer. *Woodworth v. Hall et al.*, 1 W. & M. 389.—WOODBURY, 1846.

32. "If the law allows a party to withdraw expressions used in his first specification by inadvertence or mistake, and he does withdraw them, it would involve no little absurdity for the law afterward to estop him in consequence of the very words which have been withdrawn or cancelled under its permission." *Allen v. Blunt et al.*, 2 W. & M. 121.—WOODBURY, 1846.

33. At the trial of an infringement case, based upon an original patent, the court cannot consider a new specification filed in the Patent Office preparatory to a reissue. *Hovey v. Stevens*, 3 W. & M. 17.—WOODBURY, 1846.

34. If a reissued patent is invalid through some mistake, the original patent remains in force. *Woodworth et al. v. Edwards et al.*, 3 W. & M. 120.—WOODBURY, 1847.

35. The power to reissue is a "salutary, remedial authority, necessary often to insure justice to useful inventors and protect the sacred rights of genius and property."—*Ib.*

36. "The ground of complaint" in suits for infringement "is for causes accruing subsequently to the reissuing of the corrected patent, and in all such cases the corrected patent is made to apply, by the act, as though it had been so reissued originally." *Bloomer v. Stolley*, 5 McLean, 158.—MCLEAN, 1850.

37. The "new specification must be of the same invention," and the "claim cannot embrace a different subject-matter from that which" the inventor "sought to patent originally." *French et al. v. Rogers et al.*, 1 Fish. P. C. 133.—KANE, 1851.

38. "The surrender and the reissue, no matter how often they occur, are reciprocal—each in consideration of the other—and forming to-



gether but a single act between the parties."—*Ib.*

39. An inventor is allowed "to amend the mistakes he has honestly fallen into, in the description and claim of title, as soon and as often as he discovers them."—*Ib.*

40. "The Commissioner's action, in ordinary cases of reissue, should have more than a *prima facie* influence in finally deciding the question of identity of invention."—*Ib.*

41. An invention that is described but not claimed in a patent is, after a lapse of six years, abandoned to the public, so that it cannot be reclaimed by reissue. *Batten v. Taggart*, 2 Wall. Jr. 101.—KANE, 1851.

42. A reissued patent may be reissued. *Morse v. Bain*, 9 West. L. J. 106.—KANE, 1851.

43. A contract referring to an original patent refers equally to the reissue thereof. *McBurney v. Goodyear*, 11 Cushing (Mass.), 569.—MER-  
RICK, 1853.

44. "The right to surrender the old patent, and receive another in its place, was given for the purpose of enabling the patentee to give a more perfect description of his invention, when any mistake or oversight was committed in his first. It necessarily therefore varies from it." *O'Reilly et al. v. Morse et al.*, 15 Howard, 62.—  
SUP. CT. 1853.

45. "The corrected specifications of the new patent, on a surrender, would necessarily be different from those that were defective." *Brooks et al. v. Fiske et al.*, 15 Howard, 212.—  
SUP. CT. 1853.

46. On November 13th, 1844, one Mini, an alien not naturalized in the United States, took a patent upon the allegation that he was a citizen of the United States, the fees for citizens and unnaturalized aliens being widely different. Seven years afterward he procured a reissue, in which the defect was attempted to be cured. It was held that the reissue was invalid. *Mini's Assignee v. Adams*, 3 Wall. Jr. 120.—GRIER, 1854.

47. "Under Section 13 of the patent act of 1836, whether the defect be in the specification or in the claim, . . . the patentee may surrender his patent, and, by an amended specification or claim, cure the defect. The reissued patent must be for the same invention substantially, though it be described in terms more precise and accurate than in the first patent. Under such circumstances, a new and different invention cannot be claimed. But where the specification or claim is made so vaguely as to be inoperative and invalid, yet an amendment may give it validity, and protect the rights of the patentee

against all subsequent infringements." *Battin et al. v. Taggart*, 17 Howard, 74.—SUP. CT. 1854.

48. If a reissue is valid, an infringer under it is to be held as such, although the infringing machine was constructed before the reissue was granted, and was not an infringement of the original patent. *Carr v. Rice*, 1 Fish. P. C. 198.—BERTS, 1856.

49. "By the laws of the United States, a patentee who has obtained a patent for a new and useful invention or improvement has a right to surrender the patent which has been granted to him, if it is defective in the specification or in the claim of the thing discovered, and, in lieu of the patent surrendered, obtain a reissued patent for the original discovery or improvement made, upon an amended specification and claim, and such reissued patent is to have full effect from the time it is issued up to the expiration of fourteen years from the date of the original patent." *Serrell v. Collins et al.*, 4 Blatch. 61.—INGER-  
SOLL, 1857.

50. "The power and duty of granting a new patent for the original invention, when a lawful surrender of the old patent has been made, are by law expressly confined to the Commissioner. The decision made by him . . . is, that the reissued patent is for the same invention, originally discovered and intended by the patentee to be secured by the original patent. That decision the law has confided to his judgment. The court must take that decision as a lawful exercise of this authority. It is not re-examinable here unless it is apparent upon the face of the patent that the Commissioner has exceeded his authority, or unless there is a clear repugnancy between the old and the new patents, or unless the new one has been obtained by collusion between the Commissioner and the patentee." *Potter et al. v. Holland*, 4 Blatch. 238.—INGER-  
SOLL, 1858.

51. "Where . . . there has been an assignment of an undivided part of the whole original patent, in such a case, the assignee of such a part and the patentee become joint owners of the patent, and should join in the surrender; if they do not, it will be invalid, unless the part owner, not joining, should ratify it." *Potter et al. v. Holland*, 4 Blatch. 206.—INGERSOLL, 1858.

52. "It is not in the power of the patentee, by a surrender of his patent, to affect the rights of third persons to whom he had previously passed his interest in the whole or a part of the patent, without their consent. This consent may be manifested, either by joining in the surrender by the patentee, or by previously authorizing it,

or by subsequently ratifying or approving it. And taking advantage or benefit of it would be a ratification. And when so consented to, the rights of the party so consenting, in and to the old patent, are forever gone. And it may be considered as a sound and settled principle that a person to whom a patentee has passed his interest in a part of the old patent, upon the surrender of the same by the patentee, and obtaining a reissued patent, is entitled to the same rights under the reissued patent that he had to the old one. The patentee by taking a reissue cannot deprive him of the same right to it that he had to the old one, if he wishes to take the benefit of such right. . . . And when he does take advantage and benefit of the reissued patent, he consents to give up, and does give up, the right which he had under the old one.

"It does not follow from this, however, that because a third person to whom a patentee has passed his interest in a part of a patent is entitled to the same right to a reissued patent that he had to the old one, that he is compelled to take under the reissued one, and thereby be compelled to give up the right which he had under the old one. If he was, his right might be injuriously affected without his consent. If he was so compelled, a grantee under an old patent, of an exclusive territorial right, would be forced, without his consent, to give up any amount of damages he might be entitled to under the old patent, for a violation of right secured to him by that patent. And it might so happen that the old patent surrendered was a valid one and that the reissued one was invalid, or that the rights secured by the former were important, while the rights secured by the latter were of little consequence."—*Id.*

53. "The object of the reissue is to secure greater rights than were actually secured by the first patent. The subject of both patents is the same invention, and the object of both patents is to secure rights in the same. This is the only object in both. A less right is, or may be, secured in the invention by the first patent. A greater right is, or may be, secured to the same invention by the reissued patent."—*Id.*

54. Under Section 13 of the patent law of 1836, an assignee of an undivided interest in a certain territory need not join in a surrender which precedes a reissue.—*Id.*

55. "As the court can correct the errors of its clerk in the discharge of his ministerial duties, the Commissioner of Patents may no doubt do the same as do his clerks." *Cushman, in re, 1 MacArthur's P. C. 577.*—DUNLOP, 1858.

56. After a lapse of thirteen years, it is too

late to correct the antedate of a patent by reissue.—*Id.*

57. Where the antedate of a patent is the deliberate act of the patentee, that antedate cannot afterward be changed by reissue.—*Id.*

58. "The legal presumption is, from the action of the Patent Office, that the reissued patent is for the same invention as the original patent." *Hussey v. McCormick et al., 1 Bissell, 300.*—McLEAN, 1859.

59. A reissue is "equivalent to a distinct admission, made in the most solemn form, that the patent has no validity in the sense of entitling the patentee to an action for its infringement. The new patent can be operative only from its date, as allowing the patentee a remedy for an infringement." *Moffitt v. Garr et al., 1 Bond, 315.*—LEAVITT, 1860.

60. If a patent is reissued while a suit thereon is pending, the suit must come to an end.—*Id.*

61. If a court is in doubt about the construction of a reissued patent, it may help that doubt by referring to the original patent. *Ely v. Monson & Brimfield M'fg Co., 4 Fish. P. C. 64.*—SPRAGUE, 1860.

62. Although a man may be an inventor of a feature appurtenant to a device shown in his patent for that device, he cannot put such feature into a reissue of such patent. *Sickles v. Falls Co., 4 Blatch. 508.*—NELSON, 1861.

63. "It is undoubtedly true that the inquiry whether the reissued patent is for the same as the original involves a question of fact." A court of equity is empowered to pass on such fact. *Poppenhausen v. Falke et al., 4 Blatch. 493.*—SHIPMAN, 1861.

64. Complainant claimed that the decision of the Commissioner of Patents was, if not final and conclusive, at least *prima facie* evidence that the reissued patent was for the same invention as the original. Thereof the court said: "This is undoubtedly true in all cases where no doubts are raised in the minds of the court by an examination of the instruments themselves, and no fraud is proved."—*Id.*

65. A doubt in the mind of the court as to whether a reissued patent is for the same invention as its original is proper ground for denying a provisional injunction.—*Id.*

66. Where an invention, as described in a reissue, covers a wider space than that as described in the original, and the respondents have entered into the disputed territory, the court may refuse, on a motion for a provisional injunction, to decide upon the validity of the new matter.—*Id.*

67. "Inadvertence and error may occur as

well in the disclaimer as in the claim, and . . . whenever the mistake occurs it may be cured by reissue."—*Ib.*

68. "To warrant the exercise of this extraordinary power of the court in granting a preliminary injunction, the case should be free from ambiguity or confusion; especially should this rule be applied in a case where the difficulty or uncertainty arises from the difference between an original and reissued patent."—*Ib.*

69. It is not a valid objection to a reissued specification that, as compared with the original, it gives less prominence to some terms of the description and more to others. "The very object of a surrender is always to correct the specification, to make it clear, fuller, and more exact."—*Ib.*

70. It is not a valid objection to a reissue that the necessity for the change was discovered after and through the adjudication of a court upon the original patent.—*Ib.*

71. "A surrender of the patent to the Commissioner, within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is the legal cancellation of it, and hence can be no more the foundation for the assertion of a right after the surrender than could an act of Congress which has been repealed." *Moffitt v. Garr et al.*, 1 Black, 273.—*SUP. CT.* 1861.

72. Moneys recovered on judgments, in suits upon an original patent, or voluntary payments made under such suits, cannot be recovered back after a reissue of the patent.—*Ib.*

73. For example of animadversion on the practice of broadening, by reissue, patents which are operative and valid, see —. *Burr v. Duryee et al.*, 2 Fish. P. C. 275.—*GRIER*, 1862.

74. "Many men are wise after an event has happened or an invention is made, and can at once demonstrate that it is but a mere piracy of some previous unsuccessful one, or of some patented machine the specification of which might have been made broad enough to cover all other combinations or devices to effect the same purposes, if the patentee had only thought of it. The inadvertency, accident, or mistake is never perceived until some new machine is put into operation, and the defect in the original specification consists in not being made broad enough to cover combinations of which the first patentee had no conception."—*Ib.*

75. Complainant's patent being a reissue, the defendants made the point, that the object of the reissue was to extend the monopoly beyond the limits assigned to it by the court in a previous trial, where the original patent was in issue.

Thereupon the court said: "It not unfrequently happens that a judicial interpretation of the specification or claim of a patent, or both, discloses to the inventor and patentee, for the first time, the defects in the instrument, and shows him that he has unwittingly restricted his rights within narrower limits than his discovery, or so inartificially described his invention that he has failed to secure any substantial advantage by it. Such a disclosure furnishes a proper occasion for a surrender and reissue, when the error was inadvertent, and is clearly within the beneficent design of the statute. The judicial mind gives a legal construction to the language of the instrument, and this construction may reveal the fact that the terms used fail to cover the invention. To hold that the inventor should not be allowed to restate his claims by the use of new terms, would defeat the object of the law, and abridge or strangle the inventor's rights with the imperfect language in which he has attempted to clothe his discovery." *Poppenheusen v. Falke et al.*, 5 Blatch. 46.—*SHIPMAN*, 1862.

76. "Whenever it appears, upon a comparison of the two specifications and claims, as a matter of law, arising on their construction, that the reissued patent is for a different invention from that secured in the original patent, then the reissued patent is void and of no effect." *Sickles v. Evans et al.*, 2 Clifford, 203.—*CLIFFORD*, 1863.

77. "Where it appears, on a comparison of the two instruments, as a matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, because that the state of the case shows that the Commissioner has exceeded his jurisdiction."—*Ib.*

78. "Where the claim is narrower than the invention, and the description is given in the specification, the patent may be surrendered, and a reissue taken out, correcting the error." *Howe v. Williams*, 2 Clifford, 245.—*CLIFFORD*, 1863.

79. The claims of an original patent were: "I accordingly claim the opening above the blades at A, Fig. 3, and at D, Fig. 1, in combination with the vibrating blades. I also claim the particular application of the flush edge, at the fork of the blades, for the purpose described. The end and design of the improvements above claimed was to prevent the blades choking." The claim of the reissue thereof was: "I claim as my invention a combination of a vibrating scalloped cutter, the indentations of whose edges act as a series of moving blades, with slotted guard fingers, the sides of which act as a corresponding series of fixed shear blades; the parts of such fingers

forming the slot, being connected at the front end only, leaving the rear of the slot open and free for the escape of the material that would otherwise clog the cutter, substantially as described." The court held that the reissued claim was proper and that the inventor's "rights had not been forfeited or destroyed by the lapse of time between the reissue of the first patent and this reissue." The date of the original patent was August 7th, 1847; of the reissue, April 14th, 1857. *Hussey v. Bradley et al.*, 5 Blatch. 134.—HALL, 1863.

80 "It is well settled that in deciding upon these applications for a reissue and the question whether the invention claimed in the reissue is the same invention intended to be patented in the original application, the Commissioner of Patents is not confined to the claims, nor even to the examination of the evidence furnished by the specification, models, and drawings, accompanying the original application; and that any legal proof to show it to be the same invention should be received. . . It is also well settled that the decision of the Commissioner of Patents upon the question is *prima facie* evidence of such fact; and that the subsequent inquiry, when the question is presented to a court or jury, is limited to the fairness of the transaction, to the question of fraud in the surrender."—*Id.*

81. "Even a statement in an original patent, that a part is old, or a disclaimer of a part does not, it seems, necessarily prevent such part from being claimed in a reissued patent, though it would have had that effect if made advisedly, and not by inadvertence, accident, or mistake."—*Id.*

82. Where broadened reissued patents were taken after a lapse of ten years, the court said: "We cannot say, as a matter of law, that the reissues were too late, nor is there any proof of fraud or laches upon which we can, upon that ground, declare these reissued patents void."—*Id.*

83. "Independent of the question of abandonment or dedication, it is well settled that the prior use of an invention, under a defective patent, cannot take away the right to surrender such patent and take a new and amended one, or authorize a use under the patent."—*Id.*

84. "In law, a reissued patent is generally considered, except in respect to infringements prior to its issue, as if granted at the date of the original patent; . . . and the corrected patent, in respect to all subsequent infringements, is made to take effect as though it had been so issued originally, even though the original patent was invalid."—*Id.*

85. "The surrender of valid patents, and the granting of reissued patents thereon, with expanded or equivocal claims, where the original was clearly neither 'inoperative nor invalid,' and whose specification is neither 'defective nor insufficient,' is a great abuse of the privilege granted by the statute, and productive of great injury to the public. This privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive, and therefore more 'available' for the suppression of all other inventions." *Burr v. Duryee*, 1 Wallace, 531.—SUP. CT. 1863.

86. In an original patent for a machine for making hat bodies, the claim was: "What I claim as my invention is, the combination of a *vibrating concave surface*, substantially as described, with an exhausting pervious cone, on which the bat of flocculent fibres is held by the pressure of the surrounding air, *substantially as and for the purpose specified*." The claim in the reissue was: "What I claim as my invention and desire to secure by letters-patent, is the arrangement for hardening the hat body in a dry state, by *machinery operating substantially as herein set forth*." The reissue was condemned as being for a different invention. *Burr v. Duryee*, 1 Wall. 579.—SUP. CT. 1863.

87. A reissued patent is a new contract made with the government. *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Clifford, 351.—CLIFFORD, 1864.

88. "A new product or manufacture, and a new process or method of producing the new article, are the proper subject of separate and distinct claims in an original patent, and if so, then it is equally clear that the patentee, under the provision of the statute, upon a return of the patent for correction and reissue, and upon complying with the conditions therein specified, may have several and distinct patents for the distinct and separate parts of his invention."—*Id.*

89. The claim in a reissued patent included "not only india-rubber, when compounded with sulphur and subjected to a high degree of artificial heat, but all other vulcanizable gums, whether with or without other ingredients." Nothing of the kind was described in the original patent, that being for vulcanizing rubber with sulphur; and the reissue was held void as being for a different invention from the original.—*Id.*

90. A process patent may be reissued with claims for both process and product.—*Id.*

91. "Reissued letters-patent, as a general rule, have the effect to supersede the original patent,

but a pending application for that purpose cannot receive any such construction, no matter how nearly the proceedings may have approached to a consummation, so long as they are not finally completed. Prior to the issuing of the new patent, what is called surrender in the case is in general nothing more than a preliminary offer to that effect, as the necessary means of obtaining a reissue; and even when not so intended in the outset, it may be subsequently so treated by the Commissioner, at the request of the party applying for the reissue. Where bad faith is shown as an element of the case, a different conclusion would doubtless be followed; but the withdrawal of the application may be allowed by the Commissioner for any reasonable cause, where there is no fraud practised to procure it, and where there is no judicial interference with the rights of third persons." *Forbes et al. v. Barstow Stove Co.*, 2 Clifford, 379.—CLIFFORD, 1864.

92. Expanding patents by reissue is to be condemned. *Case v. Brown*, 2 Wallace, 230.—SUP. CT. 1864.

93. Where a patent has been reissued, "the rights of the patentee, except as to prior infringements, are to be ascertained by the law under which the original application was made." *Read v. Bowman*, 2 Wall. 591.—SUP. CT. 1864.

94. If the claim of a patent is not broad enough to cover the real invention, it can be properly broadened by reissue. *Doughty v. West et al.*, 2 Fish. P. C. 553.—SHIPMAN, 1865.

95. "Unless the reissue is for the same invention, the Commissioner has no power to grant it; and it cannot be maintained for a moment that the decision of the Commissioner is conclusive as to his own jurisdiction." *Carhart et al. v. Austin*, 2 Clifford, 528.—CLIFFORD, 1865.

96. "If it appears on the face of the two patents, by comparison, that the reissue is for a different invention from that secured in the original patent," the court may determine the non-identity on inspection.—*Ib.*

97. "Power is undoubtedly conferred upon the Commissioner to allow the specification to be amended, if the patent is inoperative or invalid for the reason stated in the provision, and to reissue the patent in proper form. Pursuant to that authority, he may doubtless allow the patentee to redescribe his invention, and to include in the description and claims of the patent not only what was well described before, but whatever was suggested or indicated in the specification or drawings which properly belongs to the invention."—*Ib.*

98. The decision of the Commissioner of Patents, in granting reissues, is conclusive as to compliance with the provision of the statute, and the court cannot look into anything that transpired antecedently to the grant, to impeach the validity of a reissued patent, unless fraud in the transaction is alleged, and then he can. *Whitely v. Swayne*, 4 Fish. P. C. 117.—LEAVITT, 1865.

99. The oath in an application for reissue did not aver that the original patent was "inoperative or invalid," but did aver that it is "not fully valid and available." The reissue was held void for this reason.—*Ib.*

100. A patent was granted to T. S. Steadman, May 23d, 1854, and purchased by William N. Whiteley for a consideration which does not appear. The patented machine was practically useless. Whiteley reissued the patent in two divisions, with extended claims, and attempted to make the title of the invention that of a "harvesting machine." These facts were held sufficient to prove fraud in procuring the reissue and to render the reissue void.—*Ib.*

101. "Where the reissued patent is correct in form, and there is no proof of fraud, intentional error, or concealment, a mere wrongdoer cannot defend himself against the charge of infringement by proving that the proceedings were contrary to law, or that the patent was granted to the wrong party." *Dental Vulcanite Co. v. Wetherbee*, 2 Clifford, 555.—CLIFFORD, 1866.

102. A reissue to cure a clerical error can be made without the regular formalities.—*Ib.*

103. "That a reissued patent does relate back to the date of the original patent is well established." *House v. Young*, 3 Fish. P. C. 335.—SHERMAN, 1867.

104. The validity of a reissued patent can only be inquired into by the court in three particulars: *first*, as to fraud or collusion between the Commissioner and the patentee; *second*, as to an excess of authority on the part of the Commissioner apparent on the face of the patents, and *third*, as to a clear repugnance between the new and the old patents.—*Ib.*

105. The claim in an original patent was: "The pulping and disintegrating of shavings of wood, and other similar vegetable matter for making paper, by treating them with caustic alkali, chlorine, simply, or its compound with oxygen and alkali, in the order substantially as described." The claims of the two divisional reissues were: "A pulp suitable for the manufacture of paper, made from wood or other vegetable substances by boiling the wood or other vegetable substance in an alkali under

pressure, substantially as described." "The process of treating wood or other vegetable substance by boiling it in an alkali under pressure, as a process, or preparatory process, for making pulp for the manufacture of paper from such wood or other vegetable substances, substantially as described." "The process of treating resinous woods by boiling in an alkali under pressure, and treating the product with chlorine and its compounds with oxygen, for making white pulp for the manufacture of paper from such woods, substantially as described." The reissues were held invalid, as being for a different invention from that of the original. *Am. Wood Paper Co. v. Heft et al.*, 3 Fish. P. C. 316. —GRIER, 1867.

106. An original patent was "for combining india-rubber and sulphur, etc., for making a hard and inflexible substance, etc., substantially as herein set forth." This was reissued in two divisions, one with a process claim and the other with a product claim. Defendant contended that this reissue proceeding was illegal. The court held it unobjectionable. *Goodyear et al. v. Waite*, 5 Blatch. 468. —NELSON, 1867.

107. The issue of a reissued patent is *prima facie* evidence of its own correctness. *Hoffheins et al. v. Brandt*, 3 Fish. P. C. 218. —GILES, 1867.

108. The issue of a reissued patent is *prima facie* evidence that the original was never abandoned. —*Id.*

109. A reissue to a second assignee is valid. *Swift et al. v. Whisen et al.*, 2 Bond, 115. —LEAVITT, 1867.

110. Under the law (as it was in 1867), the original patentee need not join in the surrender and reissue of the assigned patent. —*Id.*

111. "The action of the Commissioner is conclusive upon the question of the identity of the inventions embraced or described in the reissue and in the original patent." —*Id.*

112. "If any facts appear in the progress of a trial which are sufficient to satisfy a jury that there has been fraud in the procurement of a reissue, either actual fraud or circumstances which may be supposed to amount to constructive fraud, the reissued patent will be held invalid." —*Id.*

113. "If there is evidence that the original patentee claimed, as a part of his invention, a certain feature, or that a certain feature was a part of his invention which he omitted to claim in his specification and claim, upon surrender of that patent by himself, or by an assignee, he has a right to incorporate in the reissued patent that element, though not claimed specially in the first patent." —*Id.*

114. Very clear and decisive evidence would be required in order to invalidate a reissued patent upon an allegation of fraud in its procurement. —*Id.*

115. "The privilege of surrender and reissue is . . . invaluable to inventors, for without it they would often lose that protection for the offspring of their skill and labor which it is the immediate object of all patent laws to afford." *Blake v. Stafford*, 6 Blatch. 195. —SHIPMAN, 1867.

116. By the court: "I regard the decision of the Commissioner as final and conclusive, unless impeached for fraud in his or the patentee's acts, or for some irregularity arising on the face of the papers, or a clear repugnance between the original and reissued patents. Under the act, the Commissioner has the power to decide, and in every acceptance of surrender and reissue does decide, that the original patent was inoperative and invalid by reason of a defective specification, or by claiming too much, and that the error arose by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention. He is authorized to grant a new patent for the same invention, and for no other, and when he grants the new one, the presumption is that it embraces the same invention as the original. The jurisdiction of the Commissioner is final and conclusive, unless, as already stated, fraud or collusion somewhere is proved, or some irregularity is apparent on the face of the papers, or there is a plain repugnance between the old and the new specifications. The issue of fraud can only be raised by distinct and special allegations in the plea or answer." —*Id.*

117. A reissue may properly be broader than its original, if the subject-matter was disclosed in the original. —*Id.*

118. "The identity of the invention claimed in the original patent and that claimed in the reissued patent is a question to be decided by the evidence. If the case is at law, it is for the jury; if in chancery, for the court, as the facts proved may require." *Morris v. Royer et al.*, 2 Bond, 66. —LEAVITT, 1867.

119. An original patent for a binding machine was limited to a fixed fulcrum. In the reissue this limitation was omitted. The court held that the patentee had an unquestioned right to do this. —*Id.*

120. "There is always a strong legal presumption that a reissued patent is for the same invention described in the specification of the original patent. This presumption arises from the fact that upon the surrender of the original patent, and an application for a reissued patent, with an

amended specification, it is the duty of the Commissioner of Patents to see that the reissue is for the same invention described in the original patent, or if any part is not described, or inadvertently omitted, that in fact it was a part of the invention of the patentee. And in the latter case, it is competent for the Commissioner to receive testimony, and, on satisfactory proof, to treat it as a part of the invention, which may be properly claimed in the reissued patent."—*Ib.*

121. "The action of the Commissioner of Patents, in granting a reissue, cannot be questioned or impeached, unless on the ground of actual fraud in obtaining it, a palpable incongruity between the original and reissued patent, or an excess of authority on the part of the Commissioner."—*Ib.*

122. An assignment of a patent carries with it the title to a reissue thereof. *Middletown Tool Co. v. Judd et al.*, 3 Fish. P. C. 141.—SHIPMAN, 1867.

123. Where "there is no allegation or proof of fraud, the only mode of impeaching the reissue on this ground is by showing upon the face of the instruments that one is so different from and repugnant to the other, that the court can see that the invention described in the reissue is another and different one than that set forth in the original."—*Ib.*

124. Whether the mistake in a patent occurs through inadvertence or mistake is a question of fact for the Commissioner to decide.—*Ib.*

125. "The decision of the Commissioner is not conclusive upon the substantial identity of the invention claimed in the original and that claimed in a reissue." *Goodyear et al. v. Berry*, 2 Bond, 189.—LEAVITT, 1868.

126. "The doctrine is a familiar one, and well settled, that the invention described and claimed in a reissue must be the same as originally patented, and if, by a fair construction, the specification and claim are for something substantially different from those of the original, the patent is void."—*Ib.*

127. "If the claims of a reissued patent clearly imply an expansion of the invention beyond the claims of the original patent, there is always ground for a presumption that there was a fraudulent intent to anticipate and cover subsequent inventions, and thus bar the door against patents for all subsequent discoveries. This is clearly against the policy of our patent-right system, and has been wisely condemned by the uniform decisions of the courts of the United States."—*Ib.*

128. Goodyear's reissued patent on hard rub-

ber extended the improvement to "other allied gums" and to "other vulcanizable gums." Defendant contended that therefor the reissue was invalid. The court held otherwise, but restricted the meaning of those phrases to "caoutchouc and other gums then known to be vulcanizable."—*Ib.*

129. A reissued patent for a process substantially different from any described in the original patent is void. *Am. Wood Paper Co. v. Fibre Disintegrating Co.*, 6 Blatch. 27.—BENEDICT, 1868.

130. In a suit of a reissued patent damages antecedent to the date of the reissue cannot be recovered. *Agawam Co. v. Jordan*, 7 Wall. 583.—*SUP. CT.* 1868.

131. In an application for a patent on a syringe, a broad claim was rejected, and was thereupon amended and restricted, the claim in the patent as issued being as follows: "The combination of the prolate spheroidal-shaped elastic sac, with flexible tubes, terminating in valve boxes containing valves, arranged for the purpose of eduction and ejection, when the sac, tubes, and valve boxes are in, or nearly in, the axial line, the whole operating together substantially in the manner and for the purposes set forth." This patent issued March 31st, 1857. It was reissued April 25th, 1865, with the following claim: "What is claimed as the invention of Charles H. and Herman E. Davidson is a syringe having an elastic bulb or chamber, flexible tubes, and a suitable valvular arrangement, when organized so as to operate substantially as described." The reissued claim was substantially the claim which had first been made in the application of the original patent. The reissue was sustained, and the court said: "The Commissioner had full authority to grant the amendment; and, under the special circumstances of the case, it would seem to have been a duty, as the inventors were led into the error by himself, as may be seen by his letter when the patent was originally granted." *Morley v. Lockwood*, 8 Wall. 230.—*SUP. CT.* 1868.

132. Where fraud in the procurement of a reissue is not alleged, "the rule is that in the absence of fraud, such a defence is not open to one charged as an infringer, except in cases where it appears, by a comparison of the two patents, as a matter of law, that the reissued and original patents are not for the same invention." *Graham et al. v. Mason*, 4 Clifford, 88.—CLIFFORD, 1869.

133. "Where a patentee, having secured his invention by a patent, with a specification as he regards to be most proper, assigns the entire pat-

ent for the original term only, reserving his right, under Section 18 of the act of 1836, to apply for and obtain an extension, it ought not to be, and is not, in the power of the assignee, by surrendering the patent and obtaining a reissue of it, on a specification not signed, assented to, or adopted by the patentee, and which perhaps the patentee may regard as rendering the reissued patent invalid, or as securing, by new and different claims, rights of little value, to affect, without his consent, the statutory right conferred on the patentee to apply for and obtain an extension of the only patent which he has ever adopted and assented to." *Potter et al. v. Braussdorf et al.*, 7 Blatch. 97.—BLATCHFORD, 1869.

134. An original patent for hay elevator was reissued in two divisions, and the reissues were sustained. *Bennett v. Fowler*, 8 Wallace, 445.—SUP. CT. 1869.

135. The claim in an original patent was: "I also claim the preparing and curing the compound of india rubber, sulphur, and a carbonate or other salt, or oxide of lead, by subjugating the same to the action of artificial heat, substantially as herein described." The claim of the reissue thereof was: "What is claimed as the invention of Charles Goodyear, deceased, is the manufacture of vulcanized india-rubber [whether with or without other ingredients], chemically altered by the application of heat substantially as described." The reissue was sustained. *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

136. "It is the right of the patentee and his representatives to enlarge or restrict the claim, so as to give validity and secure the invention." (This was said in a case where the original patent issued in 1848, a reissue in 1849, and another reissue in 1860.)—*Id.*

137. The defence that a reissued patent in suit "was issued unintentionally, through a blunder of a subordinate in the Patent Office, is one which cannot be availed of in a suit brought on a patent. For any such alleged invalidity, the only remedy would be a direct proceeding by the United States to vacate the patent. The seal of the United States, and the signature of the proper officers to the grant, must be respected and the absence of fraud, so long as the United States themselves do not question the grant. This is familiar law in regard to all grants by a sovereign." *Doughty v. West et al.*, 6 Blatch. 429.—BLATCHFORD, 1869.

138. "The action of the Commissioner, in receiving a surrender and granting a reissue, is very strong *prima facie* evidence that the case

was one in which a reissue was proper and lawful, but a decision of the Commissioner upon this point is not conclusive, and the more recent decisions very clearly indicate the opinion that many reissues have been improperly granted, and that the abuses which have grown out of fraudulent or improper reissues have been so much as to require a more rigid scrutiny in regard to the propriety and legality of the surrender and reissue of a patent." *Seymour et al. v. Osborne et al.*, 3 Fish. P. C. 555.—HALL, 1869.

139. For an example of reissued claims held to be for a different invention from that set out in the original patent, see — *Id.*

140. "The presumption of the law is, that the reissued patent is for the same invention as the original. . . . Differences of description or specification are consistent with the identity of the thing patented. To correct a description, or claim, or both, is one object of allowing a surrender." *Crompton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.

141. The claims of an original patent and its reissue were stated by the court thus: "In the original patent the claim is, *first*, for the movable spring-rests; *second*, for the evener; and *third* for the combination of rotating, lifting, and depressing bars, arranged in endless chains, so as to revolve as described, with the forked jacks having internal shoulders.

"In the reissued patent the claim is for combining with the jacks that operate the series of leaves of heddles, and with the lifter and depresser and a pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position, when not required to be operated substantially as and for the purpose specified." Thereof the court said: "We think that substantially the same invention is described in the two patents."—*Id.*

142. "In the reissued patent the patentee need not claim all that was claimed in the original patent. He may retain whatever he deems proper."—*Id.*

143. The claim of a patent may be enlarged by reissue. *Richardson v. Lockwood*, 4 Clifford, 128.—CLIFFORD, 1870.

144. "Where a reissue has transpired to the party patentee, and an assignment has transpired from him to an assignee, without any such assignment being placed on record in the office, the assignee has no right to demand a patent to himself, and if he does, and is refused, the action of the Commissioner in so refusing is not the subject of an appeal to a judge." *Whitely v. Fisher*, 4 Fish. P. C. 248.—CARTTER, 1870.



145. The decisions of the Commissioner of Patents, that defects in an original patent arose from inadvertence, accident, or mistake, without any fraudulent intention, are conclusive. "They are not re-examinable, except so far as he decided there was no fraud. It is now settled that the granting of a renewed patent is so far conclusive, upon the question of the existence of error in the original patent, arising from inadvertence, accident, or mistake, that it leaves nothing open but the fairness of the transaction." *Jordan v. Dobson et al.*, 2 Abb. U. S. 398.—STRONG, 1870.

146. The issuance of a reissued patent creates the presumption of identity of invention between the original and reissue. "It may be even doubted whether this is not a conclusive presumption, unless . . . it is apparent on the very face of the patent itself, without any auxiliary evidence, that the Commissioner was guilty of a clear excess of authority, or that the patent was procured by fraud between him and the patentee."—*Ib.*

147. "The surrender of a patent for reissue contemplates a change or an amendment to the former specification or claim. It is allowed for that purpose in order to make that operative which was inoperative before."—*Ib.*

148. "A patentee's claim is as amendable under the statute as is his specification" in a reissue.—*Ib.*

149. "Formerly it seems to have been held that the reissue was conclusive as to its own validity, except in cases of fraud and collusion." That is not the doctrine of the law in 1870. *Woodward v. Dinsmore*, 4 Fish. P. C. 163.—GILES, 1870.

150. "As in a cause in equity, the court passes on the facts as well as on the law, therefore the original and reissued patents are for the court to construe and reconcile, or to declare to be irreconcilable; and although the decision of the Patent Office is entitled to great weight, yet the reissue is but *prima facie* evidence, and the duty devolves on the court . . . to determine whether the reissue claims more than the original specification shows the patentee to have invented."—*Ib.*

151. Under the act of July 4th, 1836, it is proper, in a reissue, to make additional and distinct claims, as compared with the claims of the original.—*Ib.*

152. An original patent was granted March 30th, 1858. It was reissued March 6th, 1866. The claim of the original patent was in these words: "Constructing wire staples [such as are used for connecting the semi-revolving slats

of window blinds, and screens to a rod governing their positions], by giving them a rounded edge in the direction as shown at *a, c*, Fig. 1, and an acute or sharp edge, as viewed crosswise at *f, h*, in combination with transverse indentations across the wire, the whole being formed by compression between dies, substantially as described." The reissued claim was for "a wire staple, adapted for use in making window blinds or screens, and constructed substantially as above described." Reissue sustained. *Rogers et al. v. Sargent et al.*, 7 Blatch. 507.—BLATCHFORD, 1870.

153. "Neither the reissue nor the extended patents can be abrogated by an infringer, in a suit against him for infringement, upon the ground that the letters-patent were procured by fraud in prosecuting the application for the same before the Commissioner." *Seymour v. Osborne*, 11 Wall. 516.—SUP. CT. 1870.

154. "Where the Commissioner accepts a surrender of an original patent, his decision in the premises, in a suit for infringement, is final and conclusive, and not re-examinable in such a suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnance between the old and the new patent that it must be held as a matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent."—*Ib.*

155. "Reissued letters-patent must, by express words of the section authorizing the same, be for the same invention, and, consequently, where it appears on a comparison of the two instruments, as a matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, as that state of facts shows that the Commissioner, in granting the new patent, exceeded his jurisdiction."—*Ib.*

156. "Power is unquestionably conferred upon the Commissioner to allow the specification to be amended if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to redescribe his invention and to include in the description and claims of the patent not only what was well described and claimed before, but whatever else was suggested or substantially indicated, in the specification or drawings which properly belonged to the invention as actually made and perfected."—*Ib.*

157. "Interpolations of new features, ingredients, or devices, which were neither described,

suggested, nor indicated in the original patent or Patent Office model, are not allowed, as it is clear that the Commissioner has no jurisdiction to grant a reissue unless it be for the same invention as that embodied in the original letters-patent, which necessarily includes the right, on such application, to open the case to new parol testimony and a new hearing as to the nature and extent of the improvement, except in certain special cases, as provided in a recent enactment not applicable to the case before the court."—*Ib.*

158. "Corrections may be made in the description, specification, or claim, where the patentee has claimed as new more than he had a right to claim, or where the description, specification, or claim is defective or insufficient, but he cannot under such an application make material additions to the invention which were not described, suggested, nor substantially indicated in the original specifications, drawings, or Patent Office model."—*Ib.*

159. "Whether a reissued patent is for the same invention as that embodied in the original patent, or for a different one, is a question for the court in an equity suit, to be determined as a matter of construction, on a comparison of the two instruments, aided or not by the testimony of expert witnesses, as it may or may not appear that one or both may contain technical terms or terms of art, requiring such assistance in ascertaining the true meaning of the language employed."—*Ib.*

160. "Where the specification and claim, both in the original and reissued patents, are expressed in ordinary language, without employing any technical terms or terms of art, the question whether the reissued patent is for the same invention as that described in the original patent or for a different one is purely a question of construction; but where both or either contain technical terms or terms of art, the court may hear the testimony of scientific witnesses to aid the court in coming to a correct conclusion."—*Ib.*

161. "Persons owning reissued letters-patent, and seeking redress from those who have invaded their exclusive right, are not obliged to introduce in evidence the surrendered patent, and if the old patent is not introduced by the party sued, he cannot have the benefit of such a defence."—*Ib.*

162. A city bought the patented coupling in question before the reissue of the patent in suit, and was held liable for the use thereof after the reissue. *Bliss v. City of Brooklyn*, 8 Blatch. 533.—BENEDICT, 1871.

163. "The power of accepting the surrender of the original patent and of granting a reissue of

it is here confided exclusively to the Commissioner, and it is to be exercised judicially by him. The presumption then is, that he has exercised it lawfully, and that the reasons for which alone its exercise could be invoked have been sufficiently shown to exist. As a corollary, his decision is final, and is to be treated as foreclosing all inquiry into the existence or sufficiency of the facts which are prescribed as necessary to authorize him to grant a reissue. Fraud even will not warrant a re-examination of his decision, at the instance of an alleged infringer." *Parham v. Am. B. O. & Sewing Mach. Co. et al.*, 1 Pa. Leg. G. Rep. 145.—MCKENNAN, 1871.

164. "The only ground . . . on which the allowance of a reissued patent is open to objection is, that the Commissioner has exceeded his authority in granting a reissue for an invention different from the one embraced in the original patent. If both are for the same invention, the decision of the Commissioner is unimpeachable, and the reissued patent, with the new specification and description, is to be substituted for the old, as evidence of the patentee's title and of the nature and object of his invention. Differences in the description and claims of the old and new specifications are not the tests of substantial diversity, but the description may be varied, and the claim restricted or enlarged, provided the identity of the subject-matter of the original patent is preserved. Within this range, whatever change is required to protect and effectuate the invention is allowable. . . . Nor is the alleged discrepancy to be determined by a reference exclusively to the two specifications; the drawing and model filed with the original specifications are also proper subjects of consideration, and are often of decisive weight."—*Ib.*

165. It is proper to broaden a claim by reissue.—*Ib.*

166. "In considering the validity of a reissued patent, . . . the only question is as to whether the invention described in the reissued letters is to be found in the original model, specifications, or drawings of the inventor. In other words, is it his invention? If it can be found, although defectively described, or if claimed with other matters not new, or not the invention of the patentee, the reissue is granted; and the action of the Commissioner in granting the reissue cannot be impeached or inquired into except for alleged fraud or collusion." *Chicago Fruit House Co. v. Busch et al.*, 2 Bissell, 472.—BLDGGETT, 1871.

167. "In the reissued patent, the patentee need not claim all that was claimed in the original patent. He may retain what he deems proper."—*Ib.*

168. "The courts must accept the action of the Commissioner as the lawful exercise of his authority, unless it is apparent upon the face of the patent that he has exceeded his authority and that there is a clear repugnancy between the old and the new patent."—*Ib.*

169. "An inventor is always at liberty, in a renewed patent, to omit a part of his original invention, if he deems it expedient to do so, and to retain only that part which he deems it expedient to retain. No harm is done to the public by his giving up a part of what he has invented; for the public may then use it, and there is nothing in the terms or policy of the patent act which prohibits such restriction."—*Ib.*

170. "When the Commissioner accepts the surrender of an original patent, and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and it is not re-examinable in a suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, or that there is such a repugnancy between the old and the new patent that it must be held, as a matter of legal construction, that the new patent is not for the same invention as that contained in and secured by the original patent."—*Ib.*

171. "Corrections may be made in the description, specifications, or claim, when the patentee has claimed as new more than he has a right to claim, or when the description, specification, or claim is defective or insufficient, but he cannot, under such an application, make material additions to the invention which were not described, suggested, nor substantially indicated in the original specifications, drawings, or Patent Office model."—*Ib.*

172. The claims of complainant's original patent were: "I. The construction of a preserving house, whose lower chamber, to contain provisions, is separated from its upper or ice-chamber by an air-tight metallic floor, 'M,' supported on metallic joints, 'L,' whose upper surfaces consist of a series of thin edges or points, substantially as set forth."

II. [Not important in this case.]

"III. The combination of the vestibule and the preserving chamber constructed as set forth.

"IV. The combination of the preserving chamber with the use of the chemicals used for desiccating the atmosphere and the hygrometric apparatus."

The claims of the reissue thereof were:

"1. An insulated house, . . . having an ice reservoir above, and separated from it by an air-tight metallic floor.

"2. The combination of such a house with a vestibule, as described.

"3. The use in such a house of a hygrometer constructed substantially as explained." Reissue sustained.—*Ib.*

173. The claim in a reissued patent was for a wringer roller coating impervious to water. No such thing was claimed in the original, but the reissue was sustained. *Bailey Washing & Wringing Mach. Co. v. Lincoln et al.*, 4 Fish. P. C. 379.—LOWELL, 1871.

174. "A reissue can only be for the invention originally made and intended to be described or claimed and included in the original patent. The language of Section 13 of the act of 1836 is, that the 'new patent is to be issued'—for the same invention—'for which the original patent was granted.' The object of the law is to enable the patentee to correct errors arising from 'inadvertency, accident, or mistake.'" *Brown v. Selby et al.*, 2 Bissell, 457.—DRUMMOND, 1871.

175. "When, on reissue, at the desire of the patentee, several patents are issued under Section 5 of the act of 1837, for distinct and separate parts of the thing patented, . . . each part covered by the patent should stand by itself as an invention."—*Ib.*

176. A patent may properly be reissued in divisions. *Penn. Salt M'fg Co. v. Thomas*, 8 Phil. 144.—MCKENNAN, 1871.

177. "Discrepancy in the titles and variations in the description and claims of the original and reissued patents" will not "avoid the latter. This effect results only from diversity of subject-matter."—*Ib.*

178. Complainant's original patent was for a new mode of putting up caustic alkali. Its reissued patent was in two divisions, one for the mode and one for the product; the reissues were sustained.—*Ib.*

179. The claim in complainant's original patent was: "I claim the improvement in the process of vulcanizing native india-rubber, or rubber once vulcanized, compounded with other articles, as above set forth, which consists in heating and curing them with steam, and under pressure, and in regulating the application of steam and the induration of the product by the introduction of steam and water, as described, by which a very great saving is made in time and fuel required for the process, as herein above stated." The claims of the reissue were: "1. The herein-described process of vulcanizing and moulding rubber compounds—viz., by means of moulds heated substantially as described, and so arranged that the compound, being placed in the mould and therein softened by the heat, is

forced by pressure to fill the mould, and therein vulcanized substantially as described.

"2. The herein-described process of vulcanizing rubber compounds—viz., by applying heat to the compound to be vulcanized by means of steam in steam jackets, substantially as described.

"3. The herein-described process of vulcanization of rubber goods, consisting in the application of heat, by means of steam jackets, to the compound to be vulcanized while under pressure, substantially in the manner described." The reissue was sustained. *Carew v. Boston Elastic Fabric Co.*, 3 Cliff. 356.—CLIFFORD, 1871.

180. Where the Commissioner "accepts the surrender and grants the new patent, his decision in the premises, in a suit for infringement, is final and conclusive, unless it is apparent upon the face of the reissued patent, as a matter of legal construction, that it is not for the same invention as that secured in the original letters-patent."—*Id.*

181. "It is difficult to see any solid objection to the power of "an "executor or administrator to make the surrender and obtain the reissue."—*Id.*

182. "Where it appears on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that secured in the original patent, the reissued patent is invalid, as the Commissioner, in that state of the case, must be held to have exceeded his jurisdiction."—*Id.*

183. "Power is unquestionably conferred upon the Commissioner to allow the specification to be amended, if the patent is inoperative or invalid, and in that event to issue a new patent in proper form; and he may doubtless, under the authority, allow the patentee to redescribe his invention, and to include in the description and claims of the patent not only what was well described before, but whatever else was suggested or substantially indicated in the drawings, specification, or Patent Office model which properly belonged to the invention as actually made or perfected. Interpolations of new features, ingredients, or devices, which were neither described, suggested, nor indicated in the original patent or Patent Office model, are not allowed."—*Id.*

184. "The grant of a reissued patent by the Commissioner of Patents is not conclusive upon the question whether it is for the same invention as the original patent; but whenever it appears, upon the comparison of the two specifications, as a matter of law, that the reissued patent is not for the same invention as that embraced and

secured in the original patent, the reissued patent is invalid, and the Commissioner has exceeded his jurisdiction in granting it." *Bridge et al. v. Brown et al.*, 1 Holmes, 53.—SHEPLEY, 1871.

185. "When, after the decease of the patentee, without having made an assignment of his patent, the patent has thereby devolved upon the executor, and has been by him assigned, the assignee of such executor has, by law, the right of taking out in his own name and for his own benefit a reissue of such patent." *Carew v. Boston Elastic Fabric Co.*, 1 Holmes, 45.—SHEPLEY, 1871.

186. Changing the date of a home patent, to make it identical with the date of a prior foreign patent for the same device, can properly be done by reissue. *Buerk v. Valentine*, 9 Blatch. 477.—WOODRUFF, 1872.

187. Although an original patent may be entirely void by reason of some defect curable by reissue, and the patented thing used largely by the public during the term of the original, such facts have no force to invalidate the reissue.—*Id.*

188. An original patent described and claimed both a spring and a weight acting together for a certain purpose. The reissue claimed and specified a spring alone. Reissue sustained. *Gallahue et al. v. Butterfield*, 10 Blatch. 232.—WOODRUFF, 1872.

189. A reissue may not include a substantial change discovered after the issue of the original patent. *Kirby et al. v. Dodge & Stevenson M'f'g Co. et al.*, 10 Blatch. 307.—WOODRUFF, 1872.

190. A reissue may properly describe, and its claim may cover the equivalent of the device described in the original patent. *Decker v. Grote et al.*, 10 Blatch. 331.—BLATCHFORD, 1873.

191. "The rule by which the validity of reissued patents is to be determined is well defined and familiar. It restricts the inquiry to a comparison of the terms and import of the original and reissued letters, and a consideration of the Patent Office drawings and model. If, from these, it results that the invention claimed in the reissue is substantially described or indicated in the original specification, drawing, or model, the very case for which the act of Congress was intended to provide is shown to exist, and any change in the description or claims which is necessary to effectuate the intention is within its sanction." *Seymour et al. v. Marsh et al.*, 9 Phil. 380.—MCKENNAN, 1872.

192. "It is no objection to the validity of the reissues that their claims are broader than those of the original patents, or that, in view of the

state of the art, these claims are broader than the patentees' invention. The very object of the act of Congress is to authorize such enlargement of the description and claims of the reissue, as to cover the invention indicated in the original, and the latter branch of the objection can only affect the reissue by avoiding the original patent for want of novelty of the invention. It cannot avail the defendants, unless it reaches back to the date of the original patent, and is founded upon proof that the invention then indicated was not novel. It certainly cannot be invoked against the authority of the Commissioner to allow an amended specification and to grant a reissued patent upon it. And upon this ground alone can a reissue be adjudged to be *ultra vires*."—*Id.*

193. The decision of the Commissioner of Patents in granting a reissue "is not re-examinable in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority—unless there is such a departure of the new from the old patent, that it must be held, as a matter of legal construction, that the new is for a different invention." *Wells v. Gill et al.*, 6 Fish. P. C. 89.—STRONG, 1872.

194. Where a reissue is magnified and generalized by dextrous use of words and vague generalities, it may be restricted by construction upon reference to the original patent. *Carlton et al. v. Bokee*, 17 Wallace, 463.—BRADLEY, 1872.

195. There is "no rule which forbids the inventor, who has omitted to claim separate new devices or several distinct combinations in the original patent, from making a surrender, and taking reissues for the distinct combinations or separate devices." *Wheeler Jr. v. Clipper Mower & Reaper Co.*, 10 Blatch. 181.—WOODRUFF, 1872.

196. "From the fact of surrender and reissue it is to be inferred that the original patent did not secure to the patentee all that he claimed in the reissue, but that alone does not render the reissue void; if the devices covered by the reissues were, in fact, new and useful, and if they are shown in the original specification, drawings, or model, then the patentee is entitled to secure the exclusive use of such separately by a reissue embracing each."—*Id.*

197. Although an original patent may be void, no inference arises therefrom that the reissue thereof is void.—*Id.*

198. The claim in a reissued patent was: "As a new manufacture, a shirt-collar composed of paper and muslin, or its equivalent, and polished or burnished, substantially as and for the pur-

pose described." The claim of the original patent was: "The above-described shirt-collar composed of the fabric set forth, and polished and varnished in the manner and for the purpose specified." Thereof the court said: "Under the language of the specification of the original patent, the claim now found in the reissue would have been a proper claim in the original patent. It is, therefore, a proper and valid claim in the reissue." *Union Paper Collar Co. v. Van Deusen et al.*, 10 Blatch. 109.—BLATCHFORD, 1872.

199. "In the case of a chemical patent reissued, it is necessary to its validity that the subject-matter be found described in the original patent." *Tarr et al. v. Webb*, 10 Blatch. 96.—BENEDICT, 1872.

200. Whatever is described or shown in the specification or drawings of an original patent may properly be claimed in the reissue thereof. *Black et al. v. Thorn et al.*, 10 Blatch. 66.—BLATCHFORD, 1872.

201. A patentee, having assigned away an entire interest in his patent, may properly, at the request of the assignee, surrender and reissue the patent. *Wing et al. v. Warren*, 5 Fish. P. C. 548.—CLIFFORD, 1872.

202. Where suit is brought upon a reissued patent, a copy of the original must be put in evidence, or the court cannot decide on the question of identity. *Brown et al. v. Whittemore et al.*, 5 Fish. P. C. 524.—LOWELL, 1872.

203. *Intimated*, that a patent for a machine may properly be reissued with a claim for the product. *Smith v. Nichols*, 1 Holmes, 172.—LOWELL, 1872.

204. "Nothing can be legally claimed in the reissue which does not appear either in the specification annexed to the original patent, or in the drawings, or in the model, even though it was, in fact, the invention of the patentee, and its use was contemplated by him when the patent was applied for; and the reissue could not, in that respect, be sustained by extrinsic proof that the patentee was, in truth, the inventor of all that was included in it, if neither the original specification, drawings, nor model showed or suggested the device in question." *Sarven v. Hall et al.*, 9 Blatch. 524.—WOODRUFF, 1872.

205. "It is where a patent is inoperative or invalid by reason of a defective or insufficient description, specification, or claim, and not where the device is not described or specified at all, that permission is given to reissue the patent. Devices not described or specified may, if they are the invention of the patentee, be the subject of a patent, subject to all other rules

governing the inventor's right ; but it is not the office of a reissue to embrace them."—*Ib.*

206. "If it appears upon the face of the reissued patent that it is not for the same invention as that embraced and secured in the original patent, then it would be the duty of the court, as a matter of law, to declare the reissued patent invalid." "Matters of construction arising upon the face of the patent are open questions to be decided by the court ; but all the questions of fact connected with the surrender and reissue are now held to be closed by the decision of the Commissioner in granting the reissued patent." *Metropolitan Washing Mach. Co. v. Providence Tool Co.*, 1 Holmes, 161.—SHEPLEY, 1872.

207. "Where a patentee, having patented an aggregate of several devices, is permitted to surrender his patent and receive new letters-patent for the several devices included in it, it does not follow that his new specifications may not be identical in their description of each and all of the devices included in the original aggregate patent. It is the patentee's selecting out of these devices some or one, being separable and capable of use, as a distinct device or devices, and making that or those the subject of his specific claim, that determines what is covered by each reissue." *Wheeler v. McCormick*, 11 Blatch. 334.—WOODRUFF, 1873.

208. "In a certain sense, it may be said that a reissue for a combination of several new devices includes them all, but this does not forbid the patentee from claiming the combination, and also claiming the several devices which enter into it, if he be the inventor of each, and they are useful by themselves or in other combinations."—*Ib.*

209. Where a patent has been reissued in divisions, and only one division extended, it was held that "nothing fell into the public domain on the expiration of that patent except the special device claimed in it, and that the patent did not include the devices embraced in the other reissues upon which this suit is brought."—*Ib.*

210. 'The object of a reissue, and the purpose of the law in permitting the surrender of a patent and a reissue thereof, are to correct, or rather perfect, a defective or insufficient description or specification, including the claim which the patentee makes to the devices described, and which he alleges are his invention. The reissue is therefore not to be tested by the mere language of the original specification, for the fact of a reissue proceeds upon the ground that such language is defective or insufficient. So, also, something is due to the fact of reissue itself, as presumptive evidence of the facts justifying the re-

issue in manner and form in which it is granted." *Aultman v. Holley et al.*, 11 Blatch. 317.—WOODRUFF, 1873.

211. "The reissued patent must be for the same invention, and the patentee cannot thereby secure to himself a new or different subject of patent, even though it be in truth his own invention."—*Ib.*

212. Let it be supposed that a patent for a combination had once been granted "and the patentee had, in his specification, attempted to show its application to use, by describing its construction, location, and adaptation to a particular machine, but, through mistake or error, he had failed to indicate the manner of its application, or made his description of the device otherwise imperfect ;" there is "no rule which, on obtaining a reissue, would forbid his selecting a machine of a different construction, and even one invented by and patented to another person, and, describing that, show also the application of his newly invented combination thereto, as an illustration of its practical utility and the manner of employing it ; provided always, that his description of his particular device, and its application and his claim thereto, does not embrace anything more than the combination of that particular device with the general mechanism."—*Ib.*

213. "The court will look beyond the mere form of words in the claim of a reissued patent, into the specifications, in both the original and reissued patent ; and even if, on the face of the reissued patent, it does not embrace anything not described or suggested in the original, nevertheless the court will ascertain whether there is any substantive invention adequate to support a claim ingeniously worded, not so much for the purpose of describing what the patentee really invented as of grasping within its terms some contrivance not within the knowledge or contemplation of the patentee, and for that reason, not by reason of inadvertence or mistake, not embraced in the claims of the original patent." *Forsyth v. Clapp et al.*, 1 Holmes, 278.—SHEPLEY, 1873.

214. "When the Commissioner grants a reissue, the court must assume that he has examined and found all the necessary conditions existed which authorized him to perform the act, and that the invention described in the reissued letters-patent is the same as the invention claimed in the original letters-patent. The only exceptions to such an interference are, where it appears upon the face of the patent that the Commissioner has clearly exceeded his authority, or where the new patent has been procured by

fraud or by collusion between the Commissioner and the patentee." *Am. Nicholson Pavement Co. v. City of Elizabeth et al.*, 6 Fish. P. C. 424.—NIXON, 1873.

215. What is fairly indicated or suggested in an original patent may be described and claimed in its reissue.—*Id.*

216. Forms clearly indicated by an original specification may be legally added to the drawings of its reissue. *Union Paper Bag Co. v. Nixon et al.*, 6 Fish. P. C. 402.—EMMONS, 1873.

217. "That a reissued patent cannot be allowed for an invention different from the one of which the original patent is a basis is undoubtedly true. But it is equally true that any feature of the invention, which is actually a part of it, that was only suggested or indicated in the specification or drawings, may be distinctly described in an amended specification and protected by a reissued patent, and that ordinarily the claims of the patent may be restricted or enlarged to cover the real invention." *Dorsey Harvester Revolving Rake Co. v. Marsh et al.*, 6 Fish. P. C. 387.—MCKENNAN, 1873.

218. "It is no objection to a renewed patent that part of the original invention is omitted. This an inventor may do, because the public may use it, and there is nothing in the policy or terms of the patent act which forbids it."—*Id.*

219. Where an original patent has been surrendered and cancelled, all rights under it have ceased except as they are secured by the reissued patent. *Brown v. Hinkley et al.*, 6 Fish. P. C. 370.—LONGYEAR, 1873.

220. It is entirely within the purpose and scope of a reissue to make a fuller statement than did the original patent, "of the state of the art, of the nature of the improvements developed in the patentee's arrangement, and of the advantages secured by the use of such improvements." *Robertson v. Secombe M'fg Co.*, 10 Blatch. 481.—BLATCHFORD, 1873.

221. The grant of an original patent with certain claims raises no presumption that the inventor did not intend to make other claims, which he subsequently does make in his reissue. *Eickemeyer Hat-Blocking Mach. Co. v. Pearce et al.*, 10 Blatch. 403.—BLATCHFORD, 1873.

222. In a suit for infringement, the defence of fraud in the granting of a reissue is conclusively settled by the action of the Commissioner. *Brown v. Guild*, 23 Wall. 181.—BRADLEY, 1874.

223. Where in a circuit court the defence of invalidity of reissue is not made, that defence cannot be made in the Supreme Court. *Klein v. Russel*, 19 Wall. 433.—SUP. CT. 1873.

224. "The Commissioner's decision is to be

held *prima facie* correct in all cases, and it is conclusive, unless impeached for fraud, or unless it is clear upon the face of the several specifications that the reissue is not for the same thing as the original patent. Where a remedy is sought for fraud, it must be an independent proceeding had directly for that purpose by a bill in equity in the name and by the authority of the United States." *Birdsell v. McDonald et al.*, 1 Bann. & Ard. 165.—SWAYNE & WELKER, 1874.

225. "It is undoubtedly true that it is not the province or design of a reissue to enlarge the original right of the inventor, but to cure some defect arising from inadvertency or mistake, and not from fraud, in drawing the specifications or claims of the first patent. Every inventor is entitled to the benefit of all that he invents; and if he fails, for the reason above assigned, to acquire a right to his whole invention in his letters-patent, he may surrender them and have a reissue from time to time, until his specifications and claims cover the whole ground." *Wells v. Jacques et al.*, 1 Bann. & Ard. 60.—NIXON, 1874.

226. Of a reissue the court said: "His application is made to the Commissioner of Patents, and that officer, not this court, is the tribunal in which Congress has vested the power of determining whether sufficient reasons exist to grant the reissue. His decision in the matter is final, in the sense that there is no appeal from it; and it does not seem to be re-examinable here, unless it is evident upon the face of the reissue that he has exceeded his authority, and that there is such a repugnancy between the old and the reissued patent that it must be held, as a matter of legal construction, that they are not for the same invention."—*Id.*

227. Although the Supreme Court may have decided that a certain device does not infringe a certain patent, yet, after the reissue of that patent, the Circuit Court may decide that there is an infringement.—*Id.*

228. "The very fact of reissue raises a presumption that the inventions claimed in the original and reissued patent are the same, and the presumptions of the law are that a complainant has acted rightly, and has not extended the reissued patent beyond the original invention." *Bantz v. Elsas et al.*, 1 Bann. & Ard. 351.—SWING, 1874.

229. If an original patent is for a combination the patentee has a right to a reissue for any of its valuable elements separately or together.—*Id.*

230. Where the drawings of an original patent clearly show features not described in the speci-

fication, the reissued specification may describe such parts and point out their functions.—*Id.*

231. "Under cover of securing his own invention" a patentee "cannot extend his claim to embrace the invention of another. The consequence of such an attempt is to imperil his title to the product of his own mechanical skill." *Adjustable Window Screen Co. v. Boughton*, 31 Leg. Int. 254.—MCKENNAN, 1874.

232. "Whenever a party desires to set up the defence, that a reissued patent is not for the same invention as the original, he must introduce the latter in evidence, as the question is one of law, depending upon a comparison of the two instruments." *Doherty v. Haynes*, 4 Cliff. 291.—CLIFFORD, 1874.

233. What the original patent exhibits, the reissue may claim, although the original fails to make the claim. *National Spring Co. v. Union Car Spring M'g Co.*, 12 Blatch. 80.—BLATCHFORD, 1874.

234. A reissued patent may mention equivalents not specifically mentioned in the original.—*Id.*

235. An application for reissue may be made by an assignee where the assignment was prior to the act of July 8th, 1870.—*Id.*

236. What is described in an original patent can be claimed in its reissue. *Booth v. Parks*, 1 Flippin, 381.—WELKER, 1874.

237. "Where the Commissioner accepts a surrender of an original patent, and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, and is not re-examinable in such a suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, and that there is such a repugnancy between the old and the new patent that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent." *Goodyear Dental Vulcanite Co. et al. v. Smith*, 1 Holmes, 354.—SHEPLEY, 1874.

238. "Reissued letters-patent must, by the express provisions of the statute authorizing them, be for the same invention; and, consequently, when it appears on a comparison of the two instruments, as a matter of legal construction, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, as the state of facts shows that the Commissioner, in granting the new patent, exceeded his jurisdiction. The patentee may amend what is defective or insufficient in the description of his invention, but he cannot make any material ad-

ditions to the invention claimed in the original, by interpolating in the reissue anything not described, suggested, or substantially indicated in the original specifications, drawings, or Patent Office model."—*Id.*

239. The claim in complainant's reissued patent for ovens was: "1. One or more swinging bread holders suspended from the arms or end plates of a rotating reel, in combination with a furnace so arranged and connected that the products of combustion will pass into or through the chamber within which the bread holders move." The court found that "the original patent did not warrant that part of the claim, in the reissue, which includes the direct application of heat to the bread chamber," and held the claim void. *Ball v. Withington et al.*, 1 Bann. & Ard. 549.—EMMONS, 1874.

240. "Neither reissued nor extended patents can be abrogated by an infringer, in a suit against him to recover damages for unlawfully making, using, or selling a patented invention, upon the ground that the letters-patent were procured by fraud in prosecuting the application for the same before the Commissioner." *Milligan & Higgins Glue Co. v. Upton*, 4 Cliff. 237.—CLIFFORD, 1874.

241. "Jurisdiction to reissue patents is vested in the Commissioner, and his decision, in such an application, is final and conclusive, and not re-examinable in a suit in the Circuit Court, unless it is apparent, upon the face of the patent, that the Commissioner has exceeded his authority or that there is such a repugnancy between the old and the new patent that it must be held, as a matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent."—*Id.*

242. "Power to surrender patents, for the purpose suggested in the act of Congress, implies that the specification may be corrected, to cure the defect and to supply the deficiency; but interpolations, in a reissued patent of new features, or ingredients, or devices, which were neither described, suggested, nor substantially indicated in the original specification, drawings, or Patent Office model, are not allowed."—*Id.*

243. "Nor is parol testimony admissible, in an application for reissue, to enlarge the nature and scope of the invention beyond what was described, suggested, or substantially indicated in the original specification, drawings, or Patent Office model, as the purpose of a surrender and reissue is not to introduce new features, ingredients, or devices into the patent, but to render effectual the actual invention for which the original patent should have been granted."—*Id.*



244. "Whether a reissued patent is or is not for the same invention as the surrendered original may not be satisfactorily determined without a comparison of the two, as the decision must necessarily depend very largely upon the question whether the specifications and drawings of the reissued patent are or are not substantially the same as those of the original; and if not, whether the changes or alterations are or are not greater than the act of Congress, granting the power of surrender and reissue, allows."—*Ib.*

245. Courts will avoid invalidating reissued patents "if they can reasonably do so, by a liberal application of the maxim, that letters-patent are to receive a liberal construction, and, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor."—*Ib.*

246. An original patent for collars and cuffs claimed imitated ornamented cuffs and collars generally. The reissued patent claimed the imitated surface and was sustained. *Union Paper Collar Co. v. Leland*, 1 Holmes, 427.—LOWELL, 1874.

247. "Neither reissued nor extended patents can be abrogated by an infringer in a suit against him for an infringement, upon the ground that the letters-patent were procured by fraud in prosecuting the application for the same before the Commissioner, and that the act of the Commissioner, in accepting a surrender and granting a reissue, is final and conclusive, and not re-examinable in a suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, or that there is such a repugnancy between the old and the new patent that it must be held as a matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original patent." *Le Baro et al. v. Hawkins et al.*, 1 Bann. & Ard. 428.—NIXON, 1874.

248. "In all cases of reissue and extension the presumption is that the Commissioner has not exceeded his authority, but has reissued and extended the same invention. The burden of proof is, therefore, on the defendants to show that he has exceeded his authority, and to point out where the repugnancy and difference between the two exist."—*Ib.*

249. In reissuing, "the patentee has a right to change his mode of expressing his specifications or claims, restricting or enlarging them, so as more fully to effectuate his invention. Variations in this respect do not make the two patents different. The precise object of the statute is to authorize such amendments. What

he is not allowed to do, is to interpolate into the reissue new features and devices which were not suggested or substantially indicated in the original specifications, drawings, models, or claims."—*Ib.*

250. Where a reissue is for an improvement not invented until after the issue of the original patent the reissue is void. *Am. Wood Paper Co. v. Fibre Disintegrating Co.*, 23 Wallace, 566.—SUP. CT. 1874.

251. "If a reissue is obtained with the consent of an assignee, it inures at once to his benefit; if without, he has his election to accept or reject it." *Littlefield v. Perry*, 21 Wallace, 205.—SUP. CT. 1874.

252. "Pending suits are defeated when it appears that the patent on which the suit is founded has been surrendered; nor is a supplemental bill setting up the reissued patent a proper pleading to revive such a suit in equity, as nothing can be recovered, either as damages or profits, for the infringement of the surrendered patent." *Reedy v. Scott*, 23 Wall. 352.—SUP. CT. 1874.

253. "Reissued patents must be for the same invention as the original patent; but if the defence be that it is for a different invention, the original patent, though inoperative as a cause of action or to protect the rights of the inventor, is yet admissible as evidence to sustain or disprove such a defence; nor can it be doubted that it may be the subject of reference, as to a repealed statute, to aid in the construction of the new patent issued upon the corrected specification."—*Ib.*

254. "The surrender of the patent to the Commissioner, within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence the patent can no more be the foundation of an assertion of a right, after the surrender, than could an act of Congress which has been repealed, and it has frequently been determined that suits pending, which rest upon an act of Congress, fall with the repeal of it. Antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists and is in force at the time of the trial and judgment the suits fall."—*Ib.*

255. Pending suit on a patent it was reissued. Complainant filed a supplemental bill setting up the same, and the case was tried throughout as though the reissued patent were fairly in suit. The Supreme Court held the proceeding irregular, but that both parties had waived by objection.—*Ib.*

256. He who is the inventor of several different combinations in an organized machine "may

give the description of the several combinations in one specification, and in that event he can secure the full benefit of the exclusive right to each of the several combinations by separate claims, referring back to the description in the specification; and if by inadvertence, accident, or mistake he should fail to claim any of the described combinations, he may surrender the original patent and have a reissue, not only for the combination or combinations claimed in the original, but for any which were so omitted in the claims of the original patent.

"Very different rules, however, apply in a case where the only invention described in the original patent is the one which includes all the ingredients of the machine, provided there is no suggestion, indication, or intimation that any other invention of the kind has been made. Such a patentee as the one last mentioned may subsequently discover that he can accomplish a new and useful result by a combination embracing less than the whole number of the ingredients included in the prior patented combination, but he cannot secure the right and privilege of a patentee in the combination of the smaller number of the ingredients by a surrender of his first patent and a reissue of the same which will include the second combination as well as the first, because the reissued patent, in that event, would not be for the same invention as the surrendered original."

"Nor could that change be allowed under the present patent act, for another reason equally decisive, which is that the new description of the other combinations, besides the first, would constitute new matter, the introduction of which into the specification of a reissued patent is expressly forbidden." *Gill v. Wells*, 22 Wall. 1.—SUP. CT. 1874.

257. "Equivalents are doubtless allowed to a patentee or owner of the patent to shut out infringement, but the patent act furnishes no support to the theory that a patentee may surrender a patent for an invention consisting of a combination of old ingredients and amend the descriptive parts of the specification by striking out the entire description of one of the ingredients of the combination and inserting in lieu thereof a full description of several other devices, without any allegation that they are the equivalents of the one whose description is stricken out, or any explanation whatever showing why the change was made."—*Ib.*

258. "Parol testimony is not admissible in an application for a reissued patent, to enlarge the scope and effect of the invention beyond what was described, suggested, or substantially indi-

cated in the original specification, drawings, or Patent Office model." *Union Paper Collar Co. v. Van Deusen et al.*, 23 Wall. 530.—SUP. CT. 1874.

259. "If the original patent is neither inoperative nor invalid, and if no error has been occasioned by accident or mistake, there must be a presumption of law and fact that the patentee has abandoned to the use of the public everything which he may have invented, but which he did not include in his claims and specifications." *Conklin et al., in re*, 1 MacArthur, 375.—MCARTHUR, 1874.

260. Under the act of 1836, "on an application for the reissue of a patent, the Commissioner, in ascertaining the invention intended to be patented, and for which a reissue may be granted, has no authority to look beyond the patent as originally granted, with the specifications and drawings thereto annexed, and the models deposited in the Patent Office." *Giant Powder Co. v. California Powder Works*, 3 Saw. 448.—SAWYER, 1875.

261. "The last clause of Section 53, of the act of 1870, so far as granting a new right is concerned, . . . has no retroactive operation; and it can only apply to reissues of patents originally issued since the passage of the act."—*Ib.*

262. The claim in an original patent was: "I claim as my invention, and desire to secure by letters-patent, the use of nitro glycerine or its equivalent, substantially in the manner and for the purpose described." The claim in the reissue thereof was: "The application and use of nitro-glycerine, simple or compounded, as an explosive for blasting or for disrupting purposes, in the manner and substantially as hereinbefore described." The claims in a subsequent reissue were: "The utilization, as explosives, of nitro-glycerine and the analogous substances hereinbefore mentioned, by combining therewith gunpowder, gun-cotton, or other similar substances developing a rapid heat on combustion, substantially as hereinbefore described; 2. The combination of gunpowder with nitro-glycerine, substantially as and for the purposes hereinbefore described; 3. The combination of gun-cotton with nitro-glycerine, substantially as and for the purposes hereinbefore described. . . The mixture of nitro-glycerine and rocket powder, substantially as and for the purpose hereinbefore described." It was claimed on behalf of complainant that the specification filed with the application for the original patent—which was not the same as the specification of that original patent as it issued—was to be considered in determining the validity of said subsequent reissue.

The court held that the original patent was for a process and not for a compound. It was for modes of using the liquid and not for any new compound of known or unknown ingredients. The court also held that if it was restricted in its examination to the original patent and its specification, said subsequent reissue could not be sustained. Said subsequent reissues were granted under the statute of 1870, and as to reissues under that statute the court said: "In machine patents, models and drawings can be examined in connection with the specification, and the latter changed, restricted, or enlarged so as to fully describe the actual invention made. If the patent does not relate to a machine, the specification, if defective, may be more definite and certain, so as to embrace the claim made, or the claim may be so modified as to correspond with the specification. But this is the extent . . . to which modifications can be made in such cases." The reissues were condemned.—*Ib.*—FIELD, 1875.

263. "The legal rule is, that *prima facie* a reissue is for the same invention as that originally patented." *U. S. & Foreign Salamander Felting Co. v. Haven*, 3 Dillon, 131.—TREAT, 1875.

264. As regards reissues, repeated decisions by the courts, and especially by the United States Supreme Court, indicate with sufficient distinctness, that "not only no new matter shall be introduced, but . . . an enlargement of the original claim growing out of the subsequent advance of the art is not to be tolerated. The reason of this rule is obvious. Every patent, as to novelty or utility, depends on the state of the art at the time of claim made or patent issued; and therefore, if a party, after learning from a subsequent advance of the art the worthlessness of his original invention, is to be permitted to claim a reissue incorporating what was not originally in his mind, and what had been afterward suggested to him only by the advances in the art by others, then he could, it may be, even without any new invention, override all the elements which would serve to test the validity of the new application."—*Ib.*

265. As regards a reissue, "by new matter is not meant merely the introduction of a new ingredient in a patented composition, but any change in the original specification and claim whereby a new and substantially different composition and result are secured."—*Ib.*

266. A claim in the original patent was: "A cheese press, composed of the double frame A a A, the press beam B b H, sliding standard G G, double levers C C, nuts e, and the screw D, with a hand-wheel F and square end d, all construct-

ed, arranged, and operating substantially as described.'" The claim of the reissue therefor read: "In combination with the sliding standards, supported laterally and guided in the frame of the press, the double screw-shaft supported in or against the sliding standards, substantially as and for the purpose described." The reissue was sustained. *Boomer et al. v. United Power Press Co. et al.*, 13 Blatch. 107.—SHIPMAN, 1875.

267. "The concurrence in the surrender of a patent by a transferee of an interest in it, who is not an assignee within the meaning of the statute, is not essential to the validity of a reissued patent." *Meyer et al. v. Bailey et al.*, 2 Bann. & Ard. 73.—MCKENNAN, 1875.

268. He who owns territorial right under a patent need not join in the surrender and reissue of the patent.—*Ib.*

269. "To correct accidental or inadvertent mistakes in the specification and claims of the original patent, . . . is the only legitimate purpose of a reissue." *Union Paper Collar Co. v. White*, 2 Bann. & Ard. 60.—MCKENNAN, 1875.

270. "Whatever reason there may be to suspect that the motive of the patentee was to give undue elasticity to his patent, still the law presumes that the reissue was granted to correct an inadvertent omission in the original, because it commits to the Commissioner of Patents the exclusive determination of the question, and the only test of the validity of his action is whether he was allowed a reissue for a different invention from that covered by the original patent, or for what was not therein described, claimed, or indicated."—*Ib.*

271. "It is a legitimate and important function of a reissue to modify or change the claims of the original patent so as to cover the invention set forth therein." *Westinghouse Jr. v. Gardner & Ranson Air-Brake Co.*, 2 Bann. & Ard. 55.—SWAYNE & WELKER, 1875.

272. "The only power which the courts have over reissues, when their validity is sought to be impeached upon such grounds, is to look at the record of the original patent and of the reissue, and to determine upon their face whether or not, as matter of law, the reissue is a lawful one, without inquiring by what means it was procured, and without inquiring what matters of fact were involved *dehors* the record. The act of the Commissioner in granting the reissue is final and conclusive." *Johnson v. Beard*, 2 Bann. & Ard. 50.—WOODRUFF, 1875.

273. "It is a well-settled principle that the patentee may so limit his claim as to deprive himself of the full benefit of his invention or discovery. It was to remedy such a difficulty or

omission that the privilege of surrender and reissue was granted in the patent laws. Patentees often fail to realize any substantial advantage from some of the most useful inventions, owing to their too narrow claims, until such surrender, amendment, and reissue have been made."

*Welling v. Rubber-Coated Harness Trimming Co. et al.*, 2 Bann. & Ard. 1.—NIXON, 1875.

274. A reissued patent for a machine may claim what the original patent did not claim, if what is claimed in the reissue was shown in the original model and drawings. *Calkins v. Bertraud et al.*, 6 Bissell, 494.—BLODGETT, 1875.

275. "A patentee cannot by act of surrender of his patent affect the rights of the assignee to whom he has previously granted the whole or a part of his patent without the consent of such assignee." *Barnes v. Morgan*, 3 Hun 703.—BRADY, 1875.

276. When a patent is surrendered and reissued, pending litigation thereon, the suit falls and cannot be continued by means of a supplemental bill. *Fry v. Quinlan*, 13 Blatch. 205. JOHNSON, 1875.

277. "The very object of the reissue is to give an opportunity to an inventor to change, modify, and correct his specification or claims to the extent necessary to cure defects and supply deficiencies arising from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention." *Putnam v. Yerrington*, 2 Bann. & Ard. 237.—NIXON, 1876.

278. By the introduction of new matter into a reissue is meant "such an enlargement of the original specifications or claims as to include combinations or results which did not necessarily flow from the invention as originally stated and described."—*Id.*

279. A reissue may state results which were not stated in the original patent.—*Id.*

280. "Reissued patents are presumed to be for the same invention as the original, unless the contrary appears. Matters of fact are not open under such an issue in a suit for infringement. Instead of that, the conclusion in such case must always be in favor of the validity of the reissued patent, unless it appears upon a comparison of the two instruments that the reissue, as matter of legal construction, is not for the same invention as the original. Surrenders are allowed in order that what was imperfect before may be made perfect, and that in order that what was ambiguous may be made clear and certain; and for that purpose the patentee may add whatever was substantially suggested or indicated in the original specifications, drawings, or Patent Office model. New features may not

be introduced, for the reason that every interpolation of the kind is forbidden by the act of Congress. Errors and defects may, however, be corrected under the conditions specified; and the prohibition that new features shall not be introduced must not be understood as taking away the right to include in the reissue whatever was substantially suggested or indicated in the surrendered specification, drawings, or Patent Office model." *Stevens v. Pritchard*, 4 Cliff. 417.—CLIFFORD, 1876.

281. "Unquestioned authority is conferred upon the Commissioner to grant a new patent in case the original is surrendered, and his action in granting the same is final and conclusive, unless the court is of the opinion, upon comparing the two instruments, that the reissued patent, as matter of legal construction, is not for the same invention as the original."—*Id.*

282. A claim in an original patent for cotton-presses was confined to portable revolving cotton-presses. The claim of the reissued patent extended to all cotton-presses, stationary as well as portable. It appeared that the confinement of the invention to portable presses in the original patent was made advisedly, and the reissue thereof was held invalid. *Wicks v. Stevens*, 2 Woods, 310.—BRADLEY, 1876.

283. "Defective patents may be surrendered and reissued, but the act of Congress expressly requires that the reissue must be for the same invention as the original, and consequently where it appears on a comparison of the two instruments, as matter of legal construction, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissue is invalid, as the state of facts show that the Commissioner exceeded his jurisdiction. . . . Errors and imperfections may be corrected, and with that view the Commissioner may allow the patentee to redescribe his invention, and to include in the description and claims of the patent not only what was well described before, but whatever else was suggested or substantially indicated in the specification, model, or drawings which properly belonged to the invention as actually made and perfected. Interpolations of new features or devices which were neither described, suggested, nor indicated in the original specifications, drawings, or Patent Office model are not allowed." *Tucker v. Tucker M'fg Co.*, 4 Clifford, 397.—CLIFFORD, 1876.

284. "Whether a reissued patent is for the same invention as that embodied in the original patent, or for a different one, is a question for the court, to be determined as a matter of con-

struction on a comparison of the two instruments, aided or not by the testimony of expert witnesses, as it may or may not appear that one or both may contain technical terms or terms of art requiring such assistance in ascertaining the true meaning of the language employed."—*Id.*

285. "Reissued patents are valid unless the differences between the reissued patent and the original are such that the court can see, upon a comparison of the two instruments, as matter of legal construction, that the reissued patent is not for the same invention as the original."—*Id.*

286. In a reissue "defects in the description may be cured, but the patent may not strike out the entire description of one of the ingredients of a combination and insert in lieu thereof a description of other devices, unless it be alleged that such other devices are the equivalents of the device stricken out."—*Id.*

287. In a reissue "corrections may be made in the specification, but they must not be of a character to change the substantial nature of the invention, either by enlarging or diminishing its legal effect or substantial mode of operation."—*Id.*

288. Where A sues B under an original patent and fails, then reissues his patent, and again sues B, A is not estopped from prosecuting in the latter suit. *Pickering et al. v. Phillips et al.*, 4 Cliff. 383.—CLIFFORD, 1876.

289. "A surrender, after a final judgment or decree, can have no effect upon a right passed previously into judgment. After that there is nothing open for litigation. The right of the patentee then rests on his judgment or decree, and not on his patent." *Mews v. Conover*, 11 O. G. 1111.—SUP. CT. 1876.

290. An original patent for a process made heated fat liquor an essential ingredient; the patent was reissued with the following claim: "The employment of fat liquor in the treatment of leather, substantially as specified." The reissued claim was held invalid. *Russell v. Dodge et al.*, 93 U. S. 460.—SUP. CT. 1876.

291. "The object of the law was to enable patentees to remedy accidental mistakes, and the law was perverted when any other end was secured by the reissue."—*Id.*

292. The Supreme Court adjudged certain patents invalid for want of novelty. The patent owner then reissued them and brought suit thereon. Of such reissues the court said: "If we admit there is something new and patentable in the reissued patent which was not in the original, the patent is void, because it is not for the same invention as the original. It may be

the subject of a new patent, but cannot be a reissue of an old one, and that, too, of an old one which has been adjudged invalid by the Supreme Court for want of novelty." *Jones v. McMurray*, 2 Hughes, 527.—BOND, 1877.

293. The statute warrants change of claims in a reissue when the invention is in reality the same as in the original patent. *Sprague et al. v. Adriance et al.*, 3 Bann. & Ard. 124.—WHEELER, 1877.

294. In a reissue the improvement may be set forth more methodically or directly, and may be claimed more extensively and definitely than in the original. *Searles et al. v. Van Nest et al.*, 3 Bann. & Ard. 121.—WHEELER, 1877.

295. "There is no obligation upon the patentee to claim all things in the reissue which were claimed in the original invention." *Albright v. Celluloid Harness Trimming Co.*, 2 Bann. & Ard. 629.—NIXON, 1877.

296. "Patents in a proper case may be surrendered and reissued, but the reissued patent must be for the same invention as the original patent, else the reissue is invalid; but the patentee may redescribe his invention and include in the description and claims of the specification not only what was well described before, but whatever else was suggested or substantially indicated in the old specification, drawings, or Patent Office model." *Marsh et al. v. Seymour et al.*, 97 U. S. 348.—SUP. CT. 1877.

297. The claim in an original patent for improvement in cooling and drying meal was: "The arrangement and combination of the chests D, J, shafts F, K, elevators F', fan G, and spout I, substantially as and for the purpose herein shown and described." The claim of the reissue thereof was: "The arrangement and combination of the suction fan G and spout I with the meal chest D, receiving the meal from the grinding stones, and provided with a conveyor shaft F, and elevator F', substantially as and for the purpose set forth." The reissue claim was sustained. *Herring et al. v. Nelson et al.*, 14 Blatch. 293.—JOHNSON, 1877.

298. The affirmative decision of the Commissioner of Patents on an application for reissue is conclusive evidence that the original patent was inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, and that the error arose by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention.—*Id.*

299. "One of the very plain grounds of reissue specified in the statute is, that the original

patent fails to secure the invention, by reason of the imperfection of the claim or description of the invention."—*Id.*

300. "What is found in the specification, drawing, or model of the original patent may be embraced in the reissued patent [*Seymour v. Osborne*, 11 Wall. 516]; and . . . in redescribing his invention, the patentee is not rigidly confined to what was described before, but may include in the new description whatever else was suggested or substantially indicated in the old, provided it was embraced in the invention as actually made and perfected. Differences in the claims of the old and the new specifications are not the tests of substantial diversity, but the description may be varied, and the claim restricted or enlarged, provided the identity of the subject-matter of the original patent is preserved. Within this range, whatever change is required to protect and effectuate the invention is allowable."—*Id.*

301. "The reissued patent being valid upon its face, the presumption is, that the patentee was the first inventor of that which the patent purports to secure. . . . And this is not a mere formal presumption, but if to be overthrown by parol testimony, must be overthrown upon clear and satisfactory proof. A case of doubt upon the evidence is not enough, for that leaves the presumption operative."—*Id.*

302. Complainants' original patent for a lamp stated the object of the invention to be a lamp which would burn without a chimney, and that the entire mechanism was directed to accomplish that effect. The invention, so far as the heaters were concerned, consisted in their joint use. The original patent suggested no invention save the one contained in the entire combination. The claim of the reissued patent described an article materially different from the article originally patented; the claim contained a combination of a lesser number of ingredients than the combination which composed the original invention. The court held, that had the patentee, in his original specification, suggested that a lamp containing the modified combination of the second claim of the reissue was feasible and within the scope of his invention, the reissued claim might have been sustained, but, under the circumstance, the reissue was held void, as being for a different invention from that contained in the original patent. *Miller et al. v. Bridgeport Brass Co.*, 14 Blatch. 282.—SHIPMAN, 1877.

303. "The patentee cannot, by obtaining a reissue for a process, enlarge his right to a monopoly beyond the actual invention." *Clark v.*

*Kennedy M'fg Co. et al.*, 14 Blatch. 79.—SHIPMAN, 1877.

304. "When in the specification of the original patent the inventor describes a new and useful combination of a number of ingredients, performing in combination certain functions less than he claimed, he may in the reissue claim such combination of the less number which he described, suggested, or substantially indicated as his invention, but failed to include in his claims, and the reissue need not describe it in the exact language of the original, but may contain a more full and exact description of the same invention, imperfectly described in the original." *Pearl et al. v. Ocean Mills et al.*, 2 Bann. & Ard. 469.—SHEPLEY, 1877.

305. "It is delegated, by the act of Congress upon the subject, to the Commissioner of Patents carefully to examine the question whether the patentee is entitled to a reissue, and to decide according to the result of the examination. The presumption of law is, according to the authorities, that the Commissioner has done his duty thoroughly, faithfully, and properly, and has arrived at a conclusion in accordance with his action. The question is not open for re-examination, except on the ground of fraud." *Miller & Peters M'fg Co. v. Du Brul*, 2 Bann. & Ard. 618.—SWAYNE, 1877.

306. "The only purpose of a reissue is to enable one who has, by a mistake or inadvertence, not taken what he is entitled to in his original patent, to obtain it. The reissue was only intended to cover omissions of the Patent Office, or of the inventor, in not claiming that to which he was entitled as an inventor." *Volger v. Semple*, 7 Bissell, 382.—BLODGETT, 1877.

307. It seems that although an original patent may contain a disclaimer, yet a reissue thereof, omitting the disclaimer but covering the disclaimed matter, may be had. *Am. Shoe Tip Co. v. Nat. Shoe Toe Protector Co.*, 2 Bann. & Ard. 551.—NIXON, 1877.

309. The claim in an original patent for labeling tobacco was limited to the case where the label was applied underneath the wrapper. The reissue was not so limited. The reissue was sustained. *Lorillard et al. v. McDowell et al.*, 2 Bann. & Ard. 531.—MCKENNAN, 1877.

309. "The presumption of the law is always in favor of the validity of a reissue. Any one alleging the contrary must show that it is for a different invention by satisfactory proof, or point out the new matter which constitutes the difference." *Reissner et al. v. Anness et al.*, 3 Bann. & Ard. 176.—NIXON, 1877.

310. "The object of the reissue, and the rea-

son why the right is given, are to correct defective or insufficient specifications, whereby the patent is inoperative or invalid, and anything appearing in the model which is the embodiment by the patentee of his invention can hardly come within the designation of new matter in the reissue because it is not fully described in the claim, specifications, and drawings of the original."—*Ib.*

311. "The action of the officers in the Patent Office in granting . . . reissues must be presumed to be right, and the burden of proving the reverse is on the defendants." *Am. Mid-  
dlings Purifier Co. v. Atlantic Milling Co.*, 4 Dillon's C. C. 100.—MILLER & DILLON, 1877.

312. Where, in an original patent, the word "inexplosive" was applied to a substance only preferentially used, and that word was omitted from the reissue, the reissue was sustained. *Atlantic Giant Powder Co. v. Goodyear*, 3 Bann. & Ard. 161.—SHEPLEY, 1877.

313. The original of the reissued patent in suit was for an improvement in tin cans, and the reissue described the device as applicable to different forms and constructions of cans, and by different modes from those of the original patent. The reissue was sustained. *De Flores et al. v. Reynolds et al.*, 14 Blatch. 505 — WHEELER, 1878.

314. In a reissue a patentee may use new words and phrases more aptly describing the old invention. *Draper v. Potomska Mills Corporation*, 3 Bann. & Ard. 214.—SHEPLEY, 1878.

315. In an original patent for a toy, the invention was limited to gong-shaped bells. This limitation was left out in the reissue. The reissue was sustained. *Abbe et al. v. Clark et al.*, 3 Bann. & Ard. 211.—SHIPMAN, 1878.

316. "The purposes of a surrender and reissue is not to introduce new features, ingredients, or devices, but to render effectual the actual invention for which the original patent should have been granted; but the actual invention is to be shown, suggested, or substantially indicated in the original specification, drawings, or models, and the scope or effect of the invention is not to be enlarged so as to include what was not shown, suggested, or indicated."—*Ib.*

317. The claims of a patent may be changed or strengthened by reissue. *Turrell v. Spaeth*, 14 O. G. 377.—NIXON, 1878.

318. A patent for a process cannot, after a considerable lapse of time, be reissued as a patent for a product, even though the product was described in the application for the original patent, but taken out of the same by amendment,

before the original patent issued. *Giant Powder Co. v. California Powder Works et al.*, 96 U. S. 128.—SUP. CT. 1878.

319. Where a bill of complaint sets forth the original and reissued patents, the question of the identity of the two patents is examinable upon demurrer.—*Ib.*

320. It is proper to make a new and stronger claim by reissue. *Scheussler v. Davis*, 13 O. G. 1011.—WALLACE, 1878.

321. In an original patent for skate clamps the inventor disclaimed broadly the moving of clamps in skates by adjusting screws, and made a claim to "the combination to employ V-slotted blocks with clamps and screw ends." A reissue of this patent contained four distinct claims, each for a combination: the first was for a plate or rest for the foot and mechanism for moving and holding the clamps; the second was for sole and heel clamps so combined with the mechanism for moving and holding the same that one set of clamps acted as a resistance in closing the other set; the third was for certain devices, as laterally moving clamps; the fourth was for pins and inclined slots actuated by mechanism for moving the same, and clamps for the heel. The reissue was sustained. *Turrell v. Spaeth*, 3 Bann. & Ard. 458.—NIXON, 1878.

322. An original patent described and claimed a process; one division of its reissue claimed a product. The reissue was sustained. *Badische Anilin & Soda Fabrik v. Higgins et al.*, 15 Blatch. 290.—WHEELER, 1878.

324. Whether circumstances exist *dehors* a patent authorizing a reissue is a matter to be determined at the Patent Office and not open elsewhere. "Whether the reissue is for the same invention that the original was and as such was warranted by that original is open" elsewhere.—*Ib.*

324. The correction of a mistake in the statement of a patent as to the effect of laying pavement in sections is the office of a reissue and not of a disclaimer. *Schillinger v. Gunther*, 15 Blatch. 303.—BLATCH, 1878.

325. "All matters of fact involved in the hearing of an application to reissue a patent, and in granting it, are conclusively settled by the Commissioner in granting the application." *Judson v. Bradford et al.*, 3 Bann. & Ard. 589.—CLIFFORD, 1878.

326. "Neither renewed nor extended patents can be abrogated by an infringer, in a suit against him for damages or profits, upon the ground that the letters-patent were procured by fraud in prosecuting the application for the same before the Commissioner." *Thomas et al. v.*

*Shoe Mach. M'fg Co. et al.*, 3 Bann. & Ard. 557.—CLIFFORD, 1878.

327. "Where the Commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, *in a suit for infringement*, is final and decisive, and is not re-examinable in a suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, and that there is such a repugnancy between the old and new patents, that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original."—*Id.*

328. Material interpolations make reissued patents void. "Courts of justice will avoid such a conclusion, if they can reasonably do so by a proper application of the maxim that patents are to receive a liberal construction, and if practicable, be so interpreted as to uphold and not destroy the right of the inventor."—*Id.*

329. "If the invention claimed in the reissue is not substantially different from the one described, suggested, or substantially indicated in the specification or drawing of the original patent or Patent Office model, the reissued patent must be held valid, as all other alterations and amendments fall within the intent and purpose of the provision in the act of Congress which allows a surrender and reissue."—*Id.*

330. In an original patent the claims were: "1. A lamp-chimney, A, provided with a receiver, B, substantially as and for the purpose shown and described. 2. The arrangement of the window *e*, in the metal bulb *a* of the chimney A, as and for the purpose set forth." The claims of the reissue were: "1. The combination substantially as herein shown and described, of a kerosene oil lamp, a deflector or cone, and a metallic heating chamber or shell, adapted to support a vessel to be heated. 2. A kerosene oil lamp-heater, in which the deflector or cone of the lamp is arranged in the bottom of a metallic heating chamber or shell that is adapted to support a vessel to be heated. 3. The combination of a kerosene oil lamp, a deflector or cone, and a metallic heating chamber, under the arrangement, substantially as herein shown and described, so that the air for the substance of the flame in the heater shall be admitted through the bottom of the heater, and the products of combustion shall pass off through a contracted opening in the top of the heater. 4. The combination of a kerosene oil lamp, a metallic shell adapted to support a vessel to be heated, and a window made of transparent material in the walls of the shell, substantially as herein set

forth." The reissue was sustained. *Kerosene Lamp Heater Co. v. Littell*, 3 Bann. & Ard. 312.—NIXON, 1878.

331. The action of the Commissioner of Patents in granting a reissue is conclusive that "the original patent was inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming, as his own invention, more than he had a right to claim as new, and that the error arose by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention."—*Id.*

332. "If it shall appear on examination that nothing has been embraced in the reissue beyond what is fairly indicated in the drawings, it must be held, as a matter of legal construction, that the inventions claimed in the two patents are the same."—*Id.*

333. "Whatever is fairly indicated, either in the schedules, drawing, or model of the original, may be comprehended in the specifications and claims of a reissue, without subjecting the patentee to the imputation of claiming more than he is entitled to."—*Id.*

334. "The identity of the invention, set forth in the original patent and reissue, is a matter of legal construction, and is determined by a comparison of the two patents."—*Id.*

335. "Where a patent is originally taken out for a single combination, a reissue may be had in which a separate claim may be made for sub-combinations of a part of the elements joined in one in the original invention."—*Id.*

336. The claim of an original patent was: "I claim as a new article of manufacture, 'The corner moulding or guard *a*, for trunks, made of corrugated metal, formed into shape for application, and strengthened by wire, *b*, substantially as described.'" The claims of the reissue were: "The corner-clamp A, made with the outwardly projecting beads, *b*, at the corner, said beads being convex at the outer and concave at the inner side, substantially as herein shown and described. 2. The corner-clamp corrugated substantially as herein described, as a new article of manufacture." The reissue was sustained. *Gould et al. v. Ballard et al.*, 3 Bann. & Ard. 324.—NIXON, 1878.

337. In reissuing patents, "while enlargement by the use of new instrumentalities is forbidden, restriction by the disuse of some of the old is allowable."—*Id.*

338. To impeach a reissue, which is *prima facie* evidence that it is for the same invention as its original, it must appear, in the absence of fraud, that the invention described therein is repugnant to the original. *Andrews et al.*



v. *Wright*, 3 Bann. & Ard. 329.—NELSON, 1878.

339. A reissue may claim what is simply shown and described in the original patent. *Howes et al. v. McNeal*, 15 Blatch. 103.—BLATCHFORD, 1878.

340. "Cases arise undoubtedly where a suggestion in the specification or an indication in the drawings or Patent Office model of the original patent may be sufficient to justify an alteration or enlargement of the description of the invention in the specification of a reissued patent, as where the change consists merely in the substitution of a different material from that of which a device is composed, or in the modification in the form of a device, or in the proportions of the ingredients; but where the alteration consists of a distinct invention, there ought to be found in the original specification enough to fairly apprise other inventors and the public that the invention includes and embodies such additional features." *Kelleher et al. v. Darling*, 4 Cliff. 424.—CLIFFORD, 1878.

341. A reissued patent may be good in part and void in part.—*Id.*

342. Complainant's reissued patent was for an improvement in fastening sheet metal to roofs. A claim in the reissue was: "I claim, in combination the adjusting-bolt and slotted side-plates, suitably mounted and combined with, the materials to be fastened together, for the purpose of accommodating the expansion and contraction of such materials, with reference to each other, substantially as specified." The elements of the combination, which in the original patent were set forth as having been invented by the patentee, were: "The stud, the flanges, the bottom-plate, the adjusting-bolt, 'passing through the stud,' and capable of moving in the slots of the flanges." In making a construction of the claim on which to sustain a charge of infringement, it was necessary to consider the stud no part of the fastener. In the original the language plainly imported that the stud was an essential part of the fastener. Of this reissue the court said: "A substantial change in the subject-matter has been accomplished, and upon established principles, the conclusion must follow, that the reissue is void." *Johnson et al. v. Flushing & North Side R. R. Co.*, 15 Blatch. 192.—BENEDICT, 1878.

343. In prosecuting the extension of a patent, the patentee was required to disclaim several claims of the patent. After the extension he procured substantially the same claims by reissue. The Supreme Court held these reissued claims invalid, and the patentee estopped by his disclaimer from securing these claims. *Leggett*

*et al. v. Avery et al.*, 101 U. S. 256.—SUP. CT. 1878.

344. Doubtful "whether a reissued patent may be sustained in any case where it contains claims that have once been formally disclaimed by the patentee or rejected with his acquiescence, and he has consented to such rejection in order to obtain his patent."—*Id.*

345. Complainant took a patent for bronzing iron. He reissued the same in two divisions, one for the process and one for the product; the reissue was sustained. *Tucker v. Burditt et al.*, 4 Bann. & Ard. 569.—LOWELL, 1879.

346. Reissuing a patent for the purpose of covering a certain device is done through a proper motive. "The question . . . is whether the invention was of such a nature that the reissue was justified. The fact that the original claim was for the whole machine may have some bearing upon the state of the art, as understood by the inventor at that time; but the machine described being the same, claims may be made to include whatever was the actual invention, if and so far as the patentee was the first to invent it." *Buffum et al. v. Oakland Mfg Co.*, 4 Bann. & Ard. 599.—LOWELL, 1879.

347. The claims of an original patent were: "A lamp-chimney consisting of sheets of mica united by means of the double and indented or perforated metal strips *b*, provided with means for attaching it to the base *B*, substantially as described. 2. A glass base, *B*, having the connection *I* and the flaring top *h* constructed and arranged to operate substantially as set forth." The claims of the reissue were: "A glass base for coal-oil burners, constructed with a tubular body to fit around the cone or burner, and having a laterally projecting flange, substantially as and for the purpose set forth. A glass base having the connection *I* and the laterally projecting flange *H*, substantially as described. A transparent base for a coal-oil lamp-chimney, having a tubular body of suitable length and form to fit and support it on the lamp, and having a laterally projecting flange *h*, substantially as described. The combination of a transparent base, having a tubular body *B* of suitable form and length to adapt it to be used on a coal-oil lamp, and a laterally projecting flange *h*, with a chimney, substantially as described." The reissue was held not to be for the same invention. *Blackman et al. v. Hibbler et al.*, 17 Blatch. 333.—BENEDICT, 1879.

348. Complainant's reissued patent in suit was for improvement in the manufacture of enamelled iron ware. The original patent was for both product and process. The change made in

the reissue was the introduction into the same of a formula for the enamel mixture. The reissue was sustained. *St. Louis Stamping Co. v. Quinby et al.*, 4 Bann. & Ard. 192.—TREAT, 1879.

349. The claim of an original patent was: "The new manufacture of enamel sheet iron ware enamelled substantially as described." The reissue claim was: "As a new manufacture mottled enamelled sheet iron ware having an oxidized base fused with the surface glaze." The reissue was sustained.—*Ib.*

350. A claim of complainant's original patent in suit was: "The composition of matter made substantially of the ingredients and in the manner and for the purpose set forth." The claim of the reissue thereof was: "The combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound." The reissue was sustained. *Atlantic Giant Powder Co. v. Rand et al.*, 16 Blatch. 250.—BLATCHFORD, 1879.

351. In an original patent for improvement in seats for public buildings, the seats were to be turned up by weights when not held down by being sat upon. In the reissue the weight might be dispensed with and the seats moved upward otherwise or retained. The reissue was sustained. *Allen v. City of N. Y. et al.*, 17 Blatch. 350.—WHEELER, 1879.

352. "That the specification or claims of the reissued patent are different from those of the original, and the invention or discovery remaining the same is of no consequence. The very object of the reissue is to correct the patent so as to make it conform with the invention." *Campbell v. James et al.*, 17 Blatch. 42.—WHEELER, 1879.

353. In an original patent a rigid canceller was described as not being so useful or desirable as an elastic one. In the reissued patent it was covered. The reissue was sustained.—*Ib.*

354. "A reissued patent has the same effect and operation in law as though it had been originally filed in the corrected form, only on the trial of actions brought on it for cases thereafter arising, and has no such effect in any other case or for any other purpose." *U. S. Stamping Co. v. King et al.*, 17 Blatch. 55.—BLATCHFORD, 1879.

355. Complainants' reissued patent in suit was for an improvement in pump tubes, and the specification of that reissue said: "In pointed pump tubes heretofore used, difficulties have arisen in keeping them free from clogging and rendering them efficient. My invention was made to overcome these difficulties, in which I

have fully succeeded." This matter was not in the original patent; the reissue was held not invalidated thereby. *Christman et al. v. Rumsey et al.*, 17 Blatch. 148.—BLATCHFORD, 1879.

356. There is no authority which will sustain a reissued patent wherein for the first time combinations appear as distinct inventions adapted to produce a new and useful result not alluded to in the original patent. *Cammeyer et al. v. Newton et al.*, 4 Bann. & Ard. 159.—BENEDICT, 1879.

357. A reissued patent was for a circular saw so constructed that the slots in the periphery thereof terminated in round holes irrespective of the position of the slots running from the centre. The reissue was held void. *Curtis et al. v. Branch et al.*, 4 Bann. & Ard. 189.—TREAT, 1879.

358. A reissued patent expanded to embrace a claim for purifying wheat flour when no such process was described, suggested, or claimed in the original patent, is void. *Am. Middlings Purifier Co. v. Atlantic Milling Co.*, 5 Dillon, 127.—DILLON, 1879.

359. A claim of an original patent was: "A pump filter, composed of parts A, B, and C, substantially as and for the purposes described." The claims of the reissue were: "1. The combination of the wire gauze C with an open grating or guard A, of sufficient length for the purpose required, and a point A', constructed substantially as and for the purposes described. 2. The combination of a grating A, having apertures through it for the passage of water to the interior, forming the lower end of the pump tube, with a wire gauze C, for filtering the water, substantially as described." The reissue was sustained.—*Ib.*

360. For an example of various changes in a reissue as compared with its original held not to invalidate the reissue, see.—*Ib.*

361. "The drawings of the original and reissue being the same, and the two specifications describing the same mechanical structure, with the same mode of operation, it must be held lawful to reissue the patent with claims to combinations not claimed in the claim of the original patent."—*Ib.*

362. A second reissue is not affected by the faults of the first. *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 17 Blatch. 208.—WHEELER, 1879.

363. "There is nothing to do but to compare the reissue upon which the suit is brought with the original patent, disregarding all else, to see if the new invention patented in this reissue is the same that is any manner described in any

part of the original ; not whether it was patented, or even thought or sought to be, there, but whether it appears, from what is there, that it might have been patented there if it had been thought of and desired."—*Id.*

364. By reissue "it was never intended to allow a patent to be enlarged ; but to allow the correction of mistakes, inadvertently committed, and the restriction of claims which had been improperly made, or which had been made too broad—just the contrary to that which has come to be the practice. In a clear case of mistake—not error in judgment—the patent may undoubtedly be enlarged ; but that should be the exception not the rule ; whereas the enlargement of claims has become the rule and their contraction the exception." *Swaine Turbine & Mfg Co. v. Ladd*, 102 U. S. 408.—SUP. CT. 1880.

365. It is a mistake to suppose that by a reissued patent the patentee or his assigns may have all that they might have claimed in the original patent.—*Id.*

366. An original patent covering the parts of a water-wheel cannot be made, by reissue, to cover the entire structure of the wheel.—*Id.*

367. An original patent for improvement in ovens had the following claim : "The perforated interior chamber, in combination with the rotary wheel and the swing platform thereon, self-discharging, substantially as set forth." Fifteen years afterward a reissue thereof was taken with the following claim : "One or more swinging bread-holders suspended from the arms or end-plates of a rotating rod, in combination with a furnace so arranged that the products of combustion will pass into or through the chamber which the bread-holders move." The reissue was condemned as not being for the same invention. *Ball et al. v. Langles et al.*, 112 U. S. 128.—SUP. CT. 1880.

368. "The drawing could and should be looked at, if necessary, in order to explain an ambiguous or doubtful specification, and to make the invention capable of being understood and used. But it cannot supply an entire want of any part of a specification or claim in a suit upon a patent, although it might afford ground for a reissue covering the part shown by it." *Tinker v. Wilbur's E. M. & R. Co.*, 1 Fed. Rep. 138.—WHEELER, 1880.

369. By the court : "Although there are several things mentioned and described in the specification of the reissue not mentioned or described in that of the original, and although the claims are quite different, there is nothing mentioned or described in the specification of the reissue not shown in the drawings or model of

the original, . . . and there is no element of any combination, or arrangement, or device claimed in the reissue that is not either mentioned or described in the original as performing or intended to perform the office assigned to it in the reissue. Therefore it cannot be held that the reissue is for any different invention." *Stephenson v. Second Ave. R. R. Co.*, 1 Fed. Rep. 416.—WHEELER, 1880.

370. The defendant must put the original patent in evidence if he would have the court pass upon the question of new matter in a reissue thereof. *Bickford v. Laporte*, 2 Fed. Rep. 214.—NIXON, 1880.

371. Complainant patented a machine for closing the seams of metallic cans which, in making a can with corners or angles, had the stock notched at the corners, so that there was no excess of metal at that point to be disposed of in the operation. In the reissue he inserted a clause looking toward a method of use which would operate in stock not thus notched. Defendants' machine came within the terms of the claim, but, as a matter of fact, seamed the cans without notching the stock, it having a recess to dispose of the excess of stock. *Held*, that if the claim were construed to cover defendants' machine, it would be invalid, and if limited to complainant's real invention the defendants did not infringe. *Covell v. Pratt et al.*, 18 Blatch. 126.—BLATCHFORD, 1880.

372. By the court : "As there is nothing described in the reissue that was not described in the original patent, either as to devices or the nature of the invention, it cannot be said that the invention in one is different from that in the other, although the claims attempting to cover the invention are so different. The reissue is therefore as valid as the original would have been if it had been the same as the reissue." *Sharp v. Tiff*, 18 Blatch. 132.—WHEELER, 1880.

373. A change in the drawings, in a reissued patent, not warranted by the model or the original drawings, though "morally objectionable" is not illegal unless such change affect the claim. *Pearl et al. v. Appleton Co. et al.*, 3 Fed. Rep. 153.—LOWELL, 1880.

374. By the court : "The history of the art shows that the actual invention was broader than the patent." . . . "A reissue was therefore desirable, and it was important to so enlarge the specification by amendment as to describe an invention of broader scope, . . . if such amendment could be made without invalidating the reissue." . . . "The reissue described the invention in broader terms than were

used in the original specification or . . . claims. There is no more matter in the reissue than was contained in the original, and it is matter which presents the invention as consisting of two separate and independent features, whereas, by the original, it was presented as consisting of those two features in combination." Reissue sustained. *Yale Lock M'fg Co. v. Scoville M'fg Co.*, 18 Blatch. 248.—SHIPMAN, 1880.

375. "If the patentee has made a palpable mistake and has limited his real invention by a misstatement of its principles, so that he is about to lose the fruit of his labor, he should be permitted to restate, and if need be enlarge the specification so as to include the same invention which was plainly the subject of, but not fully covered by the original patent, although literally the enlarged invention is one which he did not apply for in his original specification, because that specification, by a misstatement of his actual invention, applied for a narrower patent than he was entitled to have."—*Ib.*

376. Where the claims of the original patent relate to "several box frames," such claims of its reissue as covered a single box frame only were held void.—*Ib.*

377. Unlawful claims introduced into a reissue may be properly disclaimed.—*Ib.*

378. By the court: "The original describes a ring or band made to occupy a groove in the hoop so as not to interfere with the follower." The reissue describes an annular groove or depression and a ring or band made to occupy it." Reissue sustained. *Tyler v. Welch*, 18 Blatch. 209.—WALLACE, 1880.

379. It is the office of a reissue to correct errors in the specification and in the claim of the original patent. When alterations are made which enlarge the scope of the patent and secure to the patentee improvements made by others subsequent to the original patent, they should be carefully scrutinized in order to see that nothing is granted which was not fairly disclosed originally.—*Ib.*

380. "Because one mode only is indicated in the original, the patentee is not shut up to the one mode in the reissue, so long as it is not of the essence of the invention." *Broadnax v. Central Stock Yard & Transit Co.*, 4 Fed. Rep. 214.—NIXON, 1880.

381. An applicant for a patent withdrew two claims from the application and made them the subject-matter of a new application. A patent was then granted on the first application, and subsequently one on the second. Held, that the second patent was valid; that it was not a case for the reissue of the first patent; and that in

computing two years' public use, as to the later patent, the computation must begin from the earlier application. *Graham v. Geneva Lake Crawford M'fg Co.*, 11 Fed. Rep. 138.—DYER, 1880.

382. The inventor named in complainant's patent invented an automatic lubricator in which the active agent was hydrostatic pressure, assisted to some slight extent by steam pressure. The inventor supposed the latter to be the active agent, and so described it. He subsequently discovered the truth, and in a reissue described the true action of the device, and claimed, practically, the hydrostatic pressure. The reissue was held to be for a different invention. *Seibert Cylinder Oil Cup Co. v. Harper Steam Lubricator Co.*, 4 Fed. Rep. 328.—SHIPMAN, 1880.

383. An original patent was granted to John Denchfield and its reissue to John Deuchfield. It was held that the question so raised was merely one of identity, to be settled by any proper evidence. *Bignall v. Harvey et al.*, 18 Blatch. 353.—BLATCHFORD, 1880.

384. "The original Miller patent made the invention to consist of a stopper with a handle or bail hinged or jointed to the top of the stopper." . . . "The reissue covers a device in which the bail is attached to the stopper in any manner . . . The reissue is void." *Putnam v. Tinkham*, 4 Fed. Rep. 411.—SHIPMAN, 1880.

385. An original patent had a claim to a plug fastened into the hollow butt of a loaded whipstock that the whip might be finished by "turning" and the plug then shaved off. The reissued patent contained substantially the same claim, and also a new claim to the extension of the hollow butt rearward of the loaded piece, with or without the plug. No question seems to have been made but that the new claim was proper. *Am. Whip Co. v. Hampden Whip Co. et al.*, 4 Fed. Rep. 536.—LOWELL, 1880.

386. "As the power to accept a surrender and reissue new letters is vested exclusively in the Commissioner of Patents, his decision in the matter is not open to collateral attack in a suit for the infringement of the reissued letters." . . . "But it does not preclude the examination of the original and reissued patents, to see whether or not they disclose on their face a case in which the Commissioner has authority to act, or whether he has exceeded his authority in issuing letters for an invention different from that described in the original patent." *Giant Powder Co. v. Cal. Vigorit Powder Co. et al.*, 6 Sawyer, 508.—FIELD, 1880.

387. An original patent, for a cap with an ear and neck protector, stated that the connection

was by a "tape;" the reissue said it was by a "tape or cloth." The original stated that the connection was "in the middle;" the reissue substituted therefore "at the back." The reissue stated for the first time that the other connection to the protector was "on or near the front." A claim of the reissue contained for the first time the phrase "which prevents the upper edge of the protector from swinging below the lower edge of the hat or cap." Reissue sustained. *Marks v. Fox et al.*, 18 Blatch. 502.—BLATCHFORD, 1880.

388. By the court: "According to the original specification, the band C was no part of the invention, yet it is made a part of the claim of the original. Hence the reissue was proper to change the claim."—*Id.*

389. Where the office of a reissue is to secure a broad claim, the complainant must be held to such claim, even to the extent of invalidating the claim by reason of prior structure, which would not have invalidated a claim confined to the real invention. *Wisner v. Grant et al.*, 7 Fed. Rep. 922.—WALLACE, 1880.

390. Complainant's patent for car-wheel, granted in 1847, was limited to the form of the plate reaching from the hub to the rim and the medium connecting the plate with the hub. The patent was reissued in 1857 to cover a later wheel, with a claim for connecting the wheel with the hub by two curved plates extending from the hub and forming a ring or arch, and joining the ring with the rim by a single plate. Reissue sustained. *Atwood v. Portland Co.*, 10 Fed. Rep. 233.—LOWELL, 1880.

391. Whether or not a division of a reissue of a later date than its fellow is invalid, the first one is necessarily valid.—*Id.*

392. "It is not sufficient that the patent does not cover all that the patentee could have claimed if his specification had come up to his invention." . . . "If a patentee does not embrace by his specifications and claim all that he might have done, and there has been no clear mistake, inadvertence, or accident in their preparation, the presumption of law is that he has abandoned to the use of the public everything outside of them, or at least has postponed any additional claim for further consideration." *Giant Powder Co. v. Cal. Vigorit Powder Co. et al.*, 6 Sawyer, 508.—FIELD, 1880.

393. An original patent covered the combination of nitro-glycerine with any explosive, porous absorbent. The reissued patent covered the combination of nitro-glycerine with any porous substance, explosive or in explosive. Reissue held to be fatally enlarged.—*Id.*

394. By the court: "The difference between the patents consists in a slight change in the points of attachment of the coupling and centering chain D to the stern of the forward boat, which appears only in the drawing attached to the reissue. It is altogether immaterial, inasmuch as the mode of operation, the manner of construction, or the function performed are not in any wise affected." *McCrary v. Pa. Canal Co.*, 5 Fed. Rep. 367, *per curiam*, 1880.

395. An original patent was for providing the wires of a wire fence with a series of spur wheels. The reissue was for "a fence wire provided with spurs for the purpose specified." Reissue sustained. *Washburn & Moen M'fg Co. et al. v. Haish*, 10 Bissell, 65.—DRUMMOND & BLODGETT, 1880.

396. "The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others after its use."—*Id.*

397. An original patent described holding barbs of wire fences in place by "laying another wire of the same or different size along the thorn wire, and twisting the two together," but made no claim thereto. By reissue this feature was made a claim, and the reissue was sustained.—*Id.*

398. An original patent described, but did not claim, "a barb made by coiling a short piece of wire, between its ends, around the fence wire." The reissue made claim thereto and was sustained.—*Id.*

399. "The reissued patent differing from the original only in the extent of the claim, . . . the Commissioner exceeded his jurisdiction in granting a reissue at all." *Giant Powder Co. v. Cal. Vigorit Powder Co. et al.*, 5 Fed. Rep. 197.—FIELD, 1880.

400. The claim of an original patent was: "A collar A, having sectional bands B, starting from the centre of the collar or at any point between the centre and the ends thereof, and continuing with a graduated curve to and beyond the ends of the same substantially," etc. The reissue had four claims, of which the first was: "A collar provided with a band composed of the parts B, B, curved and tapered or decreasingly graduated from the ends toward the middle, as shown and described." Reissue sustained. *Wilson v. Coon et al.*, 18 Blatch. 532.—BLATCHFORD, 1880.

401. In a reissue the description or claim or both may be corrected and a new claim or claims may be made.—*Id.*

402. "It can never be held, as it never has been held, in a case where the point arose for

decision, that a patent cannot be reissued where a suit could be sustained on the specification and claim as they are."—*Id.*

403. For a *resumé* of reissue decisions, see —. *Id.*

404. "In every case a reissue must be adjudged of by its own facts."—*Id.*

405. "Where, in an original patent, an improvement is described as necessary, it is not permissible in a reissue to describe its use as simply expedient." *U. S. Dairy Co. et al. v. Smith*, 19 Fed. Rep. 97.—BLATCHFORD, 1880.

406. An original patent described painting upon sheet tin with metallic paints afterward fixed by heat. In the reissue the process was made applicable to cans, boxes, and other articles; the limitation to the use of "metallic" colors was dropped; the degree of 160 Fahrenheit was suggested for the first time. Reissue held invalid. *Flower et al. v. Raynor*, 5 Fed. Rep. 793.—NIXON, 1881.

407. "When the original shows upon its face that the grounds and reasons for its reissue do not exist, or where a comparison of the letters-patent disclose different inventions, the reissue is void." "The Commissioner's action is assumed to be correct until impeached in a regular way; and yet the court is not obliged to accept his decision as final."—*Id.*

408. In complainant's original patent for a paper box it was asserted that certain flaps were not only inserted but locked, and the feature was made important. This feature was not made important in the reissue, but the court held that the disclaimer of the original patent was, by construction, in the reissue, and that defendant's flaps, not having the locking quality, were not infringements of the reissue. *Novelty Paper Box Co. v. Stapler*, 5 Fed. Rep. 919.—NIXON, 1881.

409. A claim in a reissued patent covered practically a feature simply described in the original. Held, that the reissue was not invalid. *Straw Sewing Mach. Co. v. Eames*, 18 Blatch. 520.—BLATCHFORD, 1880.

410. By the court: "The answer sets up as a defence that the specification and claim of the plaintiff's reissue cover a larger improvement than was previously included in his original patent. If this means only that the claim of the reissue is broader than the claims of the original, it amounts to nothing." *Waring v. Johnson*, 19 Blatch. 38.—BLATCHFORD, 1881.

411. An original patent claimed "a sewing machine presser-foot, provided with means, substantially as described, for holding and channeling a seam-stay piece," etc. The reissue claims

[3] separated the folding mouth from the presser-foot proper, and also claimed the presser-foot with certain recesses. It was shown that the parts thus separated in the reissue would work separately. Reissue sustained. *Smith et al. v. Merriam et al.*, 6 Fed. Rep. 713.—LOWELL, 1881.

412. "Courts permit the claim to be varied, provided the invention is described in both patents, and hold that the decision of the office that the occasion had arisen for granting a reissue is final."—*Id.*

413. "Upon questions of the validity of a patent, or of a reissue, in all great matters of novelty and construction and patentability, the decision of the Commissioner is not final."—*Id.*

414. "If it be found that the claims of the original patent were valid, and that the reissue for the same invention states the claim or claims in a different way, though it may be a better way for the patentee, the change does not of itself vitiate the new patent; but, on the contrary, the original claims are conclusively presumed to have been made as they were through inadvertence, accident, or mistake."—*Id.*

415. By the court: "It has never been held in the Supreme Court or in any circuit court, so far as I can discover, that the Commissioner's decision is not final as to the propriety of a reissue, as distinguished from its validity upon what may be called its merits, or that the claims may not be varied to express the real invention. The claim is part of the specification, and its defect may be amended."—*Id.*

416. An original patent having described a stay-strip with a central recession, formed during the sewing on, "a stay-strip with a central recession, formed beforehand, to fit or hug the seam, could not be patented by the reissue." *Smith et al. v. Merriam et al.*, 6 Fed. Rep. 903.—LOWELL, 1881.

417. That the complainant's object in obtaining his reissue was to enjoin defendants "is not denied; and, under the recent decision of the Supreme Court, this circumstance calls for careful scrutiny of the new claims, to make clear the limits of the invention;" but if a new name for a part, appearing first in the reissue, is intelligible, or can be made so by expert testimony, "it is not necessarily fatal to the part that it may be used in a new sense." *Crompton v. Knowles et al.*, 7 Fed. Rep. 199.—LOWELL, 1881.

418. "The rights of the parties do not depend upon their skill and diligence in reissuing their patents, but upon priority of invention."—*Id.*

419. An original patent was for a process, and was reissued in two parts—one for the process

and one for the new article. Both reissues were sustained. *Tucker v. Dana*, 7 Fed. Rep. 213.—LOWELL, 1881.

420. (As the law stood in 1866) a patent surrendered for reissue is cancelled in law as well when the application is rejected as when it was granted. The patentee is in the same situation as he would have been if his original application had been rejected. The question of his right to any patent is open the same as upon an original application for the patent. (The court did not say, in this case, what change the law underwent, in this regard, by the passage of the law of July 8th, 1870.) *Peck v. Collins*, 103 U. S. 660.—SUP. CT. 1881.

421. It seems that expert evidence as to whether an original patent shows and describes what is shown and described in its reissue is admissible. *Potter et al. v. Stewart*, 18 Blatch. 561.—BLATCHFORD, 1881.

422. "It is of no consequence that the reissue states that certain combinations are found in the machine which will act in a certain way and effect certain results, when the original did not state that such combinations were found there, or failed to state that said modes of operation and said results would follow provided the said combinations in fact existed in a machine made according to the drawings and descriptions in the original patent, or provided the said modes of operation and the said results in fact followed in a machine so made. To supply such defects is the very object and office of a reissue."—*Ib.*

423. Where a part of a structure performs a function other than and additional to the function described for it in an original patent, it is not improper in a reissue to describe such other function and name the part by it.—*Ib.*

424. "It is entirely competent for a patentee to correct in a reissue, by the drawings, any mistake made in the original." *Washburn & Moen M'fg Co. v. Haish*, 7 Fed. Rep. 906.—DRUMMOND, 1881.

425. The reissue of a barbed wire fence patent said: "D represents single spurs secured to the wires;" the original made no such statement, but showed the single spurs on the wire. The original said: "The spurs may be kept in their places or at suitable distances apart by means of flanges;" the reissue said: "The spur-wheels may fit the wire closely, so as to revolve easily upon it;" the reissue referred to the "flanges" by the letter "A" in the drawings. The original claim was: "Providing the wires of a wire fence with a series of spur-wheels, substantially as and for the purpose set forth;" the reissue claimed: "A fence wire provided with spurs

for the purpose specified." These changes were all sustained.—*Ib.*

426. In the reissue of a barbed wire fence patent, the drawings were the same as the original, but the reissue, speaking of Fig. 1, referred to the use of single wires, and speaking of Fig. 2, to a double wire. The original said: "I can lay another wire;" the reissue said: "I lay another wire." The original said: "It tends to secure a regularity in the distribution of the points in many different directions;" the reissue said: "It locks the thorn, and also tends to secure a regularity in the distribution of the points in many different directions." The original had three claims; the reissue had four, the third only being identical with a claim in the original. Reissue sustained.—*Ib.*

427. One element of a reissue combination claim was "end bars." *Held*, in view of the state of the art, that there must be construed to be *inclined* and *double* end bars. One element in another of the claims was "standards." *Held*, in view of the state of the art, that they must be construed to be *longitudinally adjustable* standards. *Woven Wire Mattress Co. v. Wire Web Bed Co.*, 8 Fed. Rep. 87.—SHIPMAN, 1881.

428. It is competent for a patentee to restate his invention in a reissue, so as to point out and claim a characteristic feature which was not clearly stated in the original.—*Ib.*

429. Complainants' patented invention of an egg-carrying package consisted of a box containing thin vertical strips crossing each other, at proper distances, between thin horizontal partitions, making layers of cells, each to hold an egg. The walls of the box might form one side of the outer layer of cells, but such cells would not carry eggs safely. In the original patent the specification and drawings showed cases with the outer cells so formed as if for use, while the reissue was only for the cells formed irrespective of the walls of the case to hold eggs. "The interior and most safe ones were a part, at least, of the invention patented, and the patent might, under the statute, well be reissued and limited to that part." *Coburn et al. v. Schroeder et al.*, 19 Blatch. 377.—WHEELER, 1881.

430. An original patent was for a "spring and friction roller for regulating sash," the roller bearing against the side of the sash to prevent rattling. The reissue introduced a claim to an exteriorly-threaded cylinder which held the pulley fork. Defendants used a threaded cylinder for holding the bolt of a sash supporter (to hold the sash suspended), which came within the terms of said claim. *Held*, that the purposes of

the two threaded cylinders were not identical or analogous, and that there was no infringement. *Judd v. Babcock et al.*, 8 Fed. Rep. 605.—SHIPMAN, 1881.

431. In an original patent the claim was for a series of dies, with a disclaimer of the individual dies. The reissue claimed the individual dies and omitted the disclaimer. *Held*, that the reissue claim could not be maintained, though the proof showed the individual dies to really be the invention of the patentee. *Atwater M'fg Co. et al. v. Beecher M'fg Co.*, 8 Fed. Rep. 608.—SHIPMAN, 1881.

432. "The section upon the subject of reissues prohibits the introduction of 'new matter' into the specification, even though the new matter was the invention of the patentee, and was inadvertently omitted from the original specification. If the matter is 'new,' the patentee cannot obtain by a reissue the benefit of that part of his invention, and must make a new application, in which he will be subject to the rights of other inventors and of the public."—*Id.*

433. Complainant's original patent was for card-board divided into sections by perforations. Each section was notched at the ends and a skein of thread wound (the thread being continuous) into the notches. To divide a single skein from the board, a section was broken off. The original patent claimed the device thus made; the reissue was framed to cover the sections whether together or separate. The reissue was construed to be for the device claimed in the original. *Sutro et al. v. Moll*, 19 Blatch. 89.—BLATCHFORD, 1881.

434. "The original patent was for a [bird] cage having the horizontal bands provided with slots, through which loops formed outwardly on the upright wires were placed and held by a locking bar, extending around the cage outside the band and through the loops, making a firm and durable connection between the bands and wires." The locking bar was essential to the operativeness of the device. The reissue claim omitted the bar from the combination in order to cover a construction devised after the issue of the original patent. Reissue held invalid. *Meyer et al. v. Mazheimer*, 20 Blatch. 15.—WHEELER, 1881.

435. An original patent—on bushings for faucet holes—covered the combination of an iron bushing casing with a wooden centre having a hole of peculiar form. The reissue covered the combination of the iron casing with a yielding lining. *Held*, that the reissue was invalid. *N. Y. Bung & Bushing Co. v. Hoffman*, 20 Blatch. 3.—WHEELER, 1881.

436. "It is now settled that the decision of the Commissioner reissuing the patent is final and conclusive, and is not subject to review in any court, except as to the identity of the invention;" a matter which can be made apparent upon an examination of the face of the patent. *Kells v. McKenzie et al.*, 9 Fed. Rep. 284.—BROWN, 1881.

437. "The cases of the Supreme Court are not easily reconcilable . . . and the cases in the circuit courts are in hopeless confusion. The tendency of the later cases in the Supreme Court, however, has been to hold the patentees to a much more rigid rule."—*Id.*

438. Complainant's patent was issued with claims on specific parts, but not on the general construction, in 1872. In 1877 defendants began to make machines embracing said general construction, but not the patented features. In 1879 complainant's patent was reissued with additional claims to the general construction. Reissue held invalid.—*Id.*

439. By the court (and said of another reissue than that last mentioned): "It would seem that the reissue in this case was applied for within two years after the original patent was issued, that this might be considered as rather in the nature of a renewal of his application for the allowance of this claim and for a rehearing of the matter."—*Id.*

440. In Section 4895 of the Revised Statutes, "the 'assignee' means the assignee in any degree and however remote." "If the assignment which divested the inventor of his interest was made before July 8th, 1870," the assignee, in any degree, may reissue the patent. *Selden et al. v. Stockwell Self-lighting Gas-Burner Co.*, 19 Blatch. 544.—BLATCHFORD, 1881.

441. A reissue of a reissued patent is proper and lawful.—*Id.*

442. That the original patent was invalid by reason of a defective or insufficient specification is conclusively settled when the Commissioner grants the reissue. The oath need not point out the defect.—*Id.*

443. An original patent described the patented thing in two forms; each of the two divisions of the reissue included one form only. *Held*, proper.—*Id.*

444. What is described but not claimed in an original patent is not thereby dedicated to the public so that it cannot be claimed by reissue.—*Id.*

445. By the court: "This patentee had no right, after having stated positively to the world and to the Patent Office that he did not claim the idea of mounting the rake-head upon the top of



the carriage, by a reissue, to claim this as an element of invention by himself." *Edgerton et al. v. Furst & Bradley M'fg Co. et al.*, 10 Bissell, 402.—BLDGGETT, 1881.

446. An original patent claimed a paint compound, naming silicate of soda and lime-water (which were emulsating agents but not stated to be such) as constituents. The reissue patent omitted specific mention of the silicate of soda and lime-water, and specified, in lieu thereof, "and one or more emulsating agents." Reissue held invalid. *Averill Chemical Paint Co. v. Nat. Mixed Paint Co.*, 20 Blatch. 42.—WHEELER, 1881.

447. It is proper in a reissue to give a part a new name and to describe functions not described in the original. *Davis et al. v. Brown et al.*, 19 Blatch. 263.—BLATCHFORD, 1881.

448. A reissue patent claimed: "The loop-box A, formed out of thin plate metal, as described, with the lugs or spurs H, projecting therefrom, to affix it to a carriage top, either with or without the plate C, substantially as and for the purpose specified." The original patent claimed: "The box-loop A, when formed as described with lugs or spurs H, upon its edges and applied to a carriage top, by passing said lugs through the same and through the metal plate C, and then bending them down upon the surface of said plate, substantially as described, for the purpose specified." Reissue sustained. *Crandall v. Walters et al.*, 20 Blatch. 97.—BLATCHFORD, 1881.

449. An original patent described one of the two forms of the device as circular, as one for convenient use, and as best suited for general use. The reissue spoke of it as for carrying in the pocket. Held not to be new matter. *Selden et al. v. Stockwell Self-lighting Gas-Burner Co.*, 19 Blatch. 544.—BLATCHFORD, 1881.

450. "While . . . extensive division and enlargement of claims . . . tends to confusion and litigation, and is therefore reprehensible, it affords no legal grounds of objection to the reissue unless 'new matter' has been introduced. . . . Nothing, however, plainly embraced in the specification, model, or drawings is regarded by the courts as new matter . . . while language may be found in *Gill v. Wells*, 22 Wall. 1, and a few other cases, which, standing alone, might justify a belief that where a general combination embraces minor, subordinate combinations not claimed in the original patent, a subsequent introduction of claims into the latter is invalid. Such a conclusion, however, cannot be reconciled with what has been decided elsewhere,

both before and since." *Dederick v. Cassell et al.*, 9 Fed. Rep. 306.—BUTLER, 1881.

451. By the court: "The answer sets up that the reissue is not for the same invention as that described in the original, and that the reissue contains new matter not found, suggested, or described in the original. This objection is not tenable. The statement in the original as to what the invention consists in is omitted in the reissue. It was narrower than the real invention. The drawings of the reissue and the original are the same. There was no new matter introduced into the reissue. The reissue truly describes the article and its parts. To say that the hopper is suspended in the box when the original says that it is suspended from the top of the box is no new matter." *Strobridge v. Landers et al.*, 20 Blatch. 73.—BLATCHFORD, 1881.

452. Complainant's original patent covered the construction of an axle-box at both ends of the axle. The reissued patent covered the construction at one end only: The reissued patent was sustained. *Ives & Miller v. Hartford Spring & Axle Co.*, 20 Blatch. 333.—SHIPMAN, 1881.

453. It seems that after a claim has been declared invalid it is lawful to reissue and get a different claim. *Meyer et al. v. Goodyear's Ind. Rubber Glove M'fg Co.*, 20 Blatch. 91.—SHIPMAN, 1881.

454. It seems that in considering a reissue, the character of the model filed with the application for the original patent is a matter for proof.—*Id.*

455. An original patent was for a take-up for looms, one element of the claimed combination being the "lay" which operated the take-up. In the reissue, "operating mechanism" was substituted for "lay." Defendant used the same take-up in a knitting machine, but operated by a crank, using no "lay." It was held that the reissue was valid, but that the claim must be restricted to looms, and that the defendant did not infringe. *Holmes et al. v. Plainville M'fg Co.*, 20 Blatch. 123.—SHIPMAN, 1881.

456. An original patent "was for a double dome without a chimney, the peculiarity of the supposed invention being the use of the double dome as a means of dispensing with the chimney. The reissue is for a single dome with a chimney." Reissue held void. *Miller & Co. v. Bridgeport Brass Co.*, 104 U. S. 350.—SUR. CT. 1881.

457. "Nothing but a clear mistake or inadvertence and a speedy application for its correction is admissible when it is sought merely to enlarge the claim." "The right to have it corrected" is "abandoned and lost by unreason-

able delay." "An omission to claim other devices or combinations apparent on the face of the patent is in law a dedication to the public of that which is not claimed." (In the case in hand the delay was fifteen years.)—*Id.*

458. In the case of a reissue with enlarged claims, "it is competent for the courts to decide whether the delay was unreasonable and whether the reissue was therefore contrary to law and void."—*Id.*

459. By the court: "If he was the author of any other invention than that which he specifically describes and claims, though he might have asked to have it patented at the same time and in the same patent, yet if he has not done so, and afterward desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent." *James v. Campbell et al.*, 104 U. S. 356.—SUP. CT. 1881.

460. "When a patent fully and clearly, without ambiguity or obscurity, describes and claims a specific invention complete in itself, so that it cannot be said to be inoperative or invalid by reason of a defective or insufficient specification, a reissue cannot be had for the purpose of expanding and generalizing the claim so as to make it embrace an invention not described and specified in the original."—*Id.*

461. "If by actual inadvertence, accident, or mistake, innocently committed, the claim does not fully assert or define the patentee's right in the invention specified in the patent, a speedy application for its correction before adverse rights have accrued may be granted."—*Id.*

462. A claim in a reissue which is in substance the claim of the old patent, with added elements in combination, is valid. *Fay et al. v. Fraser*, 11 Bissell, 422.—BLODGETT, 1882.

463. By the court: "It was not necessary for the patentees, Rose and Matthews, to enumerate all the known functions of these frost jackets on their original patent; and as no claim was based upon them, it could not be hurtful to enumerate them in the reissued patent. But the complainants in the reissued patent have split up and divided the elements of their invention, and claimed them separately, and not as a combination. Of course this enlarges the scope of their patent. The separate claims embrace fewer elements in combination than were embraced in the claim of the original patent. No one could infringe the original patent unless he used all the elements of the combination. Any one will infringe the reissue who uses any of those elements which are now separately claimed. . . . It cannot be denied that each of these separate claims

is much broader than the claim in the original patent, and they are put forth in the reissue fourteen years after the original was granted. The latter showed on its face that these broad claims were not made, and if the patentees were really the inventors of an independent jacket standing loosely on the elbow of the main, when apprised that it was not claimed in the patent, they ought to have used due diligence in surrendering it and having the mistake corrected. The case clearly comes within the ruling lately made in *Miller v. The Bridgeport Brass Company*." *Matthews et al. v. Boston Mach. Co. et al.*, 105 U. S. 54.—SUP. CT. 1882.

464. By the court: "There is a wide departure from the original invention in this, that the subject of the latter was a jacket or casing whose top was enclosed in and covered by a flange projecting from the hydrant, which effectually prevented the removal of the jacket without removing the hydrant also, and which caused the hydrant to be raised when the jacket was lifted by the frost. In the reissued patent nothing is said of this arrangement of the top of the jacket, and the claims ignore it altogether, so that, as already intimated, the jacket as it now stands would cover such a jacket as that described and claimed in the complainants' patent of 1869, which slides like a sleeve over the hydrant at top as well as bottom. The reissue is not only for a broader claim, made many years after the original was granted, but is for a different invention. Therefore, so far as the jacket is concerned, we think it cannot be sustained."—*Id.*

465. By the court: "That the matter herein described was a part of the invention, as shown by the specification and drawings, the plaintiff's expert testifies and the defendant's expert seems to admit. That additional or enlarged claims may thus be inserted in reissues of patents, under proper circumstances, is too well settled by the decisions to admit of question." *Combined Patents Can. Co. v. Lloyd*, 21 O. G. 713.—BUTLER & MCKENNAN, 1882.

466. "The question whether a patent is inoperative or invalid, by reason of a defective or insufficient description or specification, and whether such defect has arisen by 'inadvertence, accident, or mistake, and without any fraudulent or deceptive intention,' appears from the decisions of the court to be submitted finally to the judgment of the Commissioner, wherever the circumstances bring it within the jurisdiction conferred upon him by the statute. It is so stated by Mr. Curtis [Curtis' Law of Patents, 282, 282a, 282b], who cites *Stimson v. Railroad*

*Co.*, 4 Howard, 380; *Woodworth v. Stone*, 3 Story, 749, 753; *Allen v. Blunt*, 3 Story, 742; *Jordan v. Dobson*, 2 Abb. [U. S.] 308; *Rubber Co. v. Goodyear*, 7 Wall. 788, and other cases, in support of the proposition; and it has been so understood by the circuit courts, in which it has been frequently announced and followed. While the language of the Supreme Court has, on several occasions, exhibited a feeling of restiveness, in view of the abuses which have grown out of the extensive powers accorded to the Commissioner, no decision, we believe, has yet been announced inconsistent with the understanding and practice just stated."—*Id.*

467. "Where the additional matter claimed . . . does not appear by reference to the patent or contemporary records to be embraced in the invention, or where it plainly appears by such reference that such omission 'could not have occurred through inadvertence or mistake,' as said by the court in *James v. Campbell*, the case is not within the jurisdiction of the Commissioner, and a reissue with additional claims may be declared void."—*Id.*

468. "Nearly thirteen years elapsed before the application [for reissue] was made. If the matters described in the additional claims were a part of the original invention [as has been conceded], and were omitted through 'inadvertence, accident, or mistake,' it is impossible to believe that he did not discover the omission much earlier. In the language of the court in *Miller v. Brass Co.*, it plainly appeared on the face of his patent, and must have been seen on opening the paper. The patentee knew what he had intended; must necessarily have understood its scope and extent. He may not have comprehended all the uses to which it might effectually be applied. But to secure a different use simply does not require a different or additional claim. What he did not claim must be regarded, in view of his subsequent conduct, as intending to dedicate to the public. He cannot, therefore, after others have acted upon what he thus did, be allowed to change position, and thereby suppress their enterprises and destroy their business. This application of the equitable doctrine of estoppel has more than once been suggested by the Supreme Court, and is announced and applied in *Miller v. Brass Co.* above cited."—*Id.*

469. An original patent having described and claimed a limitation that was omitted from the reissue, a claim to the limitation was put into the reissue by construction. *Campbell et al. v. Kavanaugh*, 20 Blatch. 256.—BLATCHFORD, 1882.

470. By the court: "In the present case the

question of the identity of the invention in the original and reissued patents is to be determined from their face by mere comparison, notwithstanding what was said in *Batten v. Tuggart* [17 Howard, 74, 85], and consistently with *Bischoff v. Wethered*, [9 Wall. 812], according to the rule laid down in *Seymour v. Osbourne* [11 Wall. 545] and *Powder Company v. Powder Works* [98 U. S. 134]. That is, if it appears from the face of the instruments that extrinsic evidence is not needed to explain terms of art or to apply the descriptions to the subject-matter, so that the court is able, from mere comparison, to say what are the inventions described, and to affirm from such mere comparison that they are not the same but different, then the question of identity is one of pure construction, and not of evidence, and consequently is a matter of law for the court, without any auxiliary matter of fact to be passed upon by the jury if the action be at law." *Heald v. Rice*, 104 U. S. 737.—SUP. CT. 1882.

471. An original patent being for an improvement in return-flue boilers, with a casual mention of a straw-feeding attachment for the furnace, a claim was procured in the reissue for the combination of the straw-feeding attachment with the return-flue boiler. The reissue was held to be for a different invention and, therefore, void.—*Id.*

472. By the court: "Having declared that the merit of his invention consisted in making an attachment that would not free the spring and cause it to fracture, as the old rigid connection did, the patentee was not entitled to a reissue embracing what he had discarded as faulty, even if he was the first to discover the rigid connection. There was no mistake in the description of the complainant's invention in the original patent; and in the reissue it was obvious that there was an effort to embrace the rigid connection which was discarded in the first instance. But waiving all that has thus far been said against the complainant's right to a decree, if he was ever entitled to one, by unreasonable delay, if the original claim was too narrow to secure to the patentee the full benefit of his discovery, the mistake was apparent at the time the patent issued; and the granting of the reissued patent with broader claims, on an application made almost after the lapse of almost five years, was unjust to the public and unauthorized." *Streit v. Lauter*, 11 Fed. Rep. 309.—GRESHAM, 1882.

473. By the court: "Another ground of defence is, that the reissued patent, by enlarging the scope of the original invention, is not for the

same invention, and is, therefore, void; the counsel citing the recent case of *Miller v. Brass Co.*, Sup. Ct., October Term, 1881. The main purpose of the reissue seems to have been to describe the invention more clearly and in greater detail. The only other difference we can find is, that while the claim in the original patent mentions the screw as being connected to the sliding piece [probably referring to the pin], no reference to any such connection is found in the claim in the reissue. The most, therefore, that can be urged is, that the claim in the original embraces more than the claim in the reissue. We have already said that the omission of the pin does not seem to constitute an essential or material change. But even if this were not so, there is nothing in the policy or terms of the patent act which forbids the omission of a part of the original invention from the reissued patent. *Carver v. The Braintree M'g Co.*, 2 Story, 432; *Boomer v. Power Press Co.*, 3 Blatch. 107; *Knight v. Railroad Co.*, 3 Fish. P. C. 1; *Chicago Co. v. Busch*, 4 Fish. P. C. 395; *Parham v. Sewing Mach. Co.*, Id. 468; *Bump's Law of Patents*, 186. The reasoning of the Supreme Court in *Miller v. Brass Co.* is applicable to cases of the enlargement of a patent in the reissue, and where it is for a different thing." *McWilliams M'g Co. v. Blundell*, 11 Fed. Rep. 419.—COLT, 1882.

474. By the court: "The defendant further contends that there has been an acquiescence for years on the part of McWilliams and his assignee in his use of the patent. We must remember, however, that the reissued patent was not granted until March, 1880, and that no prior use under a defective patent can authorize the use of the invention after the issuing of the renewed patent."—*Ib.*

475. In this case a single claim of the original was made three claims in the reissue, but they were held to have simply made the patent more definite, and were sustained. *Searles v. Worden et al.*, 11 Fed. Rep. 501.—BROWN, 1882.

476. "It is true that if a bill is filed on an existing patent, and it expires during the progress of the suit, an account may be ordered without an injunction; but the surrender of the patent is an admission of the most solemn character that it is defective or inoperative; and when the patent is cancelled and a new one is obtained, there is but one patent remaining, and that is a new one, for the same invention, indeed, but my decree must rest upon the patent and not on the mere invention." *Jones v. Barker et al.*, 11 Fed. Rep. 597.—LOWELL, 1882.

477. Mr. Justice Bradley understood in *Miller*

*v. Bridgeport Brass Co.* to intimate "that two years, in analogy to the law of forfeiture, would be the utmost possible limit of time; but as I [the court] understood the opinion, that anything like two years would be inadmissible in ordinary cases."—*Ib.*

478. Reissue held invalid by reason of delay and enlargement.—*Ib.*

479. The statute allowing two years' public use refers to original applications and not to reissues. *Shaw v. Colwell Lead Co.*, 20 Blatch. 417.—WHEELER, 1882.

480. By the court: "Since the recent decision of the Supreme Court, the validity of the first and second claims depends upon the question whether they are an enlargement or a simple restatement of the original claims. If the new claims take in new territories, there is a good reason to insist that they are void by reason of the patentee's delay in applying for a reissue. If they merely marked more definitely the old boundaries, they are not affected by the recent decisions." *Steam Gauge & Lantern Co. et al. v. Edward Miller & Co.*, 11 Fed. Rep. 718.—SHIPMAN, 1882.

481. In the reissue "a feature nowhere alluded to in the original patent" was inserted and made a necessary element of each claim. Held, that the change was substantial and the reissue void. *Hayes v. Seton*, 20 Blatch. 484.—BENEDICT, 1882.

482. A feature made essential by an original patent, and omitted in its reissue, makes a substantial change in the reissue.—*Ib.*

483. By the court: "The remaining claims of the reissue, alleged to have been infringed, in every instance, are intended to enlarge the scope of the patent. And while it may be true, in regard to some of them, that the subject-matter of the claim is described or suggested in the original patent, it is evident, on the face of the patent, that there was no intention to assert that any of these matters formed part of the patented invention, and no intention on the part of the patentee to claim any exclusive right therein. . . . Due diligence was not used to rectify the omission and to claim these combinations." (The delay was ten years.)—*Ib.*

484. An original patent was applied for, a rejection was unlawfully declared, based upon a prior rejected application, and applicant disclaimed what was shown in such rejected application. He subsequently (four years afterward) reissued, omitting the disclaimer, and correspondingly broadened his claim. Reissue held unlawful. *Putnam v. Hutchinson*, 11 Bissell, 233.—BLODGETT, 1882.

485. By the court : " Now it may be well that the claim made in the reissue was originally allowable when the patent . . . was granted ; but . . . having thus limited his claim to a specific device, could he, after the lapse of more than nine years, procure a valid reissue embodying a claim so enlarged and comprehensive ? I am of the opinion that he could not. The delay was altogether unreasonable, and the reissue, therefore, without the authority of the law." *Sher-rif et al. v. Fulton et al.*, 12 Fed. Rep. 136.—ACHESON, 1882.

486. It does not follow that because a claim in an original patent covers an aggregation, a claim can be had by reissue, leaving out the non-co-operative feature.—*Ib.*

487. An original patent was for a " combination of the several contrivances therein described." The original issued in 1858 ; the reissue in 1872. The reissue covered the separate devices. " The right to have the correction made was abandoned and lost by unreasonable delay." *Bantz v. Frantz*, 105 U. S. 160.—SUP. CT. 1882.

488. " In *Miller v. Bridgeport Brass Co.* it is strongly intimated that whatever a patentee describes in the patent and does not claim is abandoned to the public, unless it was omitted to be claimed by inadvertence or mistake and a correction is sought immediately upon discovery of the omission. There is an allusion to the statute for defeating a patent by two years' public use and being on sale of the invention, as an illustration or reason, but the case does not seem to hold that two years are to be allowed in which to reclaim what is so described." *McKay et al. v. Jackman*, 20 Blatch. 466.—WHEELER, 1882.

489. Where a reissue claim is broad in its terms, and an alteration thereof by construction would make it the same as another claim in the same patent, the claim should be declared void rather than thus limited. *Tyler v. Galloway et al.*, 20 Blatch. 445.—SHIPMAN, 1882.

490. " One claim in a reissue may be void without necessarily invalidating the other claims. In such case it is proper to disclaim the void claim."—*Ib.*

491. Of a case where the original patent was granted March 21st, 1871, and the reissued patent August 5th, 1879, the court said : " In this case there has been no unreasonable neglect or delay."—*Ib.*

492. Where one of different clauses of claim is found to be void, such void claim must be disclaimed before the court will make a decree of infringement.—*Ib.*

493. By the court : " It is conceded that as everything essential to the process was pointed out in the original patent nine years before the reissue, and in the meantime other inventors have occupied a ground covered by the general subject-matter of the invention, what was therein pointed out and not claimed is to be deemed abandoned to the public." *Brainard v. Cramme*, 20 Blatch. 530.—WALLACE, 1882.

494. By the court : " The claims in the reissue relating to the apparatus, considered literally, are broader than the claim in the original. Indeed, they describe the invention rather than the mechanism of the apparatus. But they are to be construed with reference to the specification, and so, if consistent with the language used, as to secure the patentee the invention which is described. They are not to be construed, if the language will reasonably bear such an interpretation, so as to embrace any invention broader in its scope than that in the original patent."—*Ib.*

495. By the court : " In the reissued patent several of the devices essential to the combination described in the original patent are left out and a separate claim made for the parts which remain, and to those parts a new and essential function is given, which they could not perform under the original patent. It is therefore perfectly clear that the second claim of the reissued patent was not covered by the original patent. It describes another device operating in a different way and for a different purpose." *Johnson et al. v. Flushing & North Side R. R. Co.*, 105 U. S. 539.—SUP. CT. 1882.

496. Of a delay of fifteen years, the court said : " Even if the patentee had a right to a reissue, if applied for in seasonable time, he has lost it by his laches and unreasonable delay."—*Ib.*

497. " There is no question but that a patent may be surrendered and reissued in divisions, but the patent cannot be broadened in that way any more than if reissued together." *New v. Warren*, 22 O. G. 587.—WHEELER, 1882.

498. By the court : " The description on which it was founded was in the original, and the process, if patentable at all, might have been claimed there ; but it was not. According to numerous former cases, it might be claimed in the reissue as well. As it is, however, it comes within the principle of *Miller v. The Bridgeport Brass Co.* [21 O. G. 201] and *Campbell v. James* [*Ibid.* 337], and cannot be upheld now."—*Ib.*

499. For an example of reissued claims limited by construction to the terms of the claims of the original patent, see —. *Consolidated Oil-*

*Well Packer Co. v. Eaton, Cole & Burnham Co.*, 12 Fed. Rep. 865.—SHIPMAN, 1882.

500. For example of a reissued claim held void for enlargement, as compared with the original, see —. *Ib.*

501. Where the original patent is not in evidence, the court is precluded from inquiring whether the reissue is unduly enlarged.—*Ib.*

502. By the court: "The original patent was for a whip-socket having a bell-shaped top and a rubber disk for steadying the whip, fitting into an inner groove, near the top, in the bell-shaped part, and appears to cover no whip-sockets not having such a shaped top. The reissue is for such whip-sockets generally, without any limitation of that form of top. The patent is, to that extent, and perhaps in some other particulars, enlarged in the reissue," and void. *Searls v. Bouton et al.*, 20 Blatch. 528.—WHEELER, 1882.

503. Insufficient and imperfect description in a specification may be cured by a reissue. *Schneider v. Geo. F. Bassett & Co.*, 13 Fed. Rep. 351.—NIXON, 1882.

504. The claim in an original patent on marking-wheels mentioned the flanges on type-wheels as "yielding." After nine years' interval, and after another manufacturer was in the market with devices not having the "yielding" flange, the patent was reissued and "yielding" was omitted. Patent held invalid. *Holt et al. v. Keeler et al.*, 21 Blatch. 68.—BLATCHFORD, 1882.

505. A claim which is nominally a single claim may, by construction, be divided into two claims. "A reissue with a division of the claim into two claims would have been sustainable."—*Ib.*

506. An original claim was: "1. The bars B, B, provided with interlocking knives *d d*, and operated substantially in the manner and for the purposes herein set forth." The reissue claim was: "1. In a saw-mill dog, the combination of the knives *d d* arranged to make past each other in opposite directions and engage with the lock, in the manner set forth." The "bars" and the "interlocking" specified in the original claim were absent from the reissue claim, and the reissue claim was held invalid. *Neacy v. Allis*, 22 O. G. 1621.—DYER, 1882.

507. A reissue claim which, when compared with the original claim, indicates a purpose to make improvements occurring after the issue of the original patent, subservient to the reissue, cannot be sustained.—*Ib.*

508. By the court: "In the original it is said that the lower of the plates E *is* connected to the step through a bar with any eye with which it engages, with an aperture with a flange on the step. In the reissue it is said that the lower

end of the plate E *may* be so connected. In the original the plate E is described as being flexible. In the reissue the inventor says that he prefers to make it of flexible material. In the original it is said that the elasticity of the plate E enables it to hold the door firmly either closed or open. In the reissue it is said that such elasticity will produce the effect, when the plate E is connected to the step as shown in the drawings. In the original the description is that, as the door is opened, the plate turns on the pivot device at the lower end which connects to the step. This is omitted in the reissue. In the original the plate is said to act as a spring to hold the door either open or shut. This is omitted in the reissue. . . . The first claim in the reissue is formed in the original and grows out of the changes above mentioned." *Gosling v. Roberts*, 106 U. S. 39.—BLATCH, 1882.

509. "Where a patentee in his original claim and specifications describes his invention by partly specifying a material to be used, but declares that the sole utility or availability of that material, in connection with his device, is that it has two properties; and in his reissued specification, in the description of his invention, in his claim and specification, in the description of his invention, substitutes for his former specification of a material to be used as a part of his device, a description of materials which may be used, by specifying only those which have the two properties in which he had formally declared the utility or availability of the material which he then named consisted, there is no enlargement of the thing patented, and the reissued patent is, therefore, valid." *Dunbar et al. v. White et al.*, 4 Woods, 116.—BILLINGS, 1882.

510. By the court: "A reissued patent which enlarges an original patent—*i.e.*, which makes the invention patented other and more inclusive than the original letters-patent, is void as against intervening rights and the public as well."—*Ib.*

511. By the court: "Where, as in this case, the original claims and specifications were for a mere textile fabric as an envelope for the shrimp, in connection with other things, and it was declared that the sole object of its use was to prevent contact [that is, to secure separation] without discoloration; and in the reissued patent, in the claim and specifications, it is declared that any enveloping material may be used which will separate and not discolor—the change is only that of substituting the description of a thing by naming it, with the addition of its essential qualities—the description of the thing by naming its qualities."—*Ib.*

512. "The object of the law in the subject of

patents is to advance the interests of the public by securing certain exclusive rights to patentees, and among these rights is that of changing, by a surrender and reissue, the language where the idea remains the same."—*Id.*

513. Although the claim of a reissue may be substantially the same as the claim of its original patent, yet the description applicable to that claim may be so changed as to render the claim invalid. *Doane & W. Mfg Co. v. Smith*, 15 Fed. Rep. 459.—WHEELER, 1882.

514. By the court: "Clearly if the claim of the original patent did not cover the device used by the defendant, and if the reissue was necessary to expand or explain the patent in order to cover the defendant's plough, then such reissue is void." *Newton v. F. & B. Mfg Co. et al.*, 11 Bissell, 405.—BLDGERTT, 1882.

515. A variance between an original patent and its reissue may be availed of by a plea in bar which sets out the original and reissued patents and also pertinent intermediate patents. *Hubbel et al. v. De Land*, 11 Bissell, 382.—DYER, 1882.

516. By the court: "A claim of the combination of these elements of the old fourth claim with the other parts of the machine does not add anything to the old fourth claim, because the operation of those elements with the other parts of the machine, like the travelling bed or cutter heads, was implied or understood in the original fourth claim." *Fay v. Preble*, 14 Fed. Rep. 632.—BLDGERTT, 1882.

517. By the court: "It therefore appears that the specification and first claim of the original patent was intended to cover an elongated heel-shaped former, eccentrically set upon its shafts, against which the material of which the counter was to be made was pressed by a revolving roller or rollers, and that the first claim of the reissued patent was expanded so that it might cover a 'former' circular in cross section, concentrically set, and revolving in the semi-circular groove of a stationary mould, by which the material was pressed against the former." *Moffett v. Rodgers et al.*, 106 U. S. 423.—WOODS, 1882.

518. By the court: "It is quite clear that the original patent covers a mechanism to accomplish a specific result, and that the reissued patent covers a process by which the result is attained without regard to the mechanism used to accomplish it. The reissue is therefore broader than the original patent, and covers every mechanism which can be contrived to carry out the process." *Wing et al. v. Anthony et al.*, 116 U. S. 142.—SUP. CT. 1882.

519. Example of reissue adjudged invalid by reason of expanded claims taken after an undue lapse of time. *Gould v. Spicer et al.*, 15 Fed. Rep. 344.—GRAY, 1882.

520. By the court: "Whether the reissue is wholly valid or not, it is so to the extent that the claims in the original and in the reissue are alike and have been infringed." *Starrett v. Athol Mach. Co. et al.*, 14 Fed. Rep. 910.—LOWELL, 1883.

521. The claim in the original patent was: "The stock provided with the bar-receiving recess and boss, as described, and with the clamp arranged in such recess and boss, substantially as set forth." The reissue claim was: "The stock provided with the clamp-screw, a receiving boss or sustaining device *f* arranged so as to cause the clamp C, when therein, to be between the ventices of the angle of the lower edge T and the bearing edge *c c* of the stock, all substantially as set forth." The court held the reissue claim to be properly founded on the original.—*Id.*

522. Where, in a reissue, the patentee omits an element from his combination claim he cannot have that element construed into the claim. *Nye v. Allen*, 15 Fed. Rep. 114.—LOWELL, 1883.

523. A case where the invalidity of the reissue was charged in the answer, but the original was not offered in evidence, and the court permitted the original to be read and used at the hearing. *Knapp et al. v. Shaw et al.*, 15 Fed. Rep. 115.—LOWELL, 1883.

524. In a reissue, the language of the patent is to be construed strictly, because such patent is taken at a time when the invention is developed and understood. *Hatch et al. v. Moffett*, 15 Fed. Rep. 252.—LOWELL, 1883.

525. By the court: "A petition and affidavit were filed upon which the reissued patent sued on herein was predicated. But the affidavit does not affirm that the original or the first reissue was either inoperative or invalid, but in lieu of the statutory requirement, the affidavit alleges that the same was not 'fully valid or available.' The language thus employed is not the equivalent of that prescribed by the statute; it is an evasion, declared by this court, in *Whitney v. Swayne*, 4 Fish. P. C. 117, to be insufficient to support a reissued patent." *Poage v. McGowan et al.*, 15 Fed. Rep. 398.—BAXTER, 1883.

526. If a valid claim of an original patent reappears in the reissue thereof and is infringed, the patentee may rely upon that infringement and prevail, though other claims of the reissue are too broad. *Coté et al. v. Moffitt*, 15 Fed. Rep. 345.—LOWELL, 1883.

527. By the court: "From a comparison of the specification and claims of the two patents, it will be seen that the inventor in the first claim of the reissue either leaves out the presser-bar movement as an essential part of the improvement, and claims the movable attachment as a separate mechanism, or else, by reference to the specification, claims a tuck-marker moving in unison with and by means of any reciprocating part of the sewing machine, including both presser-bar and needle-bar; while in the second he broadly lays claim to a combination of the movable arm with a movable bracket connected with any reciprocating part of the sewing machine, whether presser-bar or needle-bar. The operation of the upper arm by the presser-bar movement thus ceases to be a material part of the invention, and the reissue claims and describes a different invention from the original. If such an alteration and enlargement of the scope of a patent by a reissue is in any case allowable, an unexplained delay of more than five years in taking out the reissue must be deemed to be unreasonable." *Singer M'fg Co. v. Goodrich*, 15 Fed. Rep. 455.—NELSON, 1883.

528. By the court: "These claims of the reissue are void, having been granted many years after the date of the original patent, and after the invention of another device which did not use the entire combination of that patent, and when 'the right to have the correction made' had been 'abandoned and lost by unreasonable delay.'" *Turrell v. Bradford et al.*, 21 Blatch. 284.—SHIPMAN, 1883.

529. The original driven well patent did not expressly state that the creation of a vacuum was a necessary factor. Whether that was a reasonable inference is a question. The reissue made the express statement, and was held void as an undue enlargement. *Andrews et al. v. Hovey*, 5 McLean, 181.—SHIRAS, 1883.

530. Where an original patent did not describe the finger beam of a harvester, and that finger beam was made an important part in the reissue claims, the reissue was held void for undue enlargement. *Hoffheins v. Russell et al.*, 107 U. S. 132.—SUP. CT. 1883.

531. Where a combination claim in a reissue specified only five of the seven elements mentioned in the combination claim of the original patent, the reissue was held void for enlargement. *Gage et al. v. Herring et al.*, 107 U. S. 640.—SUP. CT. 1883.

532. Where some claims of a reissue are unduly enlarged, and others are not, the invalidity affects only the unduly enlarged claims.—*Ib.*

533. By the court: "If the defendants infringed the second or old claim, the plaintiffs, upon filing a disclaimer of the new one, are entitled to a decree with costs for the infringement of the old and valid claim. Considering that the question of the validity of the new claim in the reissue is a question of law upon the face of the patent, and that its validity has been sanctioned by the Commissioner of Patents in granting a reissue and upheld by the Circuit Court, there has been no unreasonable delay in entering a disclaimer, for the plaintiffs were not bound to disclaim until after the judgment of this court upon the question."—*Ib.*

534. Although a reissue purported to narrow the claim, it left out one element that the original patent made essential, so that in place of being limited to a particular filtering medium, it covered filtering generally. The reissue was held void for undue enlargement. *Lansburg v. Hasbrouck et al.*, 21 Blatch. 325.—WALLACE, 1883.

535. By the court: "If they (the reissued claims) could be fairly construed as narrowing the claims of the original, the reissue would not be open to criticism, unless by not claiming what was described, there was such an abandonment to the public that the right to a reissue covering intermediate improvements, made by others in the same field of invention, has been forfeited by laches."—*Ib.*

536. Where an original patent for barbed wire fencing described the use of a second or twisted wire for *strengthening* purposes, and the reissue described the use of that wire for *locking* the wires in place, the reissue was held invalid. *Washburn & Moen M'fg Co. et al. v. Fuchs*, 5 McCrary, 236.—TREAT, 1883.

537. Where, in a reissue, a new function was set out for the parts described in the original, and one of the parts was practically dispensed with, the reissue was held valid.—*Ib.*

538. An expansion of a reissue cannot be assisted or validated by any reference to another application for patent pending at the same time that the application for the original of said reissue was pending.—*Ib.*

539. By the court: "I do not understand that the Supreme Court has ever held that a reissue can only be granted when the original patent is completely inoperative or is entirely invalid; but, on the contrary, it is held that power is conferred to cause the specification to be amended 'so as to fully describe and claim the very invention attempted to be secured by the original patent, and which was not fully secured thereby in consequence of inadvertence, acci-



dent, or mistake.' " *Gold & Stock Tel. Co. v. Wiley*, 17 Fed. Rep. 234.—SHIPMAN, 1883.

540. "A reissued patent may be valid as to one claim and invalid as to others."—*Ib.*

541. By the court: "It is true that the claims in this reissue are somewhat broader than the claims in the original patent; but as the patentee did not sleep upon his rights, but returned his original patent to the Patent Office inside of four months from the time it was granted, and asked for a reissue with these claims, I think that the reissued patent with its broader claims is valid." *Worswick M'fg Co. v. Steiger*, 17 Fed. Rep. 250.—WELKER, 1883.

542. Where an original patent was taken out April 9th, 1878, and the reissue was applied for April 1st, 1881, and in the meantime defendant had begun the manufacture of an article covered by the reissue but not by the original patent, complainant lost his right to expand his reissue by his delay. It is not to the point that the patentee read his original with unintelligent eyes, nor is the assignee of the patent in any better position on the ground that the laches was that of the inventor and not of his own. *Ives v. Sargent*, 21 Blatch. 417.—SHIPMAN, 1883.

543. Examples of reissues held void for expansion after undue delay. *Colwell v. Sessions et al.*, 21 Blatch. 421.—SHIPMAN, 1883.

544. Although reissue drawings and specification may show and describe parts not shown or described in the original, yet, in the absence of the model appurtenant to the original specification, it cannot be assumed that the change is an unwarranted one. *Hendy v. Golden State & Miner's Iron Works*, 8 Saw. 468.—SAWYER, 1883.

545. Where an original specification declared that the invention consisted in a combination of which one element was a peculiar part, and the reissue was changed so that the claim was not limited to the particular part—the reissue being applied for seventeen months after the issue of the original—the reissue was held void for unwarrantable enlargement. *McKay et al. v. Stowe et al.*, 17 Fed. Rep. 516.—GRAY, 1883.

546. "The entire reissue will not be void on account of the existence of one void claim." *Wood et al. v. Packer*, 17 Fed. Rep. 650.—NIXON, 1883.

547. "The validity of a claim in a reissue does not impair the validity of a claim in the original patent which is repeated and separately stated in the reissue patent." And it is not essential that the repeated claim should be in identically the same words as the original claim, if it be the same in substance. *Nat'l Pump Cylinder Co. v. Gunnison*, 17 Fed. Rep. 812.—ACHESON, 1883.

548. An original patent was dated August 3d, 1880, the reissued patent was dated November 22d, 1881. The claims of the original patent being for a device and process, the reissued claims for the product were held void. *Howe et al. v. Neemes et al.*, 18 Fed. Rep. 40.—DRUMMOND, 1883.

549. Complainants' original patent was dated November 4th, 1879. The application for the first reissue was filed January 22d, 1881, and reissue issued April 12th, 1881. The application for the second reissue, the one in suit, was filed July 19th, 1881. The reissue claim in question was said by the judge to be "for an invention of which no trace is to be found in the original specification, and being manifestly different from that which was the subject of the original patent," the reissue claim was held invalid. *Parker & Whipple Co. et al. v. Yale Lock Co. et al.*, 21 Blatch. 485.—SHIPMAN, 1883.

550. The invalidity of a reissue claim does not impair that of a claim in the original patent separately reproduced in the reissue. *Fetter et al. v. Newhall*, 21 Blatch. 445.—WHEELER, 1883.

551. The claim of an original patent was: "A new article of manufacture—viz., a washboard provided with the projections B and C, and with the grooves arranged in the manner and for the purposes herein described." The reissue claim was: "In a sheet-metal washboard, the projections B each bounded by grooves or depressions in combination with raised projections C in the bottoms of the interlining grooves, substantially as set forth." Reissue sustained. *Duff et al. v. Calkins*, 25 O. G. 601.—ACHESON, 1883.

552. The statute authorizing reissues uses the words "inoperative or invalid," but that means inoperative or invalid in whole or in part. *Hartshorn v. Eagle Shade Roller Co. et al.*, 18 Fed. Rep. 90.—LOWELL, 1883.

553. Complainant's original patent claimed a pawl for a curtain roller as attached to the bracket or other structure near the roller. This was an unnecessary limitation. The reissue discarded this limitation. Reissue held good.—*Ib.*

554. "With respect to reissues, the argument 'that irregularity or omission of oath does not invalidate the patent' is stronger because there is no law which requires the applicant for a reissue to take any oath at all on the subject of the invalidity of his original patent."—*Ib.*

555. The Supreme Court's decision in *Miller v. Brass Co.* is to the effect "that a delay of more time than would be reasonably sufficient to read the patent and ascertain its need of amendment should be accounted laches in a case

where enlargement of the claim is the only amendment."—*Ib.*

556. Hartshorn's patent for ten years carried a certain broad claim. Then it was discovered that Campbell was the earlier inventor of what was covered in this claim. Thereupon Hartshorn bought the Campbell patent and reissued both the Hartshorn and Campbell patents, dropping the broad claim from the Hartshorn patent and inserting it in the Campbell reissue. Under these circumstances the Campbell patent was sustained.—*Ib.*

557. By the court: "The first reissue was within a few months of the original, and before others appeared to have done anything in that region of invention, and seems to have been well enough." *Dryfoos v. Wiese*, 22 Blatch. 19.—WHEELER, 1884.

558. "The new claim of the first reissue brought forward into the second, being valid in the first, is not avoided by the invalid claim of the second."—*Ib.*

559. When, upon an application for a patent in the Patent Office, the applicant is given a reference, and thereupon erases the claim objected to, he cannot get such claim by a reissue. *Hatchman, in re*, 26 O. G. 733.—MCARTHUR, 1884.

560. By the court: "Defendant's apparatus did not infringe either one of the two claims of the original patent. . . . There is not in the specification of the original patent any suggestion or indication of any invention other than the two combinations severally claimed in the two claims. In the reissue there are material enlargements of the scope of the invention described and claimed in the original patent, and apparently with a studied view to include and cover, by descriptive words and by broader claims, an apparatus like that used by defendants." *Clements v. Odorless Excavating Apparatus Co.*, 109 U. S. 641.—SUP. CT. 1883.

561. By the court: "The suggested mistake in the original patent, that its two claims were not as broad as they might have been made, and that the combinations claimed were too narrow and contained too many elements, and that sub-combinations, such as are found in the claims 1 and 3 of the reissue, might have been claimed in the original patent in view of the state of the art and of the description and drawings of that patent, was, if a mistake at all, one apparent on the first inspection of that patent."—*Ib.*

562. By the court: "No excuse is given for the delay in applying for the reissue, nor is any actual inadvertence, accident, or mistake shown. The omission to claim sub-combinations in the

combinations claimed, the existence of such combinations being apparent on the face of the original patent, are, in law, on the facts in this case, such a dedication of them, if new, to the public, that a reissue to cover such sub-combinations in revocation of such dedication cannot be availed of to the prejudice of rights acquired by the public to what is shown in the . . . patents issued before the reissue was applied for."—*Ib.*

563. An original patent on brooms "described metallic splints, and the claim was for simply a wire broom made substantially in the manner set forth. The reissue describes metallic or other suitable splints, and the claim is for such splints inserted in bundles through apertures formed in pairs in the base-plate of the broom by looping them as described, said apertures being connected by a groove or recess to accommodate the loop, and the latter held to its place by a back or upper plate, substantially as shown and described. The substitution of other suitable splints for wires would occur to any mechanic with skill for making the brooms, and required no invention. There is nothing described as invented in the reissue that was not in the original, and therefore the invention described in the reissue is the same as that described in the original." *McArthur v. Brooklyn R. R. Supply Co. et al.*, 21 Blatch. 558.—WHEELER, 1884.

564. An original patent being dated November 13th, 1866, and its reissue being dated May 14th, 1867, the court said: "If the claim is really enlarged, as the reissue was taken out so promptly, and the invention is the same, and no rights of others are shown to have intervened, the reissue would seem to me proper."—*Ib.*

565. Where an original patent showed and described parts without ascribing any function to them, and the reissue patent not only described such function but founded a claim upon it, the reissue was held to be in this regard for a different invention from the original, and for that reason void. *Reay Ext'r. v. Raynor et al.*, 22 Blatch. 13.—WHEELER, 1884.

566. A broadened reissue, taken more than three years after the original, would seem to be, for that reason, unseasonable and invalid.—*Ib.*

567. An invalid claim in a reissue does not necessarily render the other claims void.—*Ib.*

568. A thing which was called a "slide" in an original patent was called a "carrier" in its reissue, and the change was held to be proper.—*Ib.*

569. "The question whether there is a fraud in the surrender and application for a reissue is for the officers of the Patent Office alone to decide, and their determination is conclusive in a

collateral proceeding. This court can only examine and pass upon what appears upon the face of the patent, and see whether there is anything to indicate its invalidity or render it void upon its face. All matters of fact behind the patent are to be examined, heard, and conclusively determined by the Commissioner of Patents." *Gloucester Isinglass & Glue Co. v. Brooks et al.*, 19 Fed. Rep. 426.—NELSON, 1884.

570. In an original patent, the thing patented was a device to be attached to a sewing machine, having a feeding mechanism of its own. This, in the reissue, was expanded into a combination of the stitching mechanism of a sewing machine with a feeding wheel to feed as well as guide the fabric, working independently of and in substitution for the feeding mechanism of the machine. Reissue held void for undue expansion. *R. & L. Seaming Mach. Co. v. Am. Printing Co.*, 19 Fed. Rep. 428.—NELSON, 1884.

571. A patent may be inoperative when inoperative only in part. It need not be absolutely inoperative in its entirety. If it is inoperative, so far as not to cover all that the party is entitled to claim, and what he is entitled to claim appears in the specifications, it being inoperative to that extent, it is inoperative within the meaning of the provisions of the statute, and entitles the party to a reissue. *Giant Powder Co. v. Safety Nitro-powder Co. et al.*, 27 O. G. 99.—SAWYER, 1884.

572. "The question whether there is a fraud in the surrender and application for a reissue is for the officers of the Patent Office alone to decide, and their determination is conclusive in a collateral proceeding. This court can only examine and pass upon what appears upon the face of the patent, and see whether there is anything to indicate its invalidity or render it void upon its face. All matters of fact behind the patent are to be examined, heard, and conclusively determined by the Commissioner of Patents."—*Id.*

573. The fact that a reissue is in the identical terms of its original does not render the reissue void.—*Id.*

574. "Patents can be reissued in divisions. It is not necessary that all the claims in the reissue should be included in one patent."—*Id.*

575. "A patent might be reissued in divisions in the same identical language, as to some of the claims, the changes being included in another and separate division or patent."—*Id.*

576. Complainant's patent having been declared void because it claimed a different invention from the original, the patent was again re-

issued in the terms of the original; and the second reissue was sustained.—*Id.*

577. The claim in an original patent was: "A thermometer tube having its bore out of or beyond the mechanical axis or centre, as and for the purposes described." The reissue claim was: "A thermometer having its bore in the rear of or beyond the mechanical axis or centre of the convex surface through which it is viewed, as and for the purpose specified." It was held that the reissue claim eliminated an uncertainty existing in the claim of the original patent, and that, upon a fair and reasonable construction, the reissue claim was not broader than the original. *Hicks v. Otto et al.*, 22 Blatch. 94.—WALLACE, 1884.

578. The claim of an original patent was: "I claim in finishing nails the process of curving their bodies and bevelling their points and afterward forming them through an open die to shear off superfluous metal, substantially as and for the purpose specified." The reissue claim was: "The process of curving the bodies of nails and bevelling their points by spreading the metal laterally, and afterward forcing them through an open die to shear off superfluous metal, substantially as and for the purpose set forth." The two claims were held to be substantially identical. *Globe Nail Co. v. U. S. Horse Nail Co.*, 19 Fed. Rep. 819.—NELSON, 1884.

579. Where complainant's original patent is not infringed by defendant, and the reissue is not immediate, a reissued claim which defendant infringes is void for undue expansion. *Nat'l Wire Matt. Co. v. N. Y. Braided Wire Matt. Co.*, 20 Fed. Rep. 119.—WHEELER, 1884.

580. For example of reissued patents void for undue expansion, see —. *McMurray v. Malory et al.*, 111 U. S. 97.—SUP. CT. 1884.

581. For an example of a reissued patent held void for undue expansion, see —. *Simon v. Neumann et al.*, 27 O. G. 918.—WHEELER, 1884.

582. Complainant's patent being a reissued patent, and the language of the reissued claim being broader than the language of the original patent, complainant sought to save the reissued patent by having the original claim construed as broadly as the reissue. The court held this not to be allowable, and held the reissued patent void. *Turner & Seymour M'fg Co. v. Dover Stamping Co.*, 111 U. S. 319.—SUP. CT. 1884.

583. Where a complainant abandons a claim in his reissued patent in suit, because of its invalidity through undue expansion, and there is no hearing upon that claim, a disclaimer is not necessary, nor are costs to be denied. *Mundy*

v. *Lidgerwood M'fg Co.*, 20 Fed. Rep. 191.—*WHEELER*, 1884.

584. The claims of an original patent were : "1. An endless perch A A, substantially as and for the purpose set forth." 2 Connecting rods C and C pivoted at or near the opposite ends of the perches A and A, and provided with links D and springs B and B, all combined to operate between the opposite perches A and A, substantially as and for the purpose set forth." The reissue claims were : "1. In a road wagon, the combination, as set forth, of a body, side perches, semi-elliptic springs arranged between the perches, and means for equalizing the action of such springs, as set forth." "2. The combination with the semi-elliptic springs supporting a body between the side bars or perches of a vehicle, of an equalizing bar arranged opposite and connected to the adjacent ends of said springs, as set forth." The court held that the reissued claims were not unduly expanded, and said : "Neither of the claims in the reissue distinctly specify an endless perch, as in the original ; but the claims must be read, with the specifications, and when so read, there is no doubt the patentee intended to claim the same form of perch in the reissue as in the original patent." *Saladee v. Racine Wagon & Carriage Co. et al.*, 27 O. G. 1133.—*DYER*, 1884.

585. Reissues which simply make more certain and clear a description of doubtful certainty do not fall within the rule promulgated in *Miller v. The Brass Co ; Sewing Mach. Co. v. Frame*, 28 O. G. 96.—*BUTLER*, 1884.

586. Complainant applied for his reissue patent one year, ten months, and eight days after the issue of his original patent. Meanwhile, no adverse rights had accrued. Complainant claimed, and the court found, that complainant originally desired the reissue claim—which was broader than the original made—but that complainant's solicitor failed to make it through mistake. The court sustained the reissue claim. *Stutz v. Armstrong & Son*, 28 O. G. 367.—*ACHESON*, 1884.

587. By the court : "The Supreme Court has laid down no unbending rule by which to determine what is unreasonable delay in applying for the correction of such mistake as existed here, and it seems to me that each case must be determined upon its special facts and merits."—*Ib.*

588. By the court : "The application here was within two years after the grant of the original letters-patent, the exact lapse of time being one year, ten months, and eight days. Now, while this fact may not be conclusive, it would seem to be entitled to some consideration

in view of that provision of the patent laws by which nothing less than two full years' public use of an invention is a bar to an application for a patent."—*Ib.*

589. By the court : "Again, the correction of the mistake here by the reissue was before any adverse rights had accrued, a consideration, in my judgment, of paramount importance, and evidently regarded by the Supreme Court as of great importance."—*Ib.*

590. Complainants' patent differed from its original patent in that the reissue made the use of a certain plate, whereby the box loop was to be attached to the carriage, optional. The court held this change allowable, and said : "Where it can be seen that the patentee seeks by apt words of description to secure what he has honestly invented, and nothing more, the court should hesitate to regard with favor the accusations now so freely made against reissues." *Crandall et al. v. Parker Carriage Co.*, 28 O. G. 369.—*COXE*, 1884.

591. "It is not enough to show that in the original drawing and specifications the disputed structure is described. It must be claimed also." *Hayes v. Dayton*, 20 Fed. Rep. 690.—*COXE*, 1884.

592. Reissue held void for expansion, the court saying : "The movable sashes sought to be secured are not even mentioned in the claims of the original."—*Ib.*

593. Complainant's original patent was granted September 11th, 1868. The reissued patent in suit was applied for September 26th, 1876. The claim of the original patent was : "As a new manufacture, an oil product, as above described, when produced from crude petroleum by the evaporation therefrom of the lighter hydrocarbons in vacuo by the use of steam or its equivalent, to prevent burning, substantially as herein set forth." The reissue claim was : "An unburned, reduced, heavy hydrocarbon oil, substantially as described." The reissue was held void for unlawful expansion. *Vacuum Oil Co. v. Buffalo Lubricating Oil Co.*, 22 Blatch. 266.—*COXE*, 1884.

594. A reissue claim is to be "construed in the light of contemporaneous facts which are shown in the file wrapper and contents." *Yale Lock M'fg Co. v. James*, 22 Blatch. 294.—*SHIPMAN*, 1884.

595. By the court : "In the reissue, two claims are inserted in the place of the one claim of the original, except that it does not limit the invention to an arch composed of the three sections, and eliminates the recess in the end sections as a constituent. As it was apparent, from the

description in the original, that the arch could be made of a larger number of sections, and could be made without recesses in the end sections, it was proper to make these modifications in the first claim of the reissue; and the claim of the reissue was for the same invention described in the original. The second claim in the reissue is the first claim limited by making the recess in the end sections of the tile, which is left out in that claim, a constituent. It is the same as the claim of the original patent, except that it does not confine the invention to an arch having three sections only; and for the reasons stated in reference to the first claim, it is for the same invention described in the original. As the reissue was obtained within two years after the original, it is valid." *Fryer v. Maurer*, 22 Blatch. 268.—WALLACE, 1884.

596. The time between an original and reissued patent was fourteen years. In the meantime the device covered by the new claim of the reissue and not covered by the original patent had gone into general use. The reissued claim was held invalid. *Baltimore Car Wheel Co. v. North Baltimore Passenger Railway Co.* 21 Fed. Rep. 47.—MORRIS, 1884.

597. "The rule laid down by the Supreme Court is that where it is sought merely to enlarge the claim there must be a clear mistake and inadvertence and a speedy application for its correction with no unreasonable delay; that in such a case a patentee cannot wait until inventors have produced new forms of improvement, and then apply for such an enlargement of his claim as to make it embrace those new forms; and that when it is apparent from a comparison of the two patents that the reissue is made to enlarge the scope of the patent, the court may decide whether the delay was unreasonable, and the reissue therefore void." *Wooster v. Handy*, 22 Blatch. 307.—BLATCHFORD, 1884.

598. It seems that the burden of proof is on him who reissues his patent to show that there was inadvertence, accident, or mistake.—*Id.*

599. Complainant's claim in its original patent was: "The tool for boring or cutting rock, or other hard substances, composed of an annular or tubular stork or crown, armed with a series of diamonds, and operating substantially as herein specified." The claims to be compared therewith in the reissue were as follows: "2. The row of cutting edges *a*, when attached to a revolving boring head so as to project beyond the circumference thereof, for the purpose specified." "3. In combination with a revolving and progressing boring head having cutting

points projecting beyond the periphery thereof, a hollow central drill rod through which the water is forced or passed." The reissued claims were held fatally enlarged. *Am. Diamond Drill Co. v. Sullivan Mach. Co.*, 22 Blatch. 298.—SHIPMAN, 1884.

600. An insufficient specification is properly curable by reissue. *Schneider v. Poutney*, 21 Fed. Rep. 399.—NIXON, 1884.

601. It seems that a court, in construing the claims of a reissued patent, instead of holding that they are fatally enlarged, may adopt the alternative of construing them the same as the claims in the original patent. *Steam Gauge & Lantern Co. et al. v. Miller et al.*, 21 Fed. Rep. 514.—SHIPMAN, 1884.

602. For an example of reissued claims held to be fatally enlarged, see —. *Electric Gas Lighting Co. v. Tillotson et al.*, 22 Blatch. 481.—WHEELER, 1884.

603. For an example of reissue claims taken after a delay of seven years, and after defendant had begun its manufacture, held to be fatally enlarged, see —. *Matthews et al. v. Iron Clad Mfg Co.*, 22 Blatch. 427.—BLATCHFORD, 1884.

604. Complainant's patent, reissued eleven years after the date of the original patent, had a process claim while the original patent had no process claim. Such change was held to be unwarrantable. *Scrivner v. Oakland Gas Co.*, 22 Fed. Rep. 98.—SAWYER, 1884.

605. The interval between the reissue of complainants' original patent and the application for the reissued patent was a little over four months. Two new claims, enlarged as compared with the original, were introduced in the reissue. It was not averred in defendants' answer, and there was no proof, that any intervening rights had accrued in the meantime. The reissue was sustained. *Odell et al. v. Stout et al.*, 29 O. G. 862.—SAGE, 1884.

606. "The granting of a reissue is *prima facie* evidence of inadvertence, accident, or mistake, as the granting of original letters is *prima facie* evidence of invention. This evidence may be overcome. It is not conclusive. The action of the Commissioner of Patents is not *res adjudicata*."—*Id.*

607. "It is clear that the claim of a patent may be enlarged by a reissue if the patentee moves promptly and no rights of others have intervened."—*Id.*

608. "Where it appears that claims in a reissued patent were made to broaden the invention, and thereby to cover intermediate inventions or improvements, the fraud may so vitiate all the claims in the reissue patent that all will

be held void. But one claim in a reissue may be void without necessarily invalidating the other claims. . . . The invalidity of a claim in a reissued patent does not impair the validity of a claim reproduced from the original patent in the reissued patent."—*Id.*

609. "*Miller v. Brass Co.* [104 U. S. 350] and *James v. Campbell* [Id. 370] do not sustain the proposition . . . that a reissued patent is void if the claims of the original patent are expanded. These cases, and others of later date, distinctly recognize that the claims of an original patent may be enlarged by reissued letters to include the entire invention, or, in separate claims, the distinct patentable features of the invention; provided, first, that there be no unreasonable delay in applying for the reissue, and, second, that between the date of the original patent and the date of the application for the reissue rights which would be recognized in equity in favor of others shall not have intervened."—*Id.*

610. "It is clear from the earlier decisions of the Supreme Court" that the defence that a reissue had not been procured to correct inadvertence or mistake "would be unavailing, since it had been uniformly held up to 1874 that the determination of the Commissioner as to the question of inadvertence, accident, or mistake was conclusive." *Flower et al. v. Detroit et al.*, 22 Fed. Rep. 292.—BROWN, 1884.

611. A reissued patent on a hydrant, granted eight years after the date of the original patent, set forth the patentee as the inventor of a certain loose casing, while there was nothing in the original patent tending to give support to that theory. The reissue was found invalid.—*Id.*

612. By the court: "The views announced in *Miller v. Brass Co.* on the subject of reissuing patents for the purpose of expanding or enlarging the claims were deliberately expressed and are still adhered to." *Mahn v. Harwood et al.*, 102 U. S. 354.—SUP. CT. 1884.

613. By the court: "In this very matter of reissued patents it has . . . been frequently decided that it is a good defence in a suit on such a patent to show that the Commissioner exceeded his authority in granting it. Such a defence is established by showing that the reissued patent is for a different invention from that described in the original, inasmuch as the statute declares that it must be for the same invention.

The same defence may be established by showing from the record that there was no inadvertence, accident, or mistake in drawing up the specification of the original patent, for the statute only gives a reissue when the original is defective by inadvertence or mistake."—*Id.*

614. By the court: "In our judgment a patent for an invention cannot lawfully be reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake inadvertently committed in the wording of the claim, and the application for a reissue is made within a reasonably short period after the original patent was granted. The granting of such reissues after the lapse of long periods of time is an abuse of power, and is founded on a total misconception of the law. The Commissioner of Patents has evidently proceeded in these cases on the view that a patent may be reissued after any lapse of time, for the purpose of making a broader claim, by merely showing that the claim might have been broader than it was, and that it was inadvertently made too narrow at the time. In this we think he has been entirely in error. Lapse of time may be of very small consequence in an application for the reissue of a patent on account of a defective specification or description, or where the original claim is too broad. But there are substantial reasons, not applicable to these cases, why a claim cannot be enlarged and made broader after an undue lapse of time. The rights of the public here intervene which are totally inconsistent with such tardy reissues; and the great opportunity and temptation to commit fraud after any considerable lapse of time, when the circumstances of the original application have passed out of mind and the monopoly has proved to be of great value, make it imperative that the courts, as a dictate of justice and public policy, hold the patentee strictly to the rule of reasonable diligence in making applications for this kind of reissues."—*Id.*

615. "Conceding that it is for the Commissioner of Patents to determine whether the insertion of too narrow a claim arose from inadvertence, accident, or mistake, unless where the matter is manifest from the record, the question whether the application for correction and reissue is or is not made within reasonable time is, in most if not all of such cases, a question which the court can determine as a question of law, by comparing the patent itself with the original patent, and if necessary, with the record of its inception."—*Id.*

616. "The taking out of a patent which has, as the law requires it to have, a specific claim, is notice to all the world of the most public and solemn kind that all those parts of the art, mechanism, or manufacture set out and described in the specification, and not embraced in such specific claim, are not claimed by the patentee; at least, in and by that patent. If he has

a distinct patent for other parts, or has made application therefor, or has reserved the right to make such application, that is another matter not affecting the patent in question. But so far as that patent is concerned, the claim actually made operates in law as a disclaimer of what is not claimed; and of all the law charges the patentee with the fullest notice."—*Ib.*

617. "The presumption is, and such is generally the fact, that what is not claimed was not invented by the patentee, but was known and used before he made his invention. But whether so or not, his own act has made it public property, if it was not so before. The patent itself, as soon as it is issued, is the evidence of this. The public has the undoubted right to use, and it is to be presumed does use, what is not specifically claimed in the patent."—*Ib.*

618. "If the specification is complicated and the claim is ambiguous, or involved, the patentee may be entitled to greater indulgence; and of this the court can rightfully judge in each case. No precise limit of time can be fixed and laid down for all cases. The courts will always exercise a liberality in favor of the patentee. But in any case, by such delay as the court may deem unnecessary and unreasonable, the right to a reissue will be regarded as having been abandoned and lost, and the Commissioner will be held to have exceeded his authority in granting it. Whenever it is manifest from the patent itself, compared with the original patent and cognate documents of record, or from the facts developed in the case, that the Commissioner must have disregarded the rules of law by which his authority to grant a reissue in such cases is governed, the patent will be considered as void to the extent of such illegality. It is, then, a question of law, not a question of fact."—*Ib.*

619. A reissue by reason of a defective specification or description, or for the purpose of narrowing a claim, rests on entirely different ground from a reissue taken for the purpose of broadening a claim.—*Ib.*

620. "If a patentee has not claimed as much as he is entitled to claim, he is bound to discover the fact in reasonable time, or he loses all right to a reissue; and if the Commissioner of Patents, after the lapse of such reasonable time, undertakes to grant a reissue for the purpose of correcting the supposed mistake, he exceeds his power and acts under a mistaken view of the law; and the court, seeing this, has a right, and it is its duty to declare the reissue *pro tanto* void in any suit founded upon it."—*Ib.*

621. "No invariable rule can be laid down as to what is reasonable time within which the pat-

entee should seek for the correction of a claim which he considers too narrow. In *Miller v. Brass Co.*, by analogy to the law of public use before an application for a patent, we suggested that a delay of more than two years in applying for such correction should be construed equally favorable to the public. But this was a mere suggestion by the way, and was not intended to lay down any general rule. Nevertheless, the analogy is an apposite one, and we think that excuse for any longer delay than that should be made manifest by the special circumstances of the case."—*Ib.*

622. An original patent was dated March 23d, and the application for reissue was filed July 20th, in the same year, and thereof the court said: "This reissue not obnoxious to the charge of laches." *Frazer et al. v. Gates & Scoville Iron Works*, 22 Fed. Rep. 439.—BLODGETT, 1884.

623. In an original patent the invention was declared to be an improved device for turning or rolling logs *upon* the carriage in a saw-mill. In the reissue the same invention was declared to be a device for turning or rolling logs *to or upon* the carriage, and the description in the two varied accordingly. The reissue was held to be for a different invention from the original, and, for that reason, void. *Torrent & Arms Lumber Co. v. Rodgers*, 112 U. S. 659.—SUP. CT. 1884.

624. In an original patent each of the claims was for a combination. The first claim of the reissue was for a single part. The reissue was granted five years after the original, and was held to be void because of the enlargement of the claim.—*Ib.*

625. The doctrine that a reissue can be applied for and granted at any time before the expiration of a patent, and even during an extended term, provided adverse rights have not intervened, finds no support in *Miller v. Brass Co.*, 104 U. S. 350. *Wollensak v. Reiher*, 22 Fed. Rep. 651.—GRESHAM, 1884.

626. "It was never lawful to cover, by the claims of a reissue, an improvement made after the grant of an original patent." *Union Metallic Cartridge Co. v. U. S. Cartridge Co.*, 112 U. S. 624.—SUP. CT. 1884.

627. "A disclaimer can only be made when something has been claimed of which the patentee was not the first and original inventor, and when it is intended to limit a claim, in respect to the thing not originally or first invented. It is true that in so disclaiming or limiting a claim, descriptive matter, on which the disclaimed claim is based, may, as incidental, be erased in aid of or as ancillary to the disclaimer. But the statute expressly limits a disclaimer to a re-

jection of something before claimed as new, or as invented, and which the patentee, or his assignee, no longer chooses to claim or hold. It is true that this same end may be reached by a reissue, when the patentee has claimed as his own invention more than he had a right to claim as new; but if a claim is not to be rejected or limited, but there is merely 'a defective or insufficient specification'—that is, description as distinguished from a claim, the only mode of correcting it was and is by a reissue."—*Id.*

628. Though a patentee may broaden his claim by reissue where an error arose through inadvertence, accident, or mistake, he could not do this after the lapse of eight years, in the absence of very special circumstances, and especially where the specification was plain and free from complexity. *Tuttle et al. v. Loomis et al.*, 30 O. G. 344.—WALLACE, 1885.

629. "The reissue of letters-patent by the Commissioner is *prima facie* evidence that such reissue is founded on sufficient cause and is in accordance with law. It is also presumed that the Commissioner acted within his authority under the statute until the contrary is proved." *Speath v. Barney*, 22 Fed. Rep. 828.—COLT, 1885.

630. Where a complainant in his bill alleges generally the surrender and reissue of his patent, "it is not necessary to aver specifically the ground on which the original patent was surrendered."—*Id.*

631. "Where the Commissioner accepts the surrender of an original patent and grants a new patent, his decision is final and conclusive in a suit for infringement, unless it is apparent on the face of the patent that he has exceeded his authority, and that there is such a repugnancy between the old and the new patent that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced in the original patent."—*Id.*

632. By the court: "The claims of the original patent are enlarged in the reissue, and the suit rests upon the enlargement. But little more than two months, and less than three, elapsed between the date of the original and the application for the reissue. This does not seem to me too long time to take before proceeding for an enlargement of the claims to cover parts of the invention described but not claimed in the original, especially when not shown to be designed to cover the progress of other inventors. The decided cases appear to warrant this course." *Hammond v. Franklin*, 23 Blatch. 77.—WHEELER, 1885.

633. "Where the reissue is for an invention

not shown in the original, or a different one from that shown there, neither promptitude nor delay in making an application for the reissue would seem to make any difference. It is understood that an inventor cannot at any time take out a valid reissue for an invention not shown in the original in some manner so as to be discernible there."—*Id.*

634. There is "no safe or just rule but that which confines a reissued patent to the same invention which was described or indicated in the original." It is not to the point that prior to the original patent the patentee had actually invented the thing he claims in the reissue.—*Id.*

635. Where—there being no other objection—a reissue covers what is shown in the original patent, "it would doubtless be well enough if the patent showed the parts arranged to produce the result without saying expressly that they would do it." But where it is ambiguous and uncertain whether or not the original patent showed such parts, a reissue with a claim for such parts is unwarranted.—*Id.*

636. For an example of a reissue held void for undue enlargement, see —. *Farmers' Friend M'fg Co. v. Challenge Corn Planter Co.*, 23 Fed. Rep. 42.—BAXTER, 1885.

637. An original patent claimed a process only. After the lapse of four years the right to claim the product by reissue was abandoned and lost by laches. *Union Tubing Co. et al. v. Patterson Co. et al.*, 23 Fed. Rep. 79.—WALLACE, 1885.

638. An original patent for an electric gas lighter was for a circuit breaker located at the burner and operated automatically, substantially as described. The reissue, eight or nine years later, was for machinery for breaking an electric circuit at the burner and producing sparks, there to light the gas, and the claim might or might not include machinery for turning on the gas. The change was held fatal to the reissue. *Electric Gas Lighting Co. v. Smith & Rhodes Electric Co.*, 23 Fed. Rep. 195.—WHEELER, 1885.

639. By the court: "The fact that the reissue was applied for and granted fourteen years after the date of the original patent would, undoubtedly, had the cause been defended and the validity of the original patent been controverted, been strongly presumptive of unreasonable delay; but it might possibly have been explained, and the court could not say, as matter of law, and certainly, under the decree of the court, the master could not say, that it was insusceptible of explanation." *Thompson et al. v. Wooster*, 114 U. S. 104.—SUP. CT. 1885.



640. The claim of an original patent was as follows: "Two or more type-wheels, separately controlled by mechanism and arranged side by side with their axis on the same line, so as to be impressed jointly or separately on one strip of paper, substantially as and for the purposes set forth." The reissued claim was: "Two or more type-wheels moving independently and controlled by mechanism and arranged so as to print jointly or separately upon one strip of paper in two or more lines, substantially as specified." The reissued claim was held not to be enlarged. *Gold & Stock Tel. Co. v. Commercial Tel. Co. et al.*, 23 Blatch. 199.—SHIPMAN, 1885.

641. Although a reissue is evidently intended to enlarge the claim, yet the court may, by construction, confine it within the original patent. *Hartford Woven Wire Matt. Co. v. Peerless Wire Matt. Co.*, 23 Blatch. 227.—SHIPMAN, 1885.

642. Complainant's original patent claimed a series of dies. The reissued patent claimed the dies separately. The expansion held to be unlawful. *Beecher M'fg Co. v. Atwater M'fg Co. et al.*, 114 U. S. 523.—SUP. CT. 1885.

643. "If at the date of the issue of the original patent the patentee had been conscious of the nature and extent of his invention, an inspection of the patent when issued and an examination of its terms, made with a reasonable degree of care, which is habitual to and expected of men in the management of their interests in the ordinary affairs of life, would have immediately informed him that the patent failed fully to cover the area of his invention. And this must be deemed to be notice to him of the fact, for the law imputes knowledge when opportunity and interest combined with reasonable care would necessarily import it. Not to improve such opportunity under the stimulus of self-interest with reasonable diligence constitutes laches, which, in equity, disables the party who seeks to revive a right he has allowed to lie unclaimed from enforcing it, to the detriment of those who have, in consequence, been led to act as though it were abandoned." *Wollensak v. Reiher*, 115 U. S. 93.—SUP. CT. 1885.

644. "Where the mistakes suggested were merely that the claim was not as broad as it might have been, it was apparent upon the first inspection of the patent, and if any correction was desired, it should have been applied for immediately; . . . the granting of a reissue after an unreasonable delay is clearly an abuse of the power to grant reissues, and may justly be declared to be illegal and void; . . . with reference to reissues made for the purpose of enlarging the scope of

the patent, the rule of laches should be strictly applied, and no one should be relieved who has slept upon his rights, and has thus led the public to rely upon the implied disclaimer involved in the terms of the original patent; and . . . when this is a matter on the face of the instrument, upon a mere comparison of the original patent with the reissue, it is competent for the courts to decide whether the delay was unreasonable and whether the reissue was therefore contrary to law and void."—*Ib.*

645. Although the patentee in a reissued patent may have satisfied the Patent Office of the propriety of his delay in applying for reissue, "the question as to whether the delay had been reasonable or unreasonable is for the court to determine upon the special circumstances brought to its attention; and it cannot substitute the decision of the Patent Office upon that question for its own."—*Ib.*

646. "The settled rule of decision is that, if it appears in cases where the claim is merely expanded, that the delay has been for two years or more, it is adjudged to invalidate the reissue unless the delay is accounted for and excused by circumstances which show it to have been not unreasonable."—*Ib.*

647. Where a bill of complaint "sets out or exhibits both the original and reissued patents, and it appears from inspection that the sole object of the reissue was to enlarge and expand the claims of the original, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, the question of laches is a question of law, arising on the face of the bill which avails as a defence upon a general demurrer, for want of equity."—*Ib.*

648. The claim of an original patent was: "The axle A, hinged to the wheel-spindle or draft-plate B B, so that the wheels are retained in the line of progression by the draft of the animals when one is in advance of the other, substantially as described and for the purpose set forth." The reissue claim was: "The axle A having plates B hinged to the wheel-spindle plate C, so that the wheels are retained in the line of progression when one is in advance of the other, as set forth." Reissue held unduly enlarged. *Pattee Plough Co. v. Kingman et al.*, 23 Fed. Rep. 801.—TREAT, 1885.

649. The claim of an original patent was: "The improved method of cleaning and drying oleaginous seed by feeding the same over the inclined surface of a perforated conical steam-coil, substantially in the manner described." The

reissue claim was: "The herein described method of treating seed, consisting of allowing it to flow downward around a central perforated steam reservoir, and forcing jets of steam from said reservoir outward through the mass of seed, the flow of said seed being regulated by the stirrers, substantially as set forth." Reissue claim held unduly enlarged. *Gage v. Kellogg et al.*, 23 Fed. Rep. 891.—COXE, 1885.

650. For a suggestion to the effect that the Supreme Court changed its position upon reissued patents in the class of cases beginning with *Miller v. Brass Co.*, see —. *Arnheim v. Finster et al.*, 32 O. G. 256.—WHEELER, 1885.

651. An action taken by the patentee's solicitor in the procurement of his patent, without the knowledge of the patentee, will not form a basis for a reissue, of itself.—*Id.*

652. A reissued patent not applied for with due diligence cannot be construed more broadly than its original. *Albany Steam Trap Co. v. Felthousen et al.*, 24 Fed. Rep. 699.—BLATCHFORD, 1885.

653. For an example of reissue claims held to be fatally enlarged, see —. *Arden v. Jewett et al.*, 32 O. G. 1240.—BLATCHFORD, 1885.

654. Previous to *Miller v. Brass Co.* the law upon the subject of reissues was generally recognized as conferring broader powers upon the Commissioner of Patents, and as authorizing a wider latitude in modifying the claim, than was declared to be the rule in that case and other cases since. *Tuttle et al. v. Loomis et al.*, 24 Fed. Rep. 789.—WALLACE, 1885.

655. The claims of a reissue may be made broader than the claims of the original by a change in the specification, although they may not be so in express terms.—*Id.*

656. The claim in an original patent was: "In telegraph apparatus for double transmission, the combination, with the relay at each station, of a condenser, for the purpose of neutralizing the effect of the return current, due to the static induction of the line, as set forth." The reissue claim was: "The combination in a duplex telegraph, substantially as hereinbefore set forth, of a battery, a main line, an artificial or compensating line, a rheostat in said artificial line, and a condenser having its terminals respectively connected with said artificial lines and the earth." Reissue was applied for within eleven months after the issue of the original. Thereof the court said: "The patentee was not guilty of laches; his application was made within a reasonable time, and the reissue, so far at least as it relates to the second claim, was a legitimate and commendable exercise by the

Commissioner of the duty devolved upon him by the statute." *Western Union Tel. Co. v. Baltimore & Ohio Tel. Co.*, 23 Blatch. 419.—WALLACE, 1885.

657. An original patent contained the following claim: "The abrupt or nearly right-angled enlargement of the chimney, as presented by Fig. 3, arranged in relation to the lamp burner, substantially as and for the purpose herein specified." The reissue claim was: "A lamp chimney having an abrupt or nearly right-angled enlargement on, or nearly on a level with the lamp, and combined with the conical sides and contracted opening at the top, substantially as set forth." The delay was nine years. The reissue was held void. *Shirley v. Meyer*, 23 Blatch. 249.—BENEDICT, 1885.

658. Where, between the original patent and the reissue in suit, there is an intermediate reissue, the character of the intermediate reissue is an irrelevant question. *Reed et al. v. Chase et al.*, 25 Fed. Rep. 94.—MATTHEWS, 1885.

659. A reissue in suit was applied for nearly ten years after the grant of the original patent. The claim in the original patent was: "I claim as my invention the circular-shaped harrow-tooth *d*, constructed and used in the manner and for the purpose herein specified." In the reissue patent there were some omissions and some additions as compared with the original specification, and seven claims, as follows: "[1] the combination with a harrow-frame of a curved harrow-tooth, made between its point of attachment to the frame and its point of contact with the ground and above the frame, so as to support the frame when turned upside down. [2] A spring metal harrow-tooth attached to a harrow-frame and curved so that the main portion of the harrow-tooth shall be located above the horizontal plane of the lower surface of said harrow-frame, substantially as and for the purpose shown. [3] A harrow-tooth of spring metal curved upward from its point of attachment to the harrow frame, then rearward above said frame, and downward to its point of contact with the ground, substantially as and for the purpose shown. [4] A harrow-tooth made of spring metal curved forward and upward in an arch extending well above the horizontal plane of its attachment to the harrow-frame, and free from contact therewith, except on the lower side of the bar supporting said tooth substantially as and for the purpose shown. [5] The combination, with a harrow-frame, of series or rows of spring metal teeth curved substantially as described, mounted upon the bars or frame of the harrow, and supporting said harrow-frame,

substantially as and for the purpose shown. [6] A harrow consisting of a frame carrying rows or series of spring metal teeth and adapted to have a free and unlimited yielding motion to any abnormal pressure or obstruction, substantially as and for the purpose shown. [7] A harrow consisting of a frame, carrying multiple rows or series of spring metal teeth curved between their points of attachment to said frame and their points of contact with the soil, and adapted to pierce and enter the ground as the harrow is drawn forward, and also adapted to have a free and unlimited motion throughout their entire length, substantially as and for the purpose shown." The reissued patent was sustained with all its claims, the court saying: "It cannot be successfully contended that any of the seven claims contained in the reissued patent, nor all of them combined, embrace anything not covered by the original. The claims of the reissued patent are separately within the original claim, and all combined are not more than its legal equivalent. The only purpose they can be conceived as accomplishing beyond the original claim is in excluding a construction of the original patent which its owner apprehended might possibly be suggested, which, if sustained, would not only defeat the reissue, but render the original of but little value."—*Id.*

660. A patent which has been declared void by a court is not thereby rendered incapable of reissue. *Matthews et al. v. Flower et al.*, 33 O. G. 887.—BROWN, 1885.

661. An original patent, dated August 26th, 1873, contained a claim for a combination of mechanical parts; its reissue, dated March 2d, 1875, had a process claim. The reissue was held invalid by reason of the change. *Eachus v. Broomall*, 115 U. S. 429.—SUP. CT. 1885.

662. It seems that a comparison of an original and reissued patent, for the purpose of determining the question of identity of invention, sometimes "requires an interpretation of the original patent in the light of the state of the art at the date when the application for it was filed."—*Id.*

663. For an example of a reissue held unduly expanded, as compared with the original, see —. *Am. Diamond Rock Boring Co. v. Sheldons et al.*, 33 O. G. 1598.—WHEELER, 1885.

664. The correction of a clerical error in a patent may be made in a reissue. *Reed v. Street*, 34 O. G. 339.—NIXON, 1885.

665. An original patent claimed a vibrating platform of a peculiar construction, containing certain elements. The reissue claimed a different vibrating platform, and described a vibrating

platform not covered by the original specification or claims. Reissue held invalid. *Phillips v. Risser et al.*, 26 Fed. Rep. 308.—BLDGGETT, 1885.

666. An original patent for a wagon unloader contained no suggestion or description of a receiving pen or chute, the only possible allusion to it being the mention of a lid to a certain hopper. A claim of the reissue of this patent made this pen or chute an element of a claim. It was held that the patentee could not, after the lapse of considerable time, in a reissue, add a new feature or omit old features.—*Id.*

667. A patentee may not, by reissue, get claims covering devices not within the original patent, and coming into market between the original and the application for reissue.—*Id.*

668. Complainant's original patent was granted March 7th, 1871. The reissued patent was granted April 4th, 1886. The reissue claim was: "A hay-knife, the blade whereof is provided with suitable handles and has an outwardly curved edge, provided with serrations integral with the blade, and sharpened on their edges, nearest to the blade-point, substantially as set forth." The original claim was: "The improved hay-knife above described consisting of the curved blade A, having knife-edge serrations B and handles C C placed as shown, all substantially as specified." Reissue held invalid for undue expansion. *Holt v. Kendall et al.*, 26 Fed. Rep. 622.—BLDGGETT, 1885.

669. Although an original patent may have a claim more limited than is called for by the state of the art, the patentee cannot, after an undue lapse of time, reissue and broaden the claim.—*Id.*

670. A reissue spoken of as coming "clearly within the late cases in the Supreme Court, holding that a patent cannot be reissued with expanded claims unless it is done within two years from the date of the original patent."—*Id.*

671. Complainant's original patent was for an improvement in caps, for personal wear. One year, nine months, and ten days after the date of the original, application for reissue was filed. In the interim caps not infringing the original, but infringing the reissue were put upon the market. The reissue was held invalid for undue expansion. Complainant claimed that an acquiescence in a narrow claim of the original application was the act of the solicitor and not of the inventor. This fact was held to be without force in the premises. *Arnheim v. Finster et al.*, 34 O. G. 700.—COXE, 1886.

672. "One reason why a patentee cannot have a valid reissue to cover parts of his invention de-

scribed but not claimed, when the omission to make the claim is not caused by inadvertence, accident, or mistake, is because the parts of the invention not claimed are by this course abandoned to the public and the right to claim is gone." *Railway Register M'fg Co. v. Broadway & Seventh Ave. Railroad Co.*, 34 O. G. 921.—WHEELER, 1886.

673. "The claim of an original patent was: 'The improved method of cleaning and drying oleaginous seed by feeding the same over an inclined surface of a perforated conical steam-coil, substantially in the manner described.' The claim in the reissue thereof was: 'The herein described method of treating seed, consisting in allowing it to flow downward around a central, perforated steam reservoir, and forcing jets of steam from said reservoir outward through the mass of seed, the flow of said seed being regulated by stirrers, substantially as set forth.' The reissue was held void. *Gage v. Kellogg et al.*, 26 Fed. Rep. 242.—COXE, 1886.

674. A patent was granted April 6th, 1875. Application for reissue thereof was made May 27th, 1878. Under the reissued claims articles would infringe which would not have infringed the original. Such reissue claims were held invalid. *Tubular Rivet Co. v. Copeland*, 34 O. G. 1277.—COLT, 1886.

675. Complainant's original patent was dated July 20th, 1869. The reissue application was filed in January, 1871. In the original, the invention was confined, both in the description and claim, to the screw threads of the nozzle and the cap. The court said: "The original claimed the screw threads and nothing else; the reissue claims everything but the screw threads." The court said further: "If the inventor had entertained the same idea of the scope and character of his invention in July, 1869, that he did in May, 1871, it is hardly possible that he could have been so unfortunate in making himself understood. No man of ordinary intelligence would retain for eighteen months a patent which describes and claims a device bearing hardly a trace of resemblance to his invention." *Haines v. Peck et al.*, 26 Fed. Rep. 625.—COXE, 1886.

676. "When the nature of the patent is such that the alleged defective narrowness of the claim can be seen the moment the patent is read, the patentee, if he would reissue and expand, must act immediately. It is no excuse that he is ignorant of the laws pertaining to letters-patent."—*Id.*

677. "When a claim has been examined and rejected by the Commissioner, the rejection ac-

quiesced in by the patentee or his solicitor, and the patent issued without the claim, there is no inadvertence, accident, or mistake which entitles the patentee to a reissue." *Boland v. Thompson*, 23 Blatch. 440.—COXE, 1886.

678. After a lapse of ten years after the date of an original patent, the patentee took a reissue, omitting mention of certain arms "I," and thereby expanded the claim. Reissue held invalid. *Hudnut v. La Fayette Hominy Mills*, 26 Fed. Rep. 636.—WOODS, 1886.

679. The claim of an original patent was: "In combination with the revolving chuck A, having jaws *o, o*, the inner and outer sleeves *c, w*, the former, by intermittent reciprocating motion produced by cam H, feeding the stock a suitable length through chuck A; the latter, by a similar motion produced by cam L, alternately opening jaws *o, o*, to permit the passage of stock, and closing them to hold stock to be operated upon by suitable tools." This patent was dated September 20th, 1873, and its reissue was dated July 13th, 1880. The reissue claim was: "In combination the revolving chuck *g* provided with jaws, the friction device *d* to grasp the rod, and the sleeve *f*<sup>4</sup> the cam *e*, or its equivalent, to reciprocate the sleeve *f*<sup>4</sup> to close the jaws while the rod is being rotated, and the tube *d* drawn back, and to permit the jaws to be opened as the tube is moved forward to feed the rod forward, all substantially as described." The court held this claim to be "in its most important particulars a reproduction of the first claim of the original patent;" but said: "In order to avoid the vice of an improper expansion of the original patent, the claim must receive the same construction which properly belonged to the first claim of the original." *Hartford Mach. Screw Co. v. Reynolds et al.*, 26 Fed. Rep. 528.—SHIPMAN, 1886.

680. Where the patentee "applied for a reissue within two months after the original patent was granted, the patentee cannot be charged with want of due diligence in making the application." *Russell v. Laughlin et al.*, 26 Fed. Rep. 699.—COLT, 1886.

681. "Application for a reissue having been filed within a reasonable time, and there being nothing manifest upon the record to show that the omission did not arise through inadvertence, accident, or mistake, the reissue may be sustained, provided there is nothing in it but what is found described in the original specifications and drawings."—*Id.*

682. "If the description in the original patent will not warrant the new claims, then the reissue is for a different thing from the original, and no

mount of diligence in the application for the reissue can make it valid."—*Ib.*

683. The claim in complainant's patent was : "The rotating tumbler I when separated and isolated in action from the permutation wheels, and so arranged that any inward pressure upon the bolt will be exerted on the bearings of said tumbler, and have no action nor effect upon the said permutation wheels, substantially as and for the purpose herein specified." In the original application for this patent a claim was presented as follows : "The turning-bolt I, resting on its bearing *g*, in combination with the mechanism of a combination lock, in such manner as to practically isolate or disconnect it from the main operating parts, substantially as set forth." The claim last quoted having been rejected, it was cancelled, and the said first claim was substituted therefor. The patent was issued with a claim as follows : "I claim in a combination lock, for safe or vault doors, a bolt I, which turns on a pivot or bearing when said bolt I is used in a lock having no ordinary sliding lock bolt, and in connection with the separate bolt-work of the door, and so arranged as to receive the pressure of the said bolt-work without transmitting it to the wheels or other equivalent works of the lock." The reissue claim was sustained as being rather restricted than enlarged. *Yale Lock M'fg Co. v. Sargent*, 117 U. S. 537.—*SUP. CT.* 1886.

684. A claim in complainants' original patent on printing machinery was : "Separating the sheets by mechanism substantially as described, so that they will be delivered in piles, substantially as set forth and specified." In the reissued patent the following claim was made : "Separating or changing the direction of printed sheets of paper, so that they may be automatically piled in two or more piles, or in more than one pile, by mechanism constructed to operate substantially as described." By this reissue the whole idea of piling, or any other purpose in which the flies or any other device was used, was left out, and the reissued claim covered simply a sheet-conducting mechanism in combination with automatically moving switches operating to separate conveying channels. Reissue held void for undue expansion. *Hoe et al. v. Knapp et al.*, 27 Fed. Rep. 204.—*BLODGETT*, 1886.

685. Complainant's original patent was dated July 22d, 1870. Application for reissue was filed May 26th, 1874, and granted June 23d, 1874. Application for second reissue was filed March 10th, 1884, and granted April 15th, 1884. Application for third reissue was filed Novem-

ber 26th, 1884, and granted December 23d, 1884. The first and second reissue had expanded claims. The specification of the third reissue was practically identical with that of the original patent, except that it disclaimed the original first claim. The third reissue was in suit, and its two claims were identical with the second and third claims of the original patent. The court held that if the first reissue had been identical with the original patent, the original would have been abandoned and the reissue nugatory. But under the circumstances the court sustained the reissue in suit, saying : "The question should be remitted for final decision to the court of last resort." *Celluloid M'fg Co. v. Zylonite Brush & Comb Co. et al.*, 27 Fed. Rep. 291.—*WALLACE*, 1886.

686. For an example of a reissue held invalid for expansion, see —. *Schultz v. Ostrander*, 27 Fed. Rep. 295.—*TREAT*, 1886.

687. "That . . . additional claims, omitted through 'inadvertence, accident, or mistake,' may be secured by means of a reissue, if applied for within reasonable time, is not open to question. Two years seems to have become the measure of reasonableness, or limit of time, within which, ordinarily, the application must be made." *Asmus v. Alden*, 27 Fed. Rep. 684.—*BUTLER*, 1886.

688. Whether an omission in an original patent occurred through inadvertence, accident, or mistake, is (in cases proper for amendment) a question for the Commissioner.—*Ib.*

689. It is a mistake to understand *Miller v. Brass Co.*, 104 U. S. 350, as prohibiting the introduction of new claims into a reissue under all circumstances. "Such a result could only follow a repeal or disregard of the statute governing this subject. *Miller v. Brass Co.* simply applied the equitable doctrine of estoppel to a patentee who, after inexcusable delay [during which others may be presumed to have acted on the reasonable inference that all not claimed in the patent has been dedicated to the public], sought, by means of a reissue, to enlarge the scope of his patent so as to embrace and prohibit such acts."—*Ib.*

690. A reissue claim may be restricted by introducing another element of combination, but if it also be extended by leaving out still other elements of combination, it is void. *Gage v. Kellogg et al.*, 36 O. G. 234.—*COXE*, 1886.

691. "Well-known authorities are to the effect that sub-combinations of the separate parts of an entire machine, apparent on the face of the specification, but omitted to be claimed in the original patent, by inadvertence or mistake, can

be introduced in a reissue, if seasonable application is made therefor; but if application is postponed for an unreasonable time, they become abandoned to the public, especially if the equitable rights of other parties have intervened." *Hubel v. Dick*, 28 Fed. Rep. 132.—SHIPMAN, 1886.

692. "The principles in regard to the invalidity of reissues, when unreasonably delayed, have become so well established that they cannot be successfully avoided by adding, after an unreasonable delay, in a second reissue, another element to a combination described in a void claim in the first reissue, the last added element making a different and previously unclaimed invention."—*Ib.*

693. "Although a claim in a reissue may have been introduced for the purpose of stating the invention of the patentee, as a substitute for a claim in the original patent wherein the invention was, by inadvertence, stated too broadly, yet if the new claim described and claims an invention altogether different from and independent of the invention described in the original claim, and which is a radical transformation of the invention, as originally stated, and the reissue was applied for five years after the date of the original patent, without adequate excuse for the delay, such new claim is void." *Hubel v. Dick*, 28 Fed. Rep. 656.—SHIPMAN, 1886.

694. The claim of an original patent was: "The herein described method of preserving shrimps, etc., preventing their discoloration, which consists in placing textile fabric between the can and its contents, and then sealing the can and subjecting the same to a boiling process, substantially as and for the purpose specified." The claim of the reissue thereof was: "As an improvement in the art of preserving shrimps in metal cans, the mode of preventing the discoloration of the shrimps, which consists in interposing between the metal can and the shrimps an enveloping material for the shrimps, which is not itself capable of discoloring the shrimps, and then sealing the can and subjecting the same and its contents to a boiling process, substantially as described." The reissue was held unduly expanded and void. *White et al. v. Dunbar et al.*, 119 U. S. 47.—SUP. CT. 1886.

695. "The circumstance that other improvements and inventions, made after the issue of a patent, are often sought to be suppressed or appropriated by an unauthorized reissue has sometimes been referred to for the purpose of illustrating the evil consequences of granting" expanded "reissues; but it adds nothing to their illegality. That is deduced from general princi-

ples of law as applied to the statutes authorizing reissues and affecting the rights of the government and the public."—*Ib.*

696. An original patent for gang plough was granted October 9th, 1886. A reissue thereof was applied for October 15th, 1889. The claim of the original patent was: "The lever P, rod Q, and brake R arranged and operated as and for the purpose described." The most nearly corresponding claim of the reissue was: "In a wheel-plough, the combination with a swing-axle and ground or carrying wheel, of friction-clutch mechanism and means for engaging and disengaging the latter with the ground or carrying wheel, said parts being constructed and adapted to raise the plough by locking the swing-axle to the carrying wheel by friction-clutch engagement, and raise the plough beam by the draft or power of the team, substantially as set forth." The reissue claim was held void for undue expansion. *Newton v. Furst & Bradley M'fg Co. et al.*, 119 U. S. 373.—SUP. CT. 1886.

697. A had a patent with a certain broad claim. B thereupon took a patent with a narrow claim. After the lapse of some nine years it was discovered that B was the prior inventor, and thereupon B's patent was reissued with a broadened claim. The reissue was held invalid. *Hartshorn v. The Saginaw Barrel Co. et al.*, 119 U. S. 664.—SUP. CT. 1887.

698. An original patent was dated January 24th, 1864; the first reissue thereof was dated December 26th, 1865; and the second reissue thereof was dated April 2d, 1867. The claim in issue in its three different statements in the three patents was as follows: "First. The compound eccentric D, consisting of an eccentric wrist pin, *a*, adjustable disk, *b*, and clamp, *d*, or its equivalent, in combination with the pitman F, constructed and operating in the manner and for the purpose substantially as set forth." "First. The compound eccentric D, consisting of an eccentric wrist pin, *a*, adjustable disk, *b*, and clamp, *d*, or its equivalent, constructed and operated in the manner and for the purpose substantially as set forth." "1. I claim the eccentric wrist pin *a* and turning part *d*, or its equivalent, constructed and combined as described, to operate the punch at different levels, substantially as and for the purpose herein set forth." This final reissue claim was held void for undue expansion. *Stiles v. Rice et al.*, 29 Fed. Rep. 445.—CARPENTER, 1887.

699. Doubted "that the patentee, after he has omitted the elements from his claim by a reissue, can be permitted to insist that they be brought back by construction."—*Ib.*

700. "While no invariable rule can be laid down as to what is a reasonable time within which the patentee should seek for the correction of a claim which he considers too narrow, a delay of two years, by analogy to the law of public use before an application for a patent, should be construed equally favorable to the public, and . . . excuse for any longer delay than that should be made manifest by the special circumstances of the case." *Ives v. Sargent*, 119 U. S. 652.—SUP. CT. 1887.

701. On the question of abandonment, as regards reissues, the acts of a patent solicitor are, in law, the acts of the party himself.—*Ib.*

702. Where a reissue patent is for a different invention than that described in the original, lapse of time is immaterial.—*Ib.*

703. Green's driven well patent was dated January 14th, 1868, and had the following claim: "The herein described process of sinking wells where no rock is to be penetrated—viz., by driving or forcing down a rod to and into the water underground and withdrawing it and inserting a tube in its place to draw the water through, substantially as herein described." A reissue thereof was taken May 19th, 1871, with the following claim: "The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as herein described." Thereof the court said: "The precise objection to the reissued specification is that it states that the tube which is to replace the driven rod is 'made air-tight throughout its length,' and also that in cases where the aid of a pump to draw water from the well may be necessary, the patentee attaches 'to the tube by an air-tight connection any well-known form of pump,' and that the original specification does not state that the tube is made air-tight throughout its length, nor, that the pump is to be attached to the tube by an air-tight connection, but only states that any suitable well-known pump may be applied to raise the water up through the tube to the surface or above it. It appears, however, in evidence, that the patentee, when applying for his reissue, with the text of the specification reading as it does now, applied to have granted to him a second claim, in these words: 'I also claim, in combination with a tube-driven well, an attachment of a pump to the tube by an air-tight connection, substantially as herein set forth;' that the Patent Office rejected this second claim, assigning its reasons in these words: 'The second claim is for a pump attached to a tube by an air-tight connection.

This is indispensable to the operation of a pump, and a universal right. Whenever a supply of water is found, a pump may be applied without new invention;' that in a subsequent communication by the Patent Office to the patentee, the office, in speaking of this proposed claim, said: 'This device is of universal use in artesian well tubes,' and that the patentee afterward withdrew the proposed second claim. As the air-tight connection was indispensable to the operation of a pump, it was implied as of necessity in the original specification as much so as if it had been expressed, and there was no enlargement of the invention in stating the fact in the reissued specification." The court said if the matters were not as stated by the appellant, yet the case would be simply that of a specification defective in not containing a full and perfect description of the process intended to be patented. The court sustained the reissue, saying: "In the second place, however, under this head, a material alteration from the original in the amended specification is said to have been made in the following respect: 'The original specification starts out with a declaration that the patentee has invented a new and useful improvement in the manner of sinking or constructing artesian or driven wells where no rock is to be penetrated and of raising water therefrom,' and the claim is stated to be 'the herein described process of sinking wells where no rock is to be penetrated,' etc. In the specification of the reissued patent he says: 'My invention is particularly intended for the construction of artesian wells in places where no rock is to be penetrated;' and the claim is for 'the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as herein described,' from which, it will be observed, are omitted the words 'where no rock is to be penetrated.'" The reissue was sustained. *Eames v. Andrews et al.*, 122 U. S. 40.—SUP. CT. 1887.

704. "If the amended specification does not enlarge the scope of the patent by extending the claim so as to cover more than was embraced in the original, and thus cause the patent to include an invention not within the original, the right of the public are not thereby narrowed, and the case is within the remedy intended by the statute. Those cases in which this court has held reissues to be invalid were of a different character, and were cases where, by the reissued patent, the scope of the original was so enlarged as to cover and claim as a new invention that which was either not in the original specifica-

tion as a part of the invention described, or, if described, was, by not being claimed, virtually abandoned and dedicated to public use.”—*Id.*

705. Green’s driven well patent contained the following : “ I’m aware of James Suggett’s patent of March 29th, 1864, and I disclaim all secured to him therein.” This was omitted in the reissue, and the reissue was sustained.—*Id.*

706. An original patent for improvement in clock movements was granted November 19th, 1879. A reissue was taken April 12th, 1881. A second reissue was applied for June 19th, 1881, and granted March 14th, 1882. The eight claims in issue were not in the original patent, and covered a clock made by the defendants six months before the last reissue was applied for. The second reissue, the one in suit, was held invalid for undue expansion. *Parker & Whipple Co. et al. v. Yale Clock Co. et al.*, 8 Sup. Ct. Rep. 38.—SUP. CT. 1887.

707. In this case the Supreme Court quoted from the case of *Seymour v. Osborne*, 11 Wall. 516, and then said : “ In these extracts from the opinion it is seen that the court adheres strictly to the view that, under the statute, the Commissioner has no jurisdiction to grant a reissued patent for an invention substantially different from that embodied in the original patent, and that a reissue granted not in accordance with that rule is void. In what there is said about redescribing the invention, and about including in the new description and new claims what was suggested or indicated in the original specification, drawings, or Patent Office model, it is clearly to be understood, from the entire language, that the things so to be included are only things which properly belong to the invention as embodied in the original patent ; that what that invention was is to be ascertained by consulting the original patent, and that while the new description may properly contain things which are indicated in the original specification, drawings, or Patent Office model [though not sufficiently described in the original specification], it does not follow that what was indicated in the original specification, drawings, or Patent Office model is to be considered as a part of the invention, unless the court can see from a comparison of the two patents that the original patent embodied, as the invention intended to be secured by it, what the claims of the reissue intended to cover. In what was thus said in *Seymour v. Osborne* there is no warrant for the view that, *ex vi termini*, what was suggested or indicated in the original specification, drawings, or Patent Office model is to be considered as a part of the invention indicated to have been covered

by the original patent, unless the court can see from a comparison of the two patents that the invention which the original patent was intended to cover fairly embraced the things thus suggested or indicated in the original specification, drawings, or Patent Office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent.”—*Id.*

708. A patent for a machine for making metallic shoe shanks was dated July 16th, 1872. A reissue thereof was granted, with the following additional claims : “ The arrangement of a fixed or stationary bending-die and movable bending-die of suitable form for bending a plate to form the middle shank of a shoe shank, and actuating devices therefor, in a machine adapted for cutting and punching said blanks, in such manner that the blanks are received in the bending-dies from the cutting devices, and bent and discharged automatically, substantially as described and specified. [3] the said bending-dies, constructed and arranged to form the middle and curve bend, and reverse the bends by one and the same operation of the dies, substantially as specified.” April 9th, 1878, a second reissue was granted having the original first claim and also the following claims : “ [2] In a machine for making metallic shoe shanks, the plate *d*, the convex-faced bender-plate *w*, and the convex face *v*, in combination for the purpose above described. [3] In a machine for making metallic shoe shanks, the combination with the fixed or stationary bending-die and movable bending-die of a pair of stop-pins *c*, secured to the top, and plate *d*, at the bottom of the movable die, for arresting and holding the blanks as described. [4] In a machine for making metallic shoe shanks, the combination, with the fixed or stationary bending-die, of a pair of pins or projections, *e*, extending from the bender-plate, whereby the middle and reverse bends of a metallic shoe shank are formed at one and the same operation, as described. [5] In a machine for making metallic shoe shanks, the combination of the cutting and punching mechanism, chute, *m*, *h*, stop-pins *c*, dies *v*, *w*, and projections *e*, all arranged and operating in relation to each other substantially as described, whereby the shoe shank is cut and punched, conducted to the dies, pressed into shape, and discharged automatically. [6] In a machine for making metallic shoe shanks, in combination with the convex-faced stationary die *v*, the reciprocating convex-faced bender-plate or die *w*, with the stop-pins *c*, projections *e*, and plate *d* secured thereto as described, for the purposes specified.”



The court held that the first reissue was procured after reasonable delay and was valid. The court also held that the second reissue was procured after unreasonable delay, that the second claim of the first reissue and the second claim of the second reissue were not for the same combination, and therefore the second claim of the second reissue was void. The court held that the third claim of the first reissue and the fourth claim of the second reissue were for the same combination. *Jenkins et al. v. Stetson*, 32 Fed. Rep. 398.—COLT, 1887.

709. Of a reissue the Supreme Court said: "There is no evidence of any attempt by the original patent to cover the invention covered by the first eight claims of the reissue, and those inventions must be regarded as having been abandoned or waived, so far as the reissue in question is concerned, subject, however, to the right to have made a new application for a patent to cover them; in other words, those eight claims are not for the same invention which was originally patented." *Parker & Whipple Co. et al. v. Yale Clock Co. et al.*, 8 Sup. Ct. Rep. 38.—SUP. CT. 1887.

710. A patent for an improvement in whip-sockets was taken November 5th, 1867, with the following claim: "A whip-socket provided with a fastening composed of a lever arranged or applied substantially as shown and described, to hold the whip steady or firm in its socket, as set forth." A reissue thereof, applied for June 16th, 1873, contained the following claims: "The combination of the stationary part of a whip-socket and a lever, the lever being hinged or pivoted, so that the lever bears against the whip at or near the ends of the lever, to hold the whip in position, for the purpose set forth. 2. The lever B, curved or inclined inward from its point of pivot, and used in connection with the stationary part A, substantially as and for the purpose specified. 3. The lever B, pivoted at a point inside its center of gravity, so that when left free the upper part of the lever will fall outward, substantially as and for the purpose set forth." The reissue was held void for undue expansion. *Worden et al. v. Searls*, 121 U. S. 14.—SUP. CT. 1887.

711. By the court: "I do not understand that the law, as it now exists, under the recent decisions of the Supreme Court, precludes a patentee from procuring a reissue with broader claims than those covered by his original patent, provided that he is not guilty of laches in applying for such reissue, and the reissue is for the same invention as the original." *Jenkins et al. v. Stetson*, 32 Fed. Rep. 398.—COLT, 1887.

712. A patent for a drive-chain was issued September 1st, 1874. The first reissue was applied for December 1st, 1874, and issued April 20th, 1875. The second reissue was issued June 15th, 1880. The two claims of the last reissue were: "The combination in a drive-chain of the coupling-hooks *c*, and side bars sufficiently small, close to the end bars, to pass through the opening of the hook *C*, as shown and described. [2] The combination, in the open link of a drive-chain, of the bar *b*, provided with a coupling hook, and an opposite end of the link adapted to be coupled to the hook of a correspondingly constructed link, to form a chain, substantially as set forth." The single claim of the original patent was: "Driving-chain links, notched or reduced at *e*, constructed with coupling-hooks *c*, substantially as described." The first claim of the first reissue (applied for three and one half months after the original patent was granted) was the first claim of the last reissue. The questions in the case were whether the original patent was limited to links having hooks as an integral part thereof, and whether the last reissue was an improper enlargement of the original patent. The court said: "The first claim of the present reissue describes the same invention which was described in the sole claim of the original patent, and nothing more. Neither the principle of the invention, nor the description of it, nor the claim in the original patent limited it to hooks integral with the links." The court construed the second claim of the last reissue as "limited to links which are coupled to the hooks *c*, by the means shown and described in the first claim, or by means equivalent thereto," and upheld the reissue. *Ewart M'f'g Co. v. Bridgeport Malleable Iron Co.*, 31 Fed. Rep. 149.—SHIPMAN, 1887.

713. By the court: "The only claim in issue is for a combination not claimed in or covered by the original patent, and hence is not for the same invention described in the latter. Can this defect be corrected by a reissue? The claim in the reissue was before the Commissioner, and its allowance urged by the patentee through his solicitor, but was not allowed, being omitted at his instance, and it was thereupon stricken out by the Commissioner. The patent was issued without this claim, and was accepted in this form; but a week or two after its issue was surrendered by the patentee and a reissue asked for, which was ultimately granted in its present form. Under these circumstances, we regard this case as clearly within the case of *Leggett v. Avery*, 101 U. S. 256." *Dobson v. Lees*, 30 Fed. Rep. 625, *per curiam*, 1887.

714. A patent for a spark arrester was granted April 11th, 1872. As the original specification was drawn, it might have been construed as applying only to cases where a certain tube was of less size at the top than at the smoke-stack. This defect was cured in the reissue; another correction made in the reissue was the addition of a clause to point out and describe a platform on which the grate was to stand in the smoke-stack. The claim of the original patent was for: "The grate D, with the longitudinal bars, as and for the purpose specified and shown." The reissue contained this claim: "The grating D, with the vertical bars placed at the foot of the spark or petticoat pipe E, in the manner and for the purpose substantially as described." There was also another claim for a combination of grate D and netting F. The reissue was sustained. *Kearney et al. v. Lehigh Valley R. R. Co.*, 32 Fed. Rep. 320.—BRADLEY, 1887.

715. Where objectionable features have been taken into a patent through reissue, it is proper to eliminate them by disclaimer. *Torvant v. Duluth Lumber Co.*, 30 Fed. Rep. 830.—NELSON, 1887.

716. Although a party who reissues a patent may intend to broaden the claim, it yet may be construed, in the reissue, to have the same meaning as the claim of the original. And where this is done, if the original claim, on comparison with the prior art, is susceptible of a broad construction, the reissue claim should have that broad construction. *Yale Lock M'fg Co. v. New Haven Savings Bank*, 32 Fed. Rep. 167.—SHIPMAN, 1887.

717. A reissue broadened after a delay of six years is void. *Archer v. Arnd et al.*, 31 Fed. Rep. 475.—THAYER, 1887.

718. The original of the reissued patent in suit was for an improvement in pantaloons, dated June 6th, 1876. The claim thereof was: "In combination with the fly of pantaloons, or similar garments, an inelastic bridge or check-piece, arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, is received by said bridge or check-piece instead of at the angle of the crotch itself." A reissue was applied for February 19th, 1881, with the following claims: "1. The combination with the fly of a pair of pantaloons, or other similar garment, of an inelastic bridge or check-piece arranged across the crotch of the fly, and operating substantially as described, to receive any strain occasioned by the spreading apart of the fly, and which would otherwise be exerted on the crotch of the fly. 2. In combination with the fly por-

tion of a pair of pantaloons, or other similar garment, a check-piece made integral with the button-hole strip of the fly and adapted to prevent any tension at the crotch *d*, that might operate injuriously upon it." Reissue held void for unlawful expansion. *Patent Clothing Co. v. Glover et al.*, 31 Fed. Rep. 816.—SHIPMAN, 1887.

## RES JUDICATA.

### CASES.

1. After the Supreme Court. has passed upon a question, it is not open for revision by a circuit court. *Van Hook v. Pendleton et al.*, 1 Blatch. 187.—BETTS, 1846.

2. Where a decision by another court upon the same patent is cited, and the defendants were not parties thereto, and defendants' machine was not in controversy therein, it is not binding, although entitled to respectful consideration. *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

3. When a patent has been sustained in numerous courts, its validity is not open for "interlocutory argument." *Sloat v. Patton*, 1 Fish. P. C. 154.—KANE, 1852.

4. "It is the duty of the court to hear everything that may be presented in every new case, especially all the new evidence that may bear upon the questions at issue." *Hove et al. v. Underwood et al.*, 1 Fish. P. C. 160.—SPRAGUE, 1854.

5. "The judges of the Circuit Court ought not to hold themselves bound, and the rights of the parties concluded, by the language of the Appellate Court, however eminent he may be, unless such language was strictly applicable to the case before the court." *Day v. Union Rubber Co.*, 3 Blatch. 488.—HALL, 1856.

6. Although a patent may have been sustained in prior adjudications, yet "in a subsequent case new facts may be proved showing a prior invention of the same thing." *Pitts v. Edmonds et al.*, 1 Bissell, 168.—MCLEAN, 1857.

7. "Courts are called upon only to decide questions that are before them. A judge sometimes, in giving an opinion, uses language which, although it is always entitled to consideration and respect, yet in reference to questions that were not before the court, and the decision of which was not necessary to the decision of the questions before it, it is not of binding authority." *Day et al. v. Stellman et al.*, 1 Fish. P. C. 487.—GILES, 1859.

8. Complainants brought an interference proceeding in one circuit, and it appeared from the

record simply that the bill of complaint was dismissed. In a suit in another circuit it was contended that this dismissal was evidence that complainants' patent had been declared void. The court held otherwise. *Tyler et al. v. Hyde et al.*, 2 Blatch. 308.—BETTS, 1851.

9. "By law, a district judge is associated with a justice of the Supreme Court in holding a circuit court, and may hold the court alone, in the absence of the superior judge; but he would fail, in a just appreciation of the proprieties of the position, if he did not, under all the circumstances, show a proper deference to the action of that superior. And, clearly, it would be wrong in a district judge, as a judge of the Circuit Court, in any case, to review or set aside such action. At least, the reasons that would justify such a course must be peculiar and stringent." *Hussey v. Whitley et al.*, 1 Bond, 407.—LEAVITT, 1860.

10. A previous order for a provisional injunction, made by the same court, "must be viewed as conclusive of the facts which it recites."—*Id.*

11. A laying down of general sweeping propositions is mischievous in expounding the law of patents. *Morton v. N. Y. Eye & Ear Infirmary*, 5 Blatch. 116.—SHIPMAN, 1862.

12. Where a patent has been sustained in a large number of contested cases, its validity will be taken as permanently established. *Goodyear et al. v. Hills*, 3 Fish. P. C. 134.—CARTER, 1866.

13. "As . . . to the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, where the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde*, consistent with the record, may be received to prove the fact; but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment involved its consideration and determination, it will not be conclusive." *Packet Co. v. Sickles*, 5 Wall. 580.—SUP. CT. 1866.

14. "A decree of a court of chancery has

some value, and is more persuasive evidence than the verdict of a jury." *Goodyear et al. v. Mulee et al.*, 3 Fish. P. C. 420.—GRIER, 1868.

15. A recovery against a party in a British court, where that court did not have jurisdiction of the person, is null and void as regards an American court. *Bischoff v. Wethered*, 9 Wallace, 812.—SUP. CT. 1869.

16. A case decided by the Supreme Court is thereafter authority for the circuit courts. *Richardson v. Lockwood*, 4 Cliff. 128.—CLIFFORD, 1870.

17. "Where an adjudication is upon the same title, a former judgment, if regularly pleaded, is often a bar to a second suit, though some of the parties may be different."—*Id.*

18. "Without violation of judicial property and the best interests of all who pursue or defend . . . cases already decided between" the "same parties must be followed. It would greatly impair the influence of the court and the confidence of the suitors if any succeeding judge turned it into one of appeal for all questions previously decided. Where doctrines are reconsidered, as often they are and should be, the circumstances of the case must be exceptional and furnish the justification for the action in each instance where it is taken." *Tilghman v. Mitchell*, 9 Blatch. 18.—BLATCHFORD, 1871.

19. "Because in particular cases other tribunals, co-ordinate or appellate, have decided that certain words, when used in connection with their accompanying incidents, did impart a claim for a result or principle, another tribunal should not treat these judgments as setting up formulas in all circumstances involving a similar meaning." *Union Paper Bag Co. v. Nixon et al.*, 6 Fish. P. C. 402.—EMMONS, 1873.

20. A decision by a circuit judge is binding throughout the circuit. *Hawes v. Cook et al.*, 5 O. G. 493.—HUNT, 1873.

21. "In a case where . . . rulings have been . . . numerous, and directly upon the points, and . . . elaborate in argument, it is unusual to do more than to refer to them generally, as settling the points in issue." *Goodyear Dental Vulcanite Co. et al. v. Willis*, 1 Flippin, 388.—EMMONS, 1874.

22. "Appellate courts often follow a series of adjudications made by subordinate tribunals, where they have been acquiesced in and have become, in some sense, a rule of property. It is not because they are obligatory, but from the unfitness of shifting rules."—*Id.*

23. "When one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand

it should be followed, until modified by the Appellate Court." "Where the particular patent has been adjudged to be valid, or that a particular device infringes upon it, . . . eminently beyond other cases is the rule applicable to them."—*Ib.*

24. "It would present an unseemly spectacle for the same governmental grant to receive half a dozen different constructions in as many co-ordinate courts, all authorized to construe it and inform the citizen what it means, and all having the force of law contemporaneously under the same government."—*Ib.*

25. Where a patent has been sustained in one circuit, although other parties and other circuits are not bound thereby, yet he who would have a different decision made must "point out indisputable grounds upon which such difference may be based." *Blake v. Robertson et al.*, 6 O. G. 297.—BENEDICT, 1874.

26. "The general rule is, that all matters which have been once determined by judicial authority cannot be, by judicial authority, again drawn into controversy as between the parties and privies to the decision. The parties, with some exceptions not necessarily here to be stated, are named in the record. They have their day in court; are interested in the property or matters involved in the litigation, and have the right to give direction and control to the proceedings. There must be an end to strife, and where a person has been summoned to appear, or voluntarily appears, and has the opportunity to maintain or deny the issues presented by the pleadings in a cause, he is ever afterward estopped from controverting the truth of the facts directly decided." *Consolidated Fruit Jar Co. v. Whitney et al.*, 2 Bann. & Ard. 30.—NIXON, 1875.

27. Where a suit has been once had between two parties, the question involved therein is *res adjudicata* between those parties in any subsequent suit. *Rumford Chemical Works v. Hecker*, 2 Bann. & Ard. 351.—NIXON, 1876.

28. "The interests of the public will be best conserved, and the respect and authority of the courts will be best maintained, following in all instances the decisions of the courts upon the same subject-matter of controversy, when, after a comparison of the testimony in the two cases, there does not appear to be new, or additional, or contradictory evidence which impels the court in the second hearing to a different result."—*Ib.*

29. "Each plaintiff and each defendant can litigate his own case, and is not bound by decisions in other cases, to which he was not a

party, and which he had no opportunity to litigate. Such is the rule of law, and its necessity, to avoid collusive judgments and fraudulent combinations, is too obvious to need defence." *Celluloid M'fg Co. v. Goodyear Dental Vulcanite Co.*, 13 Blatch. 375.—HUNT, 1876.

30. In a second suit upon the same patent, and upon a different state of facts, the court can and will, if justice calls for it, amend the construction given to the patent in the first suit. *Union Paper Bag Mach. Co. et al. v. Nixon et al.*, 1 Flippin, 491.—EMMONS & SWING, 1876.

31. One Mann began suit against Wright and another defendant. Pending suit Mann died, and the suit was revived by his executor. A decree that the patent was valid and that defendants had infringed was made, and the case was referred to a master. After entry of this decree the present bill was filed against the defendant Wright and his codefendant, who, since said trial, had been engaged in the infringing manufacture. The present defendants had purchased the rights to this patent from Mann's executor. It was held that the present complainant was in full privity to the present former decree, that the defendant Wright was also in privity thereto and bound thereby, and also that the other defendant, Wright's present partner, was so far in privity with the former case, by his partnership relation to Wright, that he was also bound by said decree. *Dayton v. Wright et al.*, 2 Bann. & Ard. 449.—BLODGETT, 1876.

32. "A judgment of a court of competent jurisdiction, upon a question directly involved in the suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that the several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which judgment was rendered—the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Russell v. Place et al.*, 94 U. S. 606.—SUP. CT. 1876.

33. "The issuing of patents is not conclusive upon the courts. Patents are subject to review by the courts. Suits, in a very large proportion of patent cases, are but means of appeal to the courts from the action of the Patent Office.

Yet while this is so, that action must always carry great weight with the courts. It is always very strongly persuasive with them." *Yuengling v. Johnson*, 1 Hughes, 607.—HUGHES, 1877.

34. When the presiding judge of a circuit has made a decision, that decision is the law of the circuit until reversed by the Supreme Court. *Goulds M'f'g Co. v. Cowing et al.*, 14 Blatch. 315.—JOHNSON, 1877.

35. The decision of the Supreme Court of the United States is that of a court whose judgments "are final upon all questions of patent law; whether the parties in interest now were before it or not, its decisions as to what is law in the case govern the decisions of all the other courts in the United States. Where the question is 'one of complicated facts, and the facts may be controverted, and are controverted in the Supreme Court of the United States, with regard to the validity of the patent, of course the decision of that court upon those facts is conclusive, so far as the facts are the same.'" *Am. Middlings Purifier Co. v. Christian et al.*, 4 Dillon's C. C. 448.—MILLER & NELSON, 1877.

36. "It is a sad thing to say that perhaps no class of cases coming before the courts have so much fraud, perjury, and wicked conduct generally as patent cases. The vast amount involved in some of them, the conflicting interests, with a variety of people of all classes, the contests between the patentees themselves—in which the sums involved are almost fabulous—lead to perjury and fraud of the grossest kind. It is the undoubted experience of the judges who are familiar with patent cases that there is a large amount of false swearing and corruption in them. It is possible, therefore, . . . that there may be a collusive suit brought . . . for the purpose of establishing a patent, in which the control of the litigation is all upon one side, although apparently there is an honest contest between two parties with regard to it. When, therefore, a proposition of that kind is made, it is to be considered."—*Id.*

37. By the court: "I am not aware—I do not believe—that any case exists or can be found in which an inferior court has held, on an application for a preliminary injunction, that the decision of the Supreme Court of the United States establishing the validity of a patent can be assailed in the court below."—*Id.*

38. After the United States Supreme Court has deliberately decided in favor of the validity of a patent, a circuit court will not thereafter consider that patent invalid upon the authority of a mass of affidavit testimony, upon a motion for a provisional injunction.—*Id.*

39. Where a patent has been held valid by the Supreme Court, it is conclusive on the circuit courts as to the principle decided, and raises a *prima facie* presumption of the validity of the patent, requiring clear and satisfactory proof to the contrary before it can be rebutted. A claim of collusion of parties in procuring such a judgment of the Supreme Court, if made, is overcome by the fact of long and patient examination of the case in the Supreme Court. *Am. Middlings Purifier Co. v. Atlantic Milling Co.*, 4 Dillon's C. C. 100.—MILLER & DILLON, 1877.

40. A judgment on a decree *pro confesso* does not preclude subsequent full inquiry by another court. *Everet v. Thatcher et al.*, 2 Flippin, 234.—BAXTER, 1878.

41. Where a case has once been tried in one court and afterward comes up in another court, with additional testimony, the second court may proceed to try the whole case anew. *Phillips et al. v. City of Detroit*, 4 Bann. & Ard. 347.—BROWN, 1879.

42. Although a patent has been sustained in one court, yet in a subsequent action where defendant's article is a new article, the prior case is of no force upon the question of infringement. *Clarke v. Johnson*, 16 Blatch. 495.—BENEDICT, 1879.

43. Where the validity of a patent has been once upheld by a court, that decision cannot be disputed in a subsequent case in the same court, "without most cogent reasons," *Odorless Excavating Apparatus Co. v. Clements*, 4 Bann. & Ard. 540.—BOND, 1879.

44. "Where a judgment upon a different cause of action is relied on as settling a question, it must be shown that the question was actually raised and decided." *Am. Diamond Rock Boring Co. v. Sheldon et al.*, 17 Blatch. 208.—WHEELER, 1879.

45. For circumstances under which an adjudication on a final hearing in one circuit will not be followed, from comity, on a motion for a provisional injunction in another circuit, see — *U. S. Stamping Co. v. King et al.*, 17 Blatch. 55.—BLATCHFORD, 1879.

46. "General observations by a judge or a court in deciding a case must always be read in view of the facts of the case that was *subjudica*, and are not necessarily authoritative, *ex vi termini*, in another case where the facts are not the same." *Wilson v. Coon et al.*, 18 Blatch. 532.—BLATCHFORD, 1880.

47. Where the present litigants had previously been in interference in the Patent Office the court said: "If the only question in the case was the priority of invention, as between the

parties, I should not hesitate to grant the injunction forthwith to the complainant. The decree of the Patent Office on the interference doubtless concludes the defendant, as he has not thought proper to appeal from the same after submitting himself to jurisdiction." *Greenwood v. Bracher*, 1 Fed. Rep. 856.—NIXON, 1880.

48. "It is well settled that even after the validity of a patent has been established in a suit, and notwithstanding the presumption thereby raised that the patent is valid, it may always be shown in another suit on the patent against another defendant, and even in answer to an application for a preliminary injunction in such suit, that the right claimed by the plaintiff in the new suit was not, either as to its nature or its extent, fairly in controversy in the former suit, or that material facts were not known or considered when the former suit was tried, or that there are relevant matters which were not adjudicated in the former suit." *Page et al. v. Holmes B. A. T. Co.*, 18 Blatch. 118.—BLATCHFORD, 1880.

49. A former decision is not conclusive upon a different defendant. *Roberts et al. v. Schreiber*, 2 Fed. Rep. 855.—STRONG, 1880.

50. What a judge says, in making a decision, must be taken in connection with the question then in issue, and his remarks made incidentally cannot be made to decide a question not in evidence or argued before him. *Dunbar et al. v. Estabrook et al.*, 4 Fed. Rep. 545.—LOWELL, 1880.

51. Where the present defendant was the real, though not the nominal defendant in a former suit, wherein the present complainant was the then complainant, the findings in said former suit are conclusive in the present suit. *U. S. & Foreign Salamander Felting Co. v. Asbestos Felting Co.*, 18 Blatch. 312.—BLATCHFORD, 1880.

52. In an infringement suit an issue was priority of invention. The victor afterward brought suit to have the opposing patent cancelled; and put in evidence the record in the infringement suit. It was held that such record was proper evidence, and concluded the defendant on the question of priority of invention.—*Id.*

53. A decree made in a former suit, wherein no real defence was made, does not establish the validity of the patent sued on for the purpose of warranting provisional injunction in a subsequent suit. *Hayes v. Leton*, 5 Fed. Rep. 521.—BENEDICT, 1881.

54. A court will not place itself in direct antagonism to the conclusions of a sister court on the same questions, unless constrained to do so by the clearest convictions of error in the sister

court. *Dodge v. Feary et al.*, 8 Fed. Rep. 329.—WALLACE, 1881.

55. A prior suit between the same parties is a bar to a later suit, so far as the questions are the same. The former suit must have proceeded to a decree upon such questions, and the record of the former suit must be placed in evidence in the later suit. *Barker v. Stowe*, 20 Blatch. 185.—BLATCHFORD, 1882.

56. By the court: "Upon general questions of law we listen to the opinions of our brother judges with deference, and with a desire to conform to them if we can conscientiously do so, but we do not treat them as conclusive. In patent causes, however, where the same issue has been passed upon by the Circuit Court sitting in another district, it is only in cases of a clear mistake of law or fact, of newly-discovered testimony, or upon some questions not considered by such court, that we feel at liberty to review its findings." *Searls v. Worden et al.*, 11 Fed. Rep. 501.—BROWN, 1882.

57. Where the defence relied upon is the same as had been overruled in the Patent Office, with the same parties then represented, a provisional injunction will be ordered to issue. *Holliday et al. v. Pickhardt et al.*, 12 Fed. Rep. 147.—BLATCHFORD, 1882.

58. It seems that the decision of the Patent Office in an interference is *res judicata* between the same parties in court. *Sawyer v. Miller et al.*, 4 Woods, 472.—PARDEE, 1882.

59. By the court: "The question of priority having been determined in favor of complainants, in that proceeding [a Patent Office interference] it is *res adjudicata* as between the parties to it." Defence of want of novelty is still open to defendants. *Shuter et al. v. Davis et al.*, 16 Fed. Rep. 564.—WALLACE, 1883.

60. The plaintiff begun an action at law for an infringement of his patent. After beginning this action the plaintiff brought a bill in equity for the same infringement, and the case was carried to a final decree, covering all of defendant's profits but no damages, because the plaintiff elected to put in no evidence on that point. He then sought to recover damages in his action at law, and the court said: "The plaintiff having elected to take judgment for his profits for the precise infringement, which judgment has not been reversed, he cannot now prosecute his action for other damages arising out of the same acts of infringement." *Child v. B. & F. H. Iron Works*, 19 Fed. Rep. 258.—LOWELL, 1884.

61. In seeking to give precedents their proper application, "What was said is to be understood by reference to what it was spoken of."

*Vt. Farm Machine Co. et al. v. Com'r of Patents*, 22 Blatch. 32.—WHEELER, 1884.

62. "It is well settled that the decisions of the Commissioner of Patents, though entitled to great weight on questions of priority, are not final even between those who have been fully heard in the interference." *Gloucester Isinglass & Glue Co. v. Brooks et al.*, 19 Fed. Rep. 426.—NELSON, 1884.

63. Where complainant's patent has already been construed by a judge of the same circuit where the suit is brought, that construction is thereafter controlling. *Field v. Ireland et al.*, 28 O. G. 284.—COXE, 1884.

64. "The spectacle of the court overruling and reversing another court of co-ordinate jurisdiction in the same circuit would certainly be an anomalous one. It would be without precedent, and would lead to inextricable confusion." *Hayes v. Dayton*, 26 Fed. Rep. 690.—COXE, 1884.

65. "In order to constitute the former judgment or decree a bar, it must appear that the point in issue was judicially determined after a hearing and upon consideration of the merits." *Keller et al. v. Stolzenbach et al.*, 27 O. G. 209.—ACHESON, 1884.

66. Where complainant has prevailed over defendants in an interference in the Patent Office, the interference proceeding determines as between the parties, first, that the complainant was the prior inventor; and, second, that the subject-matter of the patent was not void for want of patentable novelty, so that the complainant would be entitled, if there were no other considerations, to a provisional injunction, there being no question as to the infringement. But it is open to the defendants to insist that the patent is void for want of patentable novelty, upon references not presented in the Patent Office and for other reasons. *Swift v. Jenks et al.* 19 Fed. Rep. 641.—COXE, 1884.

67. Although a question may be properly raised by the pleading in a former case, not between the same parties, as the present one, yet if that question was not argued, the prior case has no weight as a precedent upon that point. *Celluloid M'fg Co. v. Tower*, 26 Fed. Rep. 451.—CARPENTER, 1885.

68. Where in a prior suit between the same parties defendant consented to a decree and injunction, in which decree it was determined that the letters-patent were good and valid, the question of the validity of the patent is *res judicata* in a subsequent suit. *Tompkinson v. Willets M'fg Co.* 31 O. G. 918.—COXE, 1884.

69. A question once decided in a circuit court is controlling as to that matter in that circuit.

*Holliday et al. v. Matheson et al.*, 23 Blatch. 239.—WALLACE, 1885.

70. The defendants in this case were sued for alleged infringement of Brush's patent on electric lamps. In a prior suit by the same complainants against Condit and others, for infringement of the Brush patent, by the manufacture of electric lamps made under subsequent patents known as the "Weston Patents," it was decided that the combination which was the subject of the elder patent had been anticipated in the Hager lamp, and the bill was dismissed. These defendants, in this case, pleaded that their lamps were manufactured by the United States Electric Lighting Co., were identical in construction with the said electric lamps made and sold by Condit, that the defence of said prior suit was conducted by said United States Electric Lighting Co., that when said prior suit was commenced Edward Weston had applications pending for letters-patent on electric lamps for the benefit of said company, which were granted, and became the property of said company pending the Condit suit; that pending the same suit the Naugatuck Railroad Co. took license from the said United States Electric Lighting Co. with knowledge of complainants' claim; that the use of the lamps so licensed under the "Weston Patents" was an infringement of the Brush patent; that these defendants' lamps were made under the Weston patents, and that the invention patented by one of them cannot be made without using the invention described and claimed in the Brush patent. Thereupon the present defendants said that the said United States Electric Lighting Co. was the real defendant in the case of *Brush v. Condit*, that the Naugatuck Railroad Co. is privy in estate with its licensor, and pleaded the judgment for the defendant in the former suit as a bar to the present suit. Plea overruled on the ground that the Brush invention and the Weston invention, as claimed in the respective patents, being alike, an adjudication that the invention of the elder patent has been anticipated by a third person, is a judgment which did not determine either the title of the United States Electric Lighting Co. to the junior patents or the liability attaching to such title. *Brush et al. v. Naugatuck Railroad Co. et al.*, 23 Blatch. 277.—SHIPMAN, 1885.

71. Principals who might be enjoined as servants of another, who has been found an infringer, when proceeded against as principals are not bound by the decision made against their former employer. *Hayes v. Bickelhaupt*, 32 O. G. 135.—WHEELER, 1885.

72. Prior adjudicated cases, where the contest was not a real one, are not of authority. *Schilling v. Cranford*, 37 O. G. 1349.—HAGNER, 1885.

73. "Each suit for infringement is to be tried upon the evidence produced in that case. It can only be some legal or some important and well-established mechanical principle which can be imported from one case into another with controlling influence. Each individual suitor is entitled to have his suit tried only on the evidence adduced against him in his own case."—*Ib.*

74. Although a question may have been properly raised by the pleadings in a former case, not between the same parties, yet if that question was not argued, the prior case has no weight as a precedent in a later case. *Celluloid M'fg Co. v. Tower*, 26 Fed. Rep. 451.—CARPENTER, 1885.

75. On final hearing, rulings on motions for preliminary injunctions may be entirely disregarded for obvious reasons. *Con. Fruit Jar Co. v. Bellaire Stamping Co.*, 35 O. G. 627.—SAGE, 1886.

76. Complainant brought suit in one of the circuits against defendant. Defendant suffered a decree *pro confesso*; and a perpetual injunction was issued and served. Complainant afterward brought suit on the same patent in another circuit for subsequent infringement. Defendant desired to have the former decree made an estoppel. The court held that it was not an estoppel, saying that the former decree was interlocutory in form, that its estoppel nature was doubtful, and that such doubts are to be resolved against him in whose favor the estoppel makes. *Roemer v. Neuman*, 26 Fed. Rep. 332.—COXE, 1886.

77. A ruling made by an official superior, in the same circuit, is controlling upon the court. *May v. County of Fond du Lac*, 27 Fed. Rep. 691.—DYER, 1886.

78. Two parties, A and J, were in interference in the Patent Office; A prevailed and took patent. Thereupon A's assignee brought suit against J's assignee, and complainant contended that by this action of the Patent Office complainant was entitled to a preliminary injunction. Thereof the court said: "While acquiescence in the decision of the Patent Office in an interference case might, under some circumstances, raise a presumption of the validity of the patent and *prima facie* entitle the complainant to protection by injunction, it is far from *res adjudicata*. No court is bound by the decision of the Patent Office granting a patent, when immediate steps are taken to test its validity in an action instituted for that purpose; and in an

interference case, when the issue is decided, the rights of the defeated party are not prejudiced if he avails himself of the law which virtually transfers the controversy to the courts.

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"The patent held by complainant and the decision of the Patent Office in the interference do not make out a case for an injunction, unless the *prima facie* right is fortified by a judicial decree or judgment or acquiescence, neither of which exists." Provisional injunction refused. *Minneapolis Harvester Works v. McCormick Harvesting Machine Co.*, 28 Fed. Rep. 565.—NELSON, 1886.

79. Although the judge called upon to pass upon the same question which has been decided by a judge who is deceased may have profound respect for the memory and ability of the deceased, it is not consistent with his duty to abdicate the function of exercising independent judgment or to refuse to suitors, on the mere score of sensibility, the equitable rights to which the conscience of the court thinks them entitled. *Reed et al. v. Lawrence et al.*, 29 Fed. Rep. 915.—SEVERNS, 1886.

80. While the decision of one court is not binding upon another court ordinarily, "a proper regard for certainty and uniformity in the law requires that the courts of one circuit shall follow the decision of another covering the same invention, and especially the same letters-patent." *Worswick M'fg Co. et al. v. Philadelphia*, 30 Fed. Rep. 625, *per curiam*, 1886.

81. The *jurisdiction* of every court over the *subject-matter* it has determined or acted upon is of necessity examinable into by every tribunal which is called upon to enforce or give effect to such judgment. But when the jurisdiction over the *subject-matter* exists, irregularities in the proceedings, or the failure of the court to show literal compliance with all the requirements of the law in the mode and manner of conducting the same, will not, when collaterally attacked, avail to defeat rights acquired thereunder." *May v. Logan Co. et al.*, 30 Fed. Rep. 250.—JACKSON, 1887.

82. The parties to the present suit are stated below. In the previous suit of *Gloucester Isinglass & Glue Co. v. Brooks*, wherein Le Page was one of the respondents, it was decreed by consent and agreement that the patent in suit was valid and that the defendants had infringed. The present respondent had, before the hearing, sold his business to the Russia Cement Co., a corporation in which he was a stockholder and treasurer, and the defence of the suit was afterward carried on by the Russia Cement Co., and



the suit proceeded against him and his associate Brooks without any change of parties on the record, and the said decree was entered against them. It was held that the said agreement was binding upon the present respondent, and that the validity of the patent was *res judicata* between him and the present complainant. *Gloucester Isinglass & Glue Co. v. Le Page*, 30 Fed. R.p. 370.—CARPENTER, 1887.

83. Where it has once been decided in a suit between A and B that A is the owner of a patent, then when B afterward seeks to have A compelled to assign an interest in that patent to him, the matter is *res judicata*. *Puetz v. Bransford*, 32 Fed. Rep. 318.—MILLER, 1887.

84. Where complainant's assignee has prevailed against the present defendant in a prior suit, such questions as are the same in the two suits are *res judicata*. *United States Metallic Packing Co. v. Tripp*, 31 Fed. Rep. 350.—COLT, 1887.

## RESTRAINT OF TRADE.

### CASES.

1. An infringer's bond not to continue the infringement is not in restraint of trade. *Barry v. Clirehugh*, 12 Law Rep. 367.—JONES, 1849.

2. Where A and B, being both interested in a patent, B agrees to manufacture under it until a certain time, then discontinue, and A then agrees to go on with the manufacture, neither to manufacture less than a certain price, such a contract is not void as being against public policy and in restraint of trade. *Parkhurst v. Kinsman et al.*, 1 Blatch. 488.—NELSON, 1849.

3. The principles of public policy, as regards matters in restraint of trade, do not extend to letters-patent for inventions. *Morse Twist Drill & Machine Co. v. Morse*, 103 Mass. 73.—CHAPMAN, 1869.

4. Where a local telephone company is forbidden by its license to connect with a telegraph company unless authorized by the licensor, and connection with one telegraph company is authorized by the licensor, another telegraph company may enforce connection with itself. *Missouri, State of v. Bell Telephone Co.*, 23 Fed. Rep. 539.—BREWER & TREAT, 1885.

## ROYALTY CONTRACT.

### CASES.

1. He who purchases an interest in a patent, upon royalty, without directly agreeing to prose-

cute the business to which the patent refers, enters into an implied contract so to do. *Wilson et al. v. Marlow*, 66 Illinois, 385.—BREESE, 1872.

2. Plaintiff represented to defendants that his patent covered a certain feature which he knew it did not cover. He subsequently successfully defended the present complainant against another patent which did cover such features. Plaintiff brought suit for his royalty, and defendants sought to recoup damages growing out of this state of facts. The court decided that defendants had suffered no damage and were not entitled to recoup. *Shaw v. Soule et al.*, 20 Fed. Rep. 790.—WHEELER, 1884.

3. Where one party uses the patent of another, under promise to pay for the same, but the specific sum is not agreed upon, "the law will imply a reasonable price." *Milligan v. Lalance & Grosjean M'fg Co.*, 21 Fed. Rep. 570.—WHEELER, 1884.

4. The plaintiff had a contract with the defendant in which defendant agreed to pay \$30 for "each of the first four hundred locomotive engines," to which defendant was to apply plaintiff's inventions. The terms of payment were \$6000 within thirty days after the contract was executed, and the remainder in a period of one year thereafter. It was held that complainant was bound to pay the \$6000 within thirty days, but not bound to use the invention on any definite number of engines. *Babcock v. Northern Pacific R. R. Co.*, 26 Fed. Rep. 756.—NELSON, 1886.

## SECRET INVENTION.

### CASES.

1. He who invents or discovers and keeps secret a process of manufacture, whether a proper subject for a patent or not, has not the exclusive right to it as against a patent, or against those who in good faith acquire knowledge of it; but he has a property in it which a court of chancery will protect against unauthorized disclosure. *Peabody et al. v. Norfolk et al.*, 98 Mass. 452.—GRAY, 1868.

2. "One who invents or discovers and keeps secret a process of manufacture, whether patentable or not, has a property therein which this court will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or discloses it to a third person." *Salomon v. Hertz et al.*, 35 O. G. 1109.—RUNYON, 1886.

## SECRETARY OF THE INTERIOR.

"SECRETARY OF THE INTERIOR" IN THE  
PATENT ACTS.

Act approved March 3d, 1849.

SECTION 2. *And be it further enacted*, That the Secretary of the Interior shall exercise and perform all the acts of supervision and appeal in regard to the office of the Commissioner of Patents, now exercised by the Secretary of State. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 19. *And be it further enacted*, That the Commissioner, subject to the approval of the Secretary of the Interior, may from time to time establish rules and regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 481. The Commissioner of Patents, under the direction of the Secretary of the Interior, shall superintend or perform all duties respecting the granting and issuing of patents directed by law; and he shall have charge of all books, records, papers, models, machines, and other things belonging to the Patent Office.

SEC. 483. The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office.

## CASES.

1. Where a correction of a clerical error is made in a patent by the Commissioner, it should be re-signed by his superior officer. *Woodworth v. Hall et al.*, 1 Woodbury & Minot, 389.—WOODBURY, 1846.

2. Application for mandamus to compel a patent to issue should not run against the Commissioner of Patents, but against the Secretary of the Interior. *United States v. Comm'r of Patents*, 22 O. G. 1365.—CARTTER, 1882.

3. A patent not countersigned by the Secretary of the Interior is void so long as the omission continues. *Marsh v. Nichols et al.*, 15 Fed. Rep. 914.—BROWN, 1883.

4. The Secretary of the Interior cannot revise the findings which the law authorizes the Commissioner of Patents to make. *Hoe et al. v. Butterworth, Comm'r*, 27 O. G. 519.—JAMES, 1884.

5. A judicial decision of the Commissioner of Patents, granting or withholding a patent, is not subject to review by the Secretary of the Interior. *Butterworth, Comm'r v. Hoe et al.*, 112 U. S. 50.—SUP. CT. 1884.

6. "The Secretary of the Interior has nothing whatsoever to do with the granting or refusal of a patent. While he is the presiding officer over the discipline of the Patent Office, he has no judicial function, so to speak, with regard to the granting of a patent. That belongs to the Commissioner of Patents. There is no appeal to the Secretary of the Interior in that regard." *Kirk v. Commissioner of Patents et al.*, 37 O. G. 451.—MERRICK, 1886.

7. In a bill against the Commissioner of Patents to cause him to issue a patent, the Secretary of the Interior need not be joined.—*Id.*

## SERVICE OF PROCESS.

## CASES.

1. "By the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts." "Independently of positive legislation, the process can only be served upon persons within the same districts." "The acts of Congress adopting the state process, adopt the forms and modes of service only, so far as the persons are rightfully within the reach of such process, and do not intend to enlarge the sphere of the jurisdiction of the circuit courts." "The right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to process *in personam*; and . . . even where a person is amenable to process *in personam*, an attachment against his property cannot be issued except as part of or together with process to be served upon his person." *Day v. Newark India Rubber M'fg Co.*, 1 Blatch. 628.—NELSON, 1850.

2. "Process of attachment against the property of a non-resident defendant cannot issue from a circuit court, except as part of or together with process to be served on his person; and no judgment can be rendered against a non-resident defendant who has not been personally served with process, unless he has entered an appearance." *Saddler v. Hudson*, 2 Curtis 6.—CURTIS, 1854.

3. "By Section 11 of the judiciary act of 1789, it is provided: 'that no civil suit in a circuit or district court shall be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' . . . The construction of the foregoing section is that jurisdiction of the person of a defendant who is an inhabitant of another state can only

be obtained, in a civil action, by service of process on his person within the district where the suit is instituted; and that no jurisdiction can be acquired by attaching property of a non-resident defendant, pursuant to a state attachment law." There is no different construction of this law for patent cases. *Chaffee v. Hayward*, 20 Howard, 208.—SUP. CT. 1857.

4. The service of a copy of the order of a court granting an injunction is not the service of the injunction, and will not hold as such in contempt proceedings. *Whipple v. Hutchinson*, 4 Blatchford, 190.—NELSON, 1858.

5. An inventor had assigned his patent to a corporation. This inventor believed that a party residing in another district was using an infringement, and invited him to come and confer with him upon that matter. The party came, and thereupon the corporation had him served with process. In an infringement suit the service was held to be a good one. *Union Sugar Refinery v. Mathiesson*, 2 Clifford, 304.—CLIFFORD, 1864.

6. "It is clearly the right of the plaintiff to serve the defendant with process in the district where the plaintiff resides, provided that the process be in proper form, and the defendant be found in that district, within the true intent and meaning of that provision." But it cannot be that he was found there, if he was inveigled or enticed into the district for the purpose of making such service upon him, by false representations and deceitful contrivances of the plaintiff in the suit, or by any one acting in his behalf.—*Ib.*

7. "Where the defendant, residing in another district, is inveigled, enticed, and induced to come into the district where the plaintiff resides, by the false representations or deceptive contrivances of the plaintiff, or any one acting in his behalf, for the purpose of serving legal process upon the defendant, and the same is served through such improper means, such service is illegal and ought to be set aside, and the process should be dismissed."—*Ib.*

8. Informality as to service of notice on motion for dissolution of injunction is cured by the appearance of the party on whom the notice was or should have been served. *Brammer v. Jones et al.*, 2 Bond, 100.—LEAVITT, 1867.

9. Where the defendant resides in another circuit than that in which the suit is brought, and service of process is made upon him while passing through the latter circuit, the court acquires jurisdiction of the person of the defendant, and may enjoin him against infringement elsewhere. *Thompson et al. v. Mendelsohn*, 5 Fish. P. C. 187.—MCKENNAN, 1871.

10. "To be summoned within the meaning of the statute, is to be served with a process which the law recognizes, and which the party is bound to obey. The law knows no other summons." *Spaulding v. Tucker et al.*, 4 Fish. P. C. 633.—SAWYER, 1871.

11. Defendants contended against the grant of a provisional injunction against them, on the ground of a supposed irregularity in the service of the subpoena. It was held that defendants having had notice of the motion, and having appeared in order to oppose it, could not take advantage of any such irregularity. *Thayer et al. v. Wales et al.*, 9 Blatch. 170.—BENEDICT, 1871.

12. Where a bill of complaint avers that defendants reside out of the district, "it should appear affirmatively in the return that the subpoena was served on him within this district, to render such return a foundation for the exercise of jurisdiction over him." *Thayer et al. v. Wales et al.*, 5 Fish. P. C. 448.—BENEDICT, 1872.

13. Jurisdiction over a corporation of one state cannot be acquired in another district by service of process upon one of its officers in such district. *Decker v. N. Y. Belting & Packing Co.*, 6 Fish. P. C. 374.—BLATCHFORD, 1873.

14. A party to a patent suit in one circuit cannot, while attending the examination of witnesses in that suit in another circuit, be served with papers in another suit upon the same patent in the last-mentioned circuit. *Plimpton v. Winslow*, 20 Blatch. 82.—BLATCHFORD, 1881.

15. A party on whom improper service of process is made must, in the first motion based thereon, show the facts which evidence the impropriety of the service; if such facts are then within his knowledge; and it will not avail him to make a showing of such facts in a second motion. *Matthews v. Puffer et al.*, 20 Blatch. 233.—BLATCHFORD, 1882.

16. For a discussion of the question of service of process upon a non-resident corporation, see —. *Gray et al. v. Taper Sleeve Pulley Works*, 24 O. G. 602.—ACHESON, 1883.

17. The official residence of the Commissioner of Patents is in the District of Columbia, and where it is sought to make him a party to a suit elsewhere, proper service of process upon him must be attained in some way. *Butterworth Comm'r v. Hill et al.*, 5 Sup. Ct. Rep. 796.—SUP. CT. 1885.

18. Application was made to a court for an attachment against Vernon H. Brown, individually, and Vernon H. Brown, Albert H. Brown, Vernon C. Brown, and George H.

Wilde, members of the firm of Vernon H. Brown & Co., and each of them, for contempt of court in violating an injunction. It did not appear by the affidavits that either of the said members named, except Vernon H. Brown, had had a personal notice served upon him of the motion in this case. Thereupon the court said : "Instances have doubtless arisen and will again arise where a substituted service has been and will be accepted by the court in the place of a personal service ; but the proper practice in all such cases is to apply to the court, assign satisfactory reasons, and thus obtain its order in advance for the substituted service." Motion was therefore dismissed as to all except Vernon H. Brown. *Bate Refrigerating Co. v. Gillette et al.*, 32 O. C. 1466.—NIXON, 1885.

19. "Suits in equity in the federal courts are regulated, not by the state statutes, but by the judiciary acts and the rules of equity practice adopted for and governing said courts. Equity, Rule 13 provides 'the service of all subpoenas shall be by delivery of a copy thereof, by the officers serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.' The court can acquire jurisdiction over parties in equity suits only by the service of process within the district in compliance with the requirements of this rule, or by their voluntary appearance." The requirements of such a rule are not complied with by returns, the statements of which make a local corporation on whom service is actually made nothing but a partnership agent of the parent corporation, the location of which is outside of the district where service is made. *United States v. American Bell Telephone Co. et al.*, 29 Fed. Rep. 17.—JACKSON, 1886.

20. A suit was brought on behalf of the Government against the American Bell Telephone Co., whose home and location was in Boston in the state of Massachusetts. Suit was brought in the Southern District of Ohio, and service was made upon certain local telephone corporations. The court held that "a return stating that service was made upon an officer of a local corporation, with the recital, in parenthesis, that such local company was 'the partner and agent of the American Bell Telephone,' fails to show affirmatively the facts required to constitute a valid service, either under the judiciary acts, the rules of practice governing this court, or under the statute of Ohio relating to service on foreign corporations, which provides [Rev. St. Sec. 5046] that 'when the defendant is a for-

eign corporation, having a *managing agent* in this state, the service may be upon such agents.' It is nowhere alleged in the bill that the local corporations, on whom or whose officers service was had, were the 'managing agent' or 'agents' of said Bell Telephone Co. No presumptions are to be indulged in favor of such a return, so as to give the court jurisdiction over a non-resident corporation."—*Ib.*

21. A marshal's return of service should be confined to a statement of what he did in executing the subpoenas, and should not state conclusions of law and fact apart from what was done.—*Ib.*

22. "Neither the patent law, nor the privileges secured to patentees thereunder, in any way enlarge, modify, or change the judiciary acts in respect to either the territorial jurisdiction of the federal courts or the proper service of process upon defendants."—*Ib.*

## SKILLED AID TO INVENTORS.

### CASES.

1. "An inventor is not necessarily a machinist. He is often dependent on the skill of this department of knowledge to give embodiment and practical operation to his discovery." *Gibson v. Harris*, 1 Blatch. 167.—NELSON, 1846.

2. "To constitute an inventor, it is not necessary he should have the mechanical skill and dexterity to make the drafts. If the ideas are furnished by him for producing the result aimed at, he is entitled to avail himself of the mechanical skill of others to carry out practically his contrivance." *Sparkman et al. v. Higgins et al.*, 1 Blatch. 205.—BETTS, 1846.

3. It was charged that Morse was not the inventor of his electric telegraph, because of the aid he received from skilled mechanics and scientific men in its development. Thereof the court said : "Neither can the inquiries he made nor the information or advice he received from men of science in the course of his researches impair his right to the character of an inventor. No invention can possibly be made, consisting of a combination of different elements of power, without a knowledge of the properties of each of them, and the mode in which they operate on each other. And it can make no difference, in this respect, whether he derives his information from books or from conversation with men skilled in the science. If it were otherwise, no patent in which a combination of different elements is used could ever be obtained ; for no man ever made such an invention, without hav-

ing first obtained this information, unless it was by some fortunate accident. And it is evident that such an invention as the electro-magnetic telegraph could never have been brought into action without it, and both were necessary to bring it to a successful operation. And the fact that Morse sought and obtained the necessary information and counsel from the best sources, and acted upon it, can neither impair his rights as an inventor nor detract from his merits." *O'Reilly et al. v. Morse et al.*, 15 Howard, 62.—SUP. CT. 1853.

4. "If the employer conceives the result embraced in the invention, or the general idea of a machine upon a particular principle, and in order to carry his conception into effect it is necessary to employ manual dexterity, or even inventive skill, in the mechanical details and arrangements requisite for carrying out the original conception, in such cases the employer will be the inventor, and the servant will be a mere instrument through which he realizes his idea." *Wellman v. Blood*, 1 MacArthur's P. C. 432.—MORSELL, 1856.

5. For one person to announce to another person that he desires a paper of certain quality gotten up, the second person then proceeding to get it up does not constitute the first person an inventor of the product. *Union Paper Collar Co. v. Van Deusen et al.*, 10 Blatch. 109.—BLATCHFORD, 1872.

6. A person may receive a valuable suggestion and assistance and yet be the legal inventor of the improvement claimed by him. *Sanders v. Logan et al.*, 9 Am. Law Reg. 475.—GRIER, 1861.

7. "Where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they in the course of experiments arising from that employment make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the improved principle, and may be embodied in his patent as a part of his invention.

"Suggestions from another, made during the progress of such experiments, in order that they may be sufficient to defeat a patent subsequently issued, must have embraced the plan of the improvement, and must have furnished such information to the person to whom the communication was made that it would have enabled an ordinary mechanic, without the exercise of any ingenuity and special skill on his part, to con-

struct and put the improvement in successful operation.

"Persons employed, as much as employers, are entitled to their own independent inventions; but where the employer has conceived the plan of an invention and is engaged in experiments to perfect it, no suggestion from an employé not amounting to a new method or arrangement, which, in itself, is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. But where the suggestions go to make up a complete and perfected machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belonged to another." *Agawam Co. v. Jordan*, 7 Wall. 538.—SUP. CT. 1868.

8. "Invention is the work of the brain and not of the hands. If the conception be practically complete, the artisan who gives it reflex and embodiment in a machine is no more the inventor than the tools with which he wrought. Both are instruments in the hands of him who sets them in motion and prescribes the work to be done. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought and brings into activity a different faculty. Their domains are distinct. The mechanic may greatly aid the inventor, but he cannot usurp his place. As long as the root of the original conception remains in its completeness, the outgrowth—whatever shape it may take—belongs to him with whom the conception originated." *Blandy et al. v. Griffith et al.*, 3 Fish. P. C. 609.—SWAYNE, 1869.

9. He who as a draughtsman executes the ideas of another is not the inventor. He who makes the suggestions is the inventor.—*Id.*

10. Instances are frequent "in which a person engaged as a mechanic or constructor, in embodying the inventor's idea in a material form, attempts to prove that he was the first inventor, because he made, or aided in making, the first machine." *Child v. Boston & Fair Haven Iron Works Co.*, 1 Holmes, 303.—SHEPLEY, 1873.

11. The improvement in question was for paper collars; the alleged inventor did not invent either the paper or the process, but his claim was that, as he was the first person to conceive the idea that paper possessing the described qualities was desirable, and inasmuch as he was not a paper manufacturer, he had a right to employ trained skill to produce the desired product and still remain the inventor; the court held

otherwise. *Union Paper Collar Co. v. Van Deusen et al.*, 23 Wall. 530.—Sup. Ct. 1874.

12. "Where a person has discovered a new and useful principle in a machine, manufacture, or composition of matter, he may employ other persons to assist in carrying out that principle; and if they, in the course of experiments arising from that employment, make discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are, in general, to be regarded as the property of the party who discovered the original principle, and they may be embodied in his patent as part of his invention."—*Id.*

13. Where one person conceives of an improvement and employs a skilled person to embody it, the former is the inventor and not the latter. *Yoder v. Mills*, 25 Fed. Rep. 821.—McKENNAN, 1885.

#### SPECIFICATION—SUFFICIENCY OF.

##### "SPECIFICATION—SUFFICIENCY OF" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 2. *And be it further enacted*, That the grantee or grantees of each patent shall, at the time of granting the same, deliver to the Secretary of State a specification in writing containing a description, accompanied with drafts or models, and explanations and models (if the nature of the invention or discovery will admit of a model), of the thing or things by him or them invented or discovered, and described as aforesaid, in the said patents; which specification shall be so particular, and said models so exact, as not only to distinguish the invention or discovery from other things before known or used, but also to enable a workman or other person skilled in the art of manufacture whereof it is a branch, or wherewith it may be nearest connected, to make, construct, or use the same, to the end that the public may have the full benefit thereof, after the expiration of the patent term; which specifications shall be filed in the office of the said Secretary, and certified copies thereof shall be competent evidence in all courts and before all jurisdictions where any matter or thing touching or concerning such patent, right, or privilege shall come in question.

SEC. 6. This section provides as a defence to an action for infringement evidence "that the specification filed by the plaintiff does not contain the whole of the truth concerning his invention or discovery; or that it contains more than is necessary to produce the effect described; and

if the concealment of part or the addition of more than is necessary shall appear to have been intended, or shall actually mislead the public, so as the effect described cannot be produced by the means specified, then and in such cases the verdict and judgment shall be for the defendant." [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 3. *And be it further enacted*, That every inventor, before he can receive a patent, shall swear or affirm that he does verily believe that he is the true inventor or discoverer of the art, machine, or improvement for which he solicits a patent, which oath or affirmation may be made before any person authorized to administer oaths, and shall deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same. And in the case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of the principle or character, by which it may be distinguished from other inventions; and he shall accompany the whole with drawings and written references, where the nature of the case admits of drawings, or with specimens of the ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention is of a composition of matter; which description, signed by himself, and attested by two witnesses, shall be filed in the office of the Secretary of State, and certified copies thereof shall be competent evidence in all courts where any matter or thing touching such patent right shall come in question. And such inventor shall, moreover, deliver a model of his machine, provided the Secretary shall deem such model to be necessary.

SEC. 6. *Provided always, and be it further enacted*, That the defendant in such action shall be permitted to plead the general issue, and give this act, and any special matter, of which notice in writing shall have been given to the plaintiff or his attorney thirty days before trial, in evidence, tending to prove that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the desired effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing thus secured by patent was not originally discovered

by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person ; in either of which cases judgment shall be rendered for the defendant with costs, and the patent shall be declared void. [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 6. *And be it further enacted*, That any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent in public use or on sale with his consent or allowance, as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application, in writing, to the Commissioner of Patents, expressing such desire ; and the Commissioner, on due proceedings had, may grant a patent therefor. But before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same ; and in case of any machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions ; and shall particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery. He shall, furthermore, accompany the whole with a drawing or drawings, and written references, where the nature of the case admits of drawings, or with specimens of ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter ; which descriptions and drawings, signed by the inventor and attested by two witnesses, shall be filed in the Patent Office ; and he shall moreover furnish a model of his invention, in all cases which admit of a representation by model, of a convenient size to exhibit advantageously its several parts. The applicant shall also make oath or affirmation

that he does verily believe that he is the original and first inventor or discoverer of the art, machine, composition, or improvement for which he solicits a patent, and that he does not know and does not believe that the same was ever before known or used ; and also of what country he is a citizen ; which oath or affirmation may be made before any person authorized by law to administer oaths.

SEC. 15. This section provides as a defence to an action for infringement proof “ that the description and specification filed by the plaintiff does not contain the whole truth relative to his invention or discovery, or that it contains more than is necessary to produce the desired effect ; which concealment or addition shall fully appear to have been made for the purpose of deceiving the public.” [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 26. *And be it further enacted*, That before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same ; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle so as to distinguish it from other inventions ; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery ; and said specification and claim shall be signed by the inventor and attested by two witnesses.

SEC. 61. This section provides as a defence to an action for infringement evidence :

“ First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect.” [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4888. Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and

using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same; and in case of a machine, he shall explain the principle thereof and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor and attested by two witnesses.

SEC. 4919. This section provides as a defence to an action for infringement, as follows:

"First. That for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect."

#### CASES.

1. Whether an omission of description from a specification is material, whether the invention can be practised from the specification, and whether the omission was with intent to deceive, are all questions of fact. *Reutgen v. Kanowers et al.*, 1 Wash. 168.—WASH. 1804.

2. Where a patent made incomplete mention of a particular feature of the invention, and made no reference to the petition, which was more explicit, the patent was held invalid. *Evans v. Chambers*, 2 Wash. 125.—WASH. 1807.

3. Insufficient description of invention does not vitiate a patent unless the defect had its rise in an intent to deceive the public. *Whittemore v. Cutter*, 1 Gall. 429.—STORY, 1813.

4. The title or name given to an invention in a patent is not a material matter.—*Ib.*

5. A specification is to be adapted "to the comprehension of any practical mechanic skilled in the art of which the machine is a branch, without taxing his genius or his inventive powers." *Gray et al. v. James et al.*, 1 Peters' C. C. 394.—WASH. 1817.

6. Whether a specification be defective in description, and whether the defect had its rise in a deceptive intent, are questions of fact.—*Ib.*

7. Deficiency of description in a specification must be with intent to deceive in order to vitiate the patent. (Referring to Section 6, act 1793.)—*Ib.*

8. Clear description is requisite, that the public may readily practise the invention at the ex-

piration of the patent. If not present, the object is defeated. *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

9. Insufficiency of description must be with intent to deceive in order to vitiate the patent. (Sec. 6, act 1793.)—*Ib.*

10. "Where the construction of the patent and specification, as to the subject of the grant, is doubtful, the affidavit—if more precise—may be resorted to, to explain the ambiguity." *Pettibone v. Derringer*, 4 Wash. 215.—WASH. 1818.

11. A mistake in description which is apparent does not vitiate a patent. *Kneass v. Schuyllkill Bank*, 4 Wash. 9.—WASH. 1870.

12. It is not required that things common and well known shall be described in a specification.—*Ib.*

13. Whether a specification fully describes the invention is a question of fact. *Evans v. Eaton*, 7 Wheat. 356.—SUP. CT. 1822.

14. A specification has two objects. One is to fully describe the invention, that the public may put it in practice when the patent expires. The other is to define the extent of the invention, that the public may not ignorantly infringe.—*Ib.*

15. Plaintiff's specification need not, as a rule, describe the old machine, but it may become necessary to do so in order to make the specification intelligible.—*Ib.*

16. It is not within the province of the court, in a jury case, to decide a patent void for defective specification.—*Ib.*

17. The title of a patent should not indicate one thing and the specification describe another. *Sullivan v. Redfield et al.*, 1 Paine, 441.—THOMPSON, 1825.

18. Drawings annexed to and referred to in the specification constitute a part thereof. *Earle v. Sawyer*, 4 Mason, 1.—STORY, 1825.

19. It is the province of the court to decide whether a specification is so uncertain as to have no meaning. *Davis v. Palmer*, 2 Brock, 298.—MARSHALL, 1827.

20. "It is within the province of the jury to decide whether a skilful workman can carry into execution the plea of the inventor."—*Ib.*

21. "It is undoubtedly a correct rule, in relation to patents, that if the specification is sufficiently explicit in its details to enable a skilful mechanic to construct the patented improvement without any other aid, it is not to be considered void because some of the minor details of the machine are not set forth at large." *Burrall v. Jewett*, 2 Paige, 134.—WALWORTH, 1830.



22. "The drawing may be referred to for the purpose of aiding the specification which would otherwise be imperfect."—*Ib.*

23. The specification, the drawing, and the model are all to be taken as parts of the description. *Whiting et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

24. "The clearness of the specification must be according to the subject-matter of the patent; it is addressed to persons in the profession having knowledge and skill in the subject-matter." "The patent is good, though men ignorant of the subject to which it relates may not understand it."—*Ib.*

25. The defence of insufficient description only clears the defendants in the present case; the defence of such insufficiency with intent to deceive voids the patent. *Grant et al. v. Raymond et al.*, 6 Peters' C. C. 218.—SUP. CR. 1832.

26. Patents are not to be treated as odious monopolies, nor to be construed with rigor. They are to be construed fairly and not to be subjected to over-nice and critical refinements. When the nature and extent of the invention can be ascertained from the fair sense of the words used, rights are not to be frittered away on formal objections. *Ames v. Howard et al.*, 1 Sumner, 482.—STORY, 1833.

27. Where "the specification shows clearly what parts the patentee claims to have invented," and describes the structure so as to enable a person of ordinary skill in the art to construct it, that suffices. *Stanley v. Whipple*, 2 McLean, 35.—MCLEAN, 1839.

28. "The specifications must contain reasonable certainty. They must so describe the parts of a machine as to enable a person skilled in the construction of machines to build one. And if the patent be for an improvement, the improvement must be described with the same precision. This description need not be so clear as to be understood by an individual wholly unskilled in the structure of machines." *Brooks et al. v. Bricknell et al.*, 3 McLean, 250.—MCLEAN, 1843.

29. "In describing the improvement of a machine in use and well known, it is not necessary to state in detail the structure of the entire and improved machine. It is only necessary to describe the improvement by showing the parts of which it consists and the effects which it produces. Such a description in reference to the machine improved is sufficient."—*Ib.*

30. The specification of a patent need not necessarily refer specifically to the accompanying drawings.—*Ib.*

31. Where the "rib" in a cotton-gin was an important feature of the improvement, it was held that if a skilled mechanic could, from that description, construct and properly locate the rib, then the description was sufficient, although it might require some niceties in adjusting the different thicknesses to the different kinds of cotton. *Carver v. Braintree M'fg Co.*, 2 Story, 432.—STORY, 1843.

32. It is not incumbent upon a patentee to suggest in his specification all the possible modes by which his improvement might be varied, and yet the effect be produced. "It is sufficient for him to state the modes which he contemplates to be best, and to add that other mere formal variations from these modes he does not deem to be unprotected by his patent."—*Ib.*

33. "The drawings are to be treated as part of the written specification, and may be referred to to show the nature and character and extent of the claim, as well as to compose a part of the description." *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

34. "The law has two objects: First, as the grant gives an exclusive right that the nature and extent of it may be understood, and, second, that when the exclusive right ceases, from the description, the machine may be constructed." *Brooks et al. v. Jenkins et al.*, 3 McLean, 432.—MCLEAN, 1844.

35. "The specification must be complete. No defects can be obviated by extraneous evidence at the trial."—*Ib.*

36. "The utmost precision in the description of the machine is not to be expected, nor is it essential. Parts of machinery and processes generally known need not be described. A wedge, pulleys, rollers, rack and pinion, and other things are known to all machinists without stating their size or structure. Nor is it essential to state the proportion of the added parts of a machine; nor the velocity of its operations. These are matters of adjustment for the eye and judgment of the constructor. Whether a machine be large in its parts or small, its motion slow or quick, makes no difference in the principle of it. If a planing machine operates on a soft substance, its motion must necessarily be slower on a hard one. By a detailed description of things generally known, and not essential to the improvement or combination invented, the statement is rendered more prolix and less perspicuous."—*Ib.*

37. Whether specification and drawings contain description or claim of mechanism "with such reasonable certainty and precision as the law requires, to constitute a valid claim there-

for, is not a matter of law, but involves matter of fact as to the certainty and sufficiency of the description in the particulars mentioned." *Washburn et al. v. Gould*, 3 Story, 122.—STORY, 1844.

38. "Whether the patent is void for uncertainty and ambiguity in the description is a matter of fact to be decided upon the evidence by experts."—*Ib.*

39. Unless a patentee clearly describes his improvement, "the public are unable, when the time expires, to make machines correctly, and derive the proper advantages from the patent." *Davoll et al. v. Brown*, 1 Woodbury & Minot, 53.—WOODBURY, 1845.

40. "It is the province and duty of the court to settle the meaning of the patent, and if that cannot be ascertained satisfactorily upon the face of the specification, the law declares it insufficient for ambiguity and uncertainty. The meaning of the terms employed in view of the object the inventor had in contemplation, and to ascertain the extent of his claim, must be determined by the court, and the matters of fact presented by the respective parties to support or defeat the patent are then to be examined and applied as if the construction fixed by the court had been incorporated in the specification." *Emerson v. Hogg et al.*, 2 Blatch. 1.—BETTS, 1845.

41. The law does not render it necessary to set forth the old machinery with which the new contrivance is to be connected.—*Ib.*

42. "Specifications are legal instruments no less than descriptions of mechanical and philosophical, and sometimes chemical improvements." *Hovey v. Stevens*, 3 Woodbury & Minot, 17.—WOODBURY, 1846.

43. "If the description and drawing are not such as might enable a skilful artist to construct the machine," they are insufficient to satisfy the law. *Knight v. Gavitt*, Pat. Of. Mir. 131.—KANE, 1846.

44. A patent described a process as follows: "Take of common anthracite coal, unburnt, such quality as will suit the kind of clay to be made into brick or tile, and mix the same, when well pulverized, with the clay before [it] is moulded; that clay that requires the most burning will require the greatest proportion of coal dust; the exact proportions thereof cannot be specified; but, in general, three fourths of a bushel of coal dust to one thousand brick will be correct. Some clay may require one eighth more, and some not exceeding a half bushel."

The court held, the point being raised, that there was no fatal vagueness or uncertainty in

this description. *Wood v. Underhill et al.*, 5 Howard, 1.—SUP. CT. 1847.

45. "The specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention; that is to say, to compound and use it without making any experiments of his own. In patents for machines, the sufficiency of the description must, in general, be a question of fact to be determined by the jury. And this must also be the case in compositions of matter where any of the ingredients mentioned in the specification do not always possess exactly the same degree."—*Ib.*

46. "When the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent to be void. And the same rule would prevail where it was apparent that the proportions were stated ambiguously and vaguely. For in such cases it would be evident on the face of the specification that no one could use the invention without first ascertaining by experiment the exact proportion of the different ingredients required."—*Ib.*

47. In a specification the patentee "need not describe particularly a disclaimer of the old parts." *Hogg et al. v. Emerson*, 6 Howard, 437.—SUP. CT. 1848.

48. A general reference in a specification to a certain thing as being old is a sufficient notice that the old thing is not claimed. *Many v. Jagger et al.*, 1 Blatch. 372.—NELSON, 1848.

49. "The description must be such as to enable a person skilled in the art to which the invention pertains to make the thing patented in such a manner that it will be useful."—*Ib.*

50. The description in a specification must be such as to enable a competent person to make a device like that of defendants', if the latter are to be found to infringe. *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

51. The plaintiff's specification and description must be so clear and intelligible as to enable an artisan to make the patented "device without any new invention or exercise of inventive power. . . . It is only required of an inventor so to describe the article for which he seeks a patent as that a person skilled in the particular art relating to it can construct the fabric from the description, by the exercise of his skill as an artisan—not that it must be so described that a person unacquainted with or unskilled in the art may be able to produce it."—*Ib.*

52. If an invention is not described with rea-

sonable certainty and precision, the patentee can claim nothing under his patent. The object of the statutory requirement in this regard is twofold: "First, that when the term, for which the patentee has enjoyed the exclusive right, has expired, and his invention becomes the property of the public, such means of information may be accessible, through the records of the Patent Office, as will enable others to avail themselves of its benefits; and, second, that while the patent is in force, others may be informed of the precise claim of the patentee, and may not ignorantly infringe his exclusive right." *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

53. "It is for the jury to decide whether, from the evidence," a specification is sufficiently practical "to enable a skilful mechanic to construct the thing which is described."—*Id.*

54. "Under the act of 1793 . . . the law did not . . . require the patentee or the Commissioner to make the specification a part of the letters-patent, as it does by the act of 1836. But the inventor still had a right, if he pleased, for greater fulness and clearness, not only to file a specification as such, as the law directed, but to advise the Patent Office also to incorporate it into the letters as a part of them by express terms of reference." *Hogg et al. v. Emerson*, 11 Howard, 587.—SUP. CT. 1850.

55. The court may look to the whole specification and also to the drawings for the explanation of anything obscure.—*Id.*

56. A description of the old parts of a machine which contains the new improvement does not vitiate a specification. *Rheem v. Holliday*, 16 Pennsylvania State, 347.—COULTER, 1851.

57. "The patent should be carefully examined to find the thing discovered, and if it be clearly set forth, the patentee should not suffer for the imperfection or vagueness of the language used in describing its true extent and nature." *Goodyear et al. v. Central Railroad of New Jersey*, 2 Wall. Jr. 356.—GRIER, 1853.

58. In a trial before a jury it is "the right of the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines to make the thing described. This the statute requires, and of this the jury are to judge." *Battin et al. v. Taggart*, 17 Howard, 74.—SUP. CT. 1854.

59. The drawings and model are to be considered in determining upon the sufficiency of the specification; "the construction which ought to be given to the specification should not be too strict and technical." *Stephens et al. v. Salisbury*, 1 MacArthur's P. C. 379.—MORSELL, 1855.

60. "As the patent law of the United States grants the patentee a monopoly, and not only awards damages, but inflicts a penalty for a violation of the exclusive privilege, it requires that the invention shall be so described, in the specifications, that one acquainted with the art or manufacture to which it relates may not only understand the invention, but be able, by following the specifications, with the aid of the drawings, to construct the machine, or make the combination, which is the subject of the patent. And this rule of law is founded on the equitable principle, that a monopoly or exclusive privilege should not be given to an individual without a just equivalent to the public. While the statutes hold out encouragements to stimulate inventions and improvements in the arts and manufactures, by securing to the inventor a remuneration for his outlay and a reward for his ingenuity, nevertheless, the consideration for which the patent issues to him is the benefit he confers on the community, by his discovery eventually becoming public property. The patentee may be regarded as a purchaser from the public, being bound to so communicate his secret, by specification, drawings, and models, that it shall be successfully available to the whole community at the expiration of the patent." *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILLSON, 1856.

61. "The patentee need not specify the kind of power to be employed, or the method of applying it in working the machine." *Carr v. Rice*, 1 Fish. P. C. 198.—BETTS, 1856.

62. If a certain thing is absolutely necessary to the working of a patented machine, and is not pointed out in the specification, the defect is a fatal one.—*Id.*

63. "One part of the specification and drawings may be resorted to to explain any other, and so as it respects the oath." *King v. Gedney*, 1 MacArthur's P. C. 443.—MORSELL, 1856.

64. The question whether a specification is uncertain and insufficient is a question of law for the court. *Wayne v. Holmes*, 1 Bond, 27.—LEAVITT, 1856.

65. "If from the entire instrument the true nature of the improvement, with the mode of carrying it out, is disclosed, it will be deemed to be a substantial compliance with the statute . . . In the description of the mode and the directions for constructing the improved machine, it is not necessary to state those improvements which it is apparent would be proper or indispensable in its structure. This would involve what the statute designates as unnecessary prolixity, which is to be avoided in a specification."—*Id.*

66. Where the specification of a patent for a washboard stated that the zinc used was to be sharpened to "a cutting edge," it was held that it was not necessary to describe the process by which the zinc was to be cut, or to state the precise angles of the cutting edge, as these were matters within the intelligence of an ordinary mechanic. And where the same specification directed that the sharpened edges of the zinc were to be buried to "a suitable extent," it was held that a mechanic could not fail to know that for the purpose of his "incision, the sharpened edge must extend to a short distance beyond the board on which the plate of zinc was fixed." In the same case it was also held that it was not necessary to describe the precise mode of applying the pressure by which the zinc was forced into the wood and the different parts of the board fastened together.—*Id.*

67. "The requirement of the statute in reference to certainty and definiteness in the directions for constructing a machine for which a patent is sought has in view two distinct objects. The first is that the public may know precisely what the invention is, and the other that upon the expiration of the patent they may have an inherent guide in the construction of the patented machine from the specification in the Patent Office."—*Id.*

68. "It is a settled rule of the law of patents, 'that the specification need not describe that which is within the ordinary knowledge of any workman who may be employed to put up the apparatus or construct the machine.' Such a workman, however, must have a competent knowledge of the work. That is, technically, be what the law calls an expert—one experienced or skilled in the particular business to which his improvement appertains, or with which it is most nearly connected." *Page v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

69. "Where the object of the patent may be obtained by a competent mechanic of ordinary skill, one acquainted with the structure of similar machines, or structures involving the same principle, by fairly following out the specifications and drawings, without other inventions or additions or experiment, the patent is valid and unimpeached, and the rule of law is sufficiently met."—*Id.*

70. "The patentee is bound to disclose in his specification the best method of working his machine known to him at the time of his application."—*Id.*

71. "The specification is intended to teach the public the improvement patented; it must fully disclose the secret; must give the best mode

known to the inventor, and contain nothing defective or that would mislead artists of competent skill in the particular manufacture."—*Id.*

72. The requirement of a full description of an invention in a specification is "to enable the public, after the expiration of the patent, to put in successful practice the invention from the description alone which has been furnished by the patentee." *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

73. "It would not seem to be a work of much labor for a man of ingenuity to describe what he has invented." *Le Roy et al. v. Tatham et al.*, 22 Howard, 132.—SUP. CT. 1859.

74. "If from the specifications and drawings, taken as a whole, any person skilled as aforesaid could construct and use the . . . machine or device therein described, without invention of his own, which would attain the result claimed for it in the said patent, then the said patent is good, although there may be a mistake in describing the action of some part of the machinery, but which mistake could be easily discovered by the mechanic when he came to examine the same." *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

75. The object and design of a sufficient specification is, "that the public may be admonished of precisely what the patentee claims, that it may not be ignorantly infringed. That is one purpose, and the second is, that when the exclusive right shall have expired the public may be at no loss to know what the nature of the invention was, so as to make it valuable and practical." *Judson v. Moore et al.*, 1 Bond, 285.—LEAVITT, 1860.

76. "It may be remarked, that in carrying out any invention, the exercise of some skilled judgment on the part of the mechanic called to construct it will always be required. Something must necessarily be left to him. If with the exercise, therefore, of ordinary intelligence and skill the jury believe that the invention could be constructed from the information given by the patent, there would be no doubt that the specification answered the requisite of the statute."—*Id.*

77. "With regard to the construction of specifications, . . . it is a rule that they shall be construed in a liberal spirit, and that they shall receive an interpretation that will, if practicable, effect the end and object designed. This is fair. A defect should be clear and palpable, to justify the court in saying that the patent was a nullity."—*Id.*

78. Where the specification of a patent makes reference, as to a certain matter, to the speci-

cation of another patent, which other patent gives the desired information about such matter, the specification of the patent first mentioned is sufficiently explicit. *Goodyear et al. v. New York Gutta-Percha & India Rubber Vulcanite Co. et al.*, 2 Fish. P. C. 312.—NELSON, 1862.

79. Where a specification mentions a specific temperature at which a patented process can be practised, it is not a material matter that it is possible to practise the process with some variation of the temperature. *Tilghman v. Werk*, 1 Bond, 511.—LEAVITT, 1862.

80. Though a higher heat and longer boiling than that described in the specification of a patented process may be used with good results, such facts do not invalidate such specification. *Buchanan v. Howland et al.*, 5 Blatch. 151.—HALL, 1863.

81. "The inventor is bound so to describe his invention that the article can be made by one skilled in the art, and it is his duty to describe the best mode which he knows." *Magie Ruffle Co. v. Douglas et al.*, 2 Fish. P. C. 330.—SHIPMAN, 1863.

82. Where a patent is for an article of manufacture, and the specification describes no mode of making it, that defect will not avoid a patent, unless the defect arose through fraudulent intent.—*Ib.*

83. An omission to state a feature of construction clearly in a specification does not avoid a patent, unless the defect was intentional. *Burden v. Corning et al.*, 2 Fish. P. C. 477.—NELSON & HALL, 1864.

84. The defence of insufficiency of specification must be set up in defendants' pleading. *Goodyear et al. v. Providence Rubber Co. et al.*, 2 Clifford, 351.—CLIFFORD, 1864.

85. "The act of Congress does not require the patentee to address himself to the uninformed upon the particular subject, but allows him to speak to persons of competent skill in the art; and it only requires him to use such full, clear, and exact terms as will enable that class of persons to reproduce the thing described from the description given in the specification." *Forbes et al. v. Barstow Stove Co.*, 2 Clifford, 379.—CLIFFORD, 1864.

86. In a process patent for treating fatty bodies, the specification directed that the fatty body used be mixed with water and placed in a vessel, to be closed and of great strength, so that the requisite amount of pressure might be applied to prevent the conversion of water into steam. Defendant contended that the specification was insufficient, because, working under it, one would naturally entirely fill the vessel with

water, in which case the whole thing became inoperative. The court held that the most ordinary knowledge of the art would teach otherwise, and held the specification sufficient. *Tilghman v. Mitchell*, 2 Fish. P. C. 518.—NELSON, 1864.

87. An inventor "is not required to specify such well-known substitutes for any particular element of his invention as any constructor acquainted with the art fully understands is usually employed as such substitute for the accomplishment of the same function." *Union Sugar Refinery v. Matthiessen*, 2 Fish. P. C. 600.—CLIFFORD, 1865.

88. "The patentees had a right to assume that those who desired to understand all the conditions under which their invention could be operated were acquainted with the preceding state of the art immediately connected with this particular subject-matter." *Tompkins v. Gage et al.*, 5 Blatch. 268.—SHIPMAN, 1865.

89. The description in a patent is to be read in the light derived from prior patents relating to the same art. *Goodyear et al. v. Waite*, 5 Blatch. 468.—NELSON, 1867.

90. "In construing the claim of patents, the specifications, and drawings, it has been the usage of the courts of the United States who are vested with the sole jurisdiction in the administration of the patent law to exercise great liberality. Courts have avowed it to be the rightful object to carry out, if possible, the purposes of the inventor in the patent which has been granted to him; and unless, therefore, the objection, on the ground of vagueness or ambiguity, is very clear and unmistakable, courts are reluctant to declare a patent void on this ground." *Swift et al. v. Whisen et al.*, 2 Bond, 115.—LEAVITT, 1867.

91. If insufficient description in a specification is intentional, the patent is void. *Whitney v. Mowry*, 2 Bond, 45.—LEAVITT, 1867.

92. In Whitney's patent for annealing car wheels, it was stated that "the temperature of the furnace or chamber and its contents be gradually raised to a point a little below that at which fusion commences." This was held to be a sufficient description of the degree of heat to be used.—*Ib.*

93. Where operatives have been able to work successfully under a patent for years, such fact makes strongly against the defence of insufficiency of description.—*Ib.*

94. "In constructing machines or carrying into effect a process, under patents, something must be left to the judgment and discretion of the mechanic or operative to whom the work is

committed. The patentee, in his specification, addresses himself to those who are supposed to be familiar with the invention covered by the patent. And if the patentee has conformed to the requirement of the statute, by describing his invention 'in such full, clear, and exact' terms as that one skilled in the branch to which it pertains can construct it, if a machine, or carry it successfully into effect, if a process, his patent is sustainable."—*Id.*

95. "In all descriptions of patented machines, something must be left to the judgment and discretion of the mechanic who constructs the machine. It will, perhaps, rarely happen, even where the utmost vigilance and care are observed, that the machine or structure will be so accurately described as that the description can be literally and strictly followed in every particular. The skilful mechanic will see that in some particulars there is some vagueness, and some discretion is required, but that fact will not invalidate the patent." *Swift et al. v. Whisen et al.*, 2 Bond, 115.—LEAVITT, 1867.

96. "A discovery of a new substance by means of chemical combinations of known materials is empirical and discovered by experiment. Where a patent is claimed for such a discovery, it should state the component parts of the new manufacture claimed with clearness and precision, and not leave the person attempting to use the discovery to find it out 'by experiment.'" *Tyler v. Boston*, 7 Wall. 327.—*SUP. CT.* 1868.

97. "The question as to the sufficiency of the description and specification must be determined, like a question of construction, from what is written, aided by the drawings, and, if need be, by the patent of the office model." *Howes v. Nute*, 4 Cliff. 173. CLIFFORD, 1870.

98. "Particular passages in the description must not be separated from what precedes or follows in the same connection; but one part of the instrument must be compared with another, and the whole considered together, in order to determine whether it is incomplete and ambiguous, or sufficient to uphold the claim of the patent."—*Id.*

99. Whether an inventor states his improvement with sufficient methodical exactness is a matter for the conclusive adjudication by the Commissioner. *Parham v. American B. O. & Sewing Mach. Co. et al.*, 1 Pa. Leg. G. Rep. 145.—MCKENNAN, 1871.

100. "The law imposes upon an inventor the duty of describing his invention in such full, clear, and exact terms, that any one skilled in the art can make use of it. The reason of this re-

quirement is obvious. It is that the exact character and purpose of the invention may be understood, and that the public may be enabled to construct and use it after the expiration of the patent. Hence, where an entire machine is claimed, it is necessary to describe all the parts essential to its practical working and use. But where an addition to an existing machine, which is an improvement merely, is claimed, it is necessary only to describe the elements composing the improvement, with their relation to the other parts of the machine. And this is true of a combination, as well as of a single mechanical device. An inventor may define his invention in his claim as he thinks proper, but it must be capable of operation, when reduced to practice, *as he proposes to use it*. If the description clearly indicates the method of its use, and its relation to the other mechanical elements operating with it, a claim for a combination of a part of them is good, although it may not embrace some that are essential to the operative efficiency of the combination."—*Id.*

101. The specification of a patent for improvement in skirt-hoops, in stating the nature of the improvement, said that the clamps which fastened the hoops to the perpendicular straps were to be made with teeth or otherwise. The fact was that it was impossible so to fasten them unless the clamps had teeth. The clamps with teeth were properly shown in the drawings. It was held that this defect did not avoid the patent. *Doughty v. Day et al.*, 9 Blatch. 262.—BLATCHFORD, 1871.

102. Complainant had a patent on paper collars. Glue was used in the manufacture, but not mentioned in the specification. On the evidence offered, it was held that the use of the glue was a matter within the common knowledge of those skilled in the art, and the patent was sustained. *Hoffman v. Aronson et al.*, 8 Blatch. 324.—BLATCHFORD, 1871.

103. "The specification . . . is to be addressed to those skilled in the art, and is to be comprehensible by them. It may be sufficient, though the unskilled may not be able to gather from it how to use the invention. And it is evident that the definiteness of a specification must vary with the nature of its subject. Addressed as it is to those skilled in the art, it may leave something to their skill in applying the invention, but it should not mislead them." *Mowry v. Whitney*, 14 Wall. 620.—*SUP. CT.* 1872.

104. The patent in suit was for the annealing and slow cooling of cast-iron car-wheels. It was objected to the specification that, in describ-

ing the degree of heat to be applied after the wheels had been deposited in the heated chamber, it stated "it to be such that the temperature of all parts of the wheels 'may be raised to the same point [say a little below that at which fusion commences].'" Thereof the court said: "Any one skilled in making cast-iron car-wheels cannot but see from this specification that the object of the process was to guard against hurtful strain without destroying the chill, and that heated air was supplied only for that purpose;" and the court held that "hence an operator, in following the directions of the specification, would be taught by his practical knowledge that the instant all parts of the wheel had been heated to that temperature no more heat was needed."—*Id.*

105. In a patent for an improved rubber composition, the specification described the making thereof as follows: "I mix the filings with the mass simultaneously with the sulphur and black lead or clay, or other ingredients which are usually mixed with the crude rubber, and when the composition is made I vulcanize or cure the same in the ordinary manner. The quantity or proportion of filings to be mixed with the rubber is variable, according to the nature of the work for which the rubber is to be used. For packings of small valves, about one part, by weight, of filings is sufficient." Thereof the court said: "As the relative proportions of the rubber, sulphur, and plumbago are not given or indicated in any way, the description is not sufficiently clear and exact to enable others skilled in the art to make a rubber compound of the ingredients therein specified adapted for use as an elastic packing for joints and valves, and sufficiently indestructible to resist the solvent action of steam or heating and corrosive fluids," *Jenkins v. Walker et al.*, 1 Holmes, 120.—SHEPLEY, 1872.

106. "When the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent void; and the same rule would prevail when it was apparent that the proportions were stated ambiguously or vaguely, for in such cases it would be evident on the face of the specification that no one could use the invention without first ascertaining by experiment the exact proportions of the different ingredients required to produce the result intended to be obtained."—*Id.*

107. "Exaggerated statements of the utility and general capacity of the machine described in the reissues do not expose the reissues to this

objection, so long as the specifications correctly describe the construction and manner of operation of the thing invented, and a practical mode of applying it." *Aultman v. Holley et al.*, 11 Blatch. 317.—WOODRUFF, 1873.

108. "While the inventive genius of the patentee is to be rewarded by a monopoly for a term of years, the public is to be compensated for such monopoly by having, after its expiration, the free and unrestricted use thereof, which free and unrestricted use cannot be enjoyed unless the description of the invention is sufficiently clear and exact to enable those skilled in the art to construct the same." *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

109. "All definitions must presuppose some knowledge of the subject-matter, or knowledge of the matters referred to in giving the definition, and, of course, a reference is made to the state of the art as it before existed here. Any one having to deal with these matters must be supposed to have some acquaintance with the subject-matter and the state of the art." *Smith v. O'Connor*, 2 Saw. 461.—SAWYER, 1873.

110. "The necessity for a spring, a weight, a slight difference of mere dimensions, or other quite obvious modifications which practical use may suggest to make the machine more efficient, would not render invalid otherwise sufficient specifications; certainly not, if it would work without them." *Union Paper Bag Co. v. Nixon et al.*, 6 Fish. P. C. 402.—EMMONS, 1873.

111. Although necessary apparatus may be omitted in the description of a machine, yet if a properly skilled mechanic could readily supply it, the specification is not void for insufficiency.—*Id.*

112. "Absolute precision as to details is not required in the specification. It is only intended as a guide, but it is not the sole instructor. Nor is it addressed merely to ordinary mechanics; but the test of its sufficiency is whether a person skilled in the art to which the invention appertains can construct and use it. The special skill of the mechanic, derived from familiarity with the art, may be applied in aid of the instruction given by the specification, and his skill may be exerted to modify any direction in the specification as to the matters of mere adjustment or adaptation of the invention to its intended use, else the authority to employ it at all is of but little value." *Dorsey Harvester Revolving-Rake Co. v. Marsh et al.*, 6 Fish. P. C. 387.—MCKEN-NAN, 1873.

113. It is a complete answer to an objection that the specification is insufficient to show that a licensee has worked under it practically.—*Id.*

114. A mistaken statement in a specification as to theory or utility does not invalidate the patent. *Hamilton v. Ives et al.*, 6 Fish. P. C. 244.—LONGYEAR, 1873.

115. The making of a claim in a specification of a patent is sufficient as regards pointing out what is old and what is new; the claim implies that all that is not claimed is old, or if not old, that the applicant does not claim it so far as the patent in question is concerned. *Brown v. Guild*, 23 Wall. 181.—BRADLEY, 1874.

116. "A grant is not necessarily void by reason of an error in the Christian name of the grantee, and . . . where it contains any other matter descriptive of the person for whom it was intended, extrinsic proof of such matter is admissible to identify the grantee, and if he is thus identified, effect will be given to the grant accordingly." *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 1 Bann. & Ard. 177.—MCKENNAN, 1874.

117. A general mention in a specification of a method of manufacture, well known to those skilled in the art, is sufficient, and a description need not be more specific. *Mulford et al. v. Pearce et al.*, 13 Blatch. 173.—SHIPMAN, 1875.

118. Where a patent makes mention of the machine it describes as having a certain kind of capacity, a thing well known in the prior art, the specification need not specifically describe the construction which gives that capacity. *Stover et al. v. Halsted et al.*, 13 Blatch. 95.—SHIPMAN, 1875.

119. A "specification or description is addressed to persons acquainted with the character and nature of the business to which the invention relates, and it is only necessary that it should be so definite, or full, as to enable persons of competent skill and knowledge to construct, produce, or use the thing described without invention or addition of their own, and without repeated experiments." *Stihell & Bierce M'fg Co. v. Cincinnati Gaslight & Coke Co. et al.*, 1 Bann. & Ard. 610.—SWING, 1875.

120. Where a mistake in a specification is obviously a mistake in description, and is easily corrected by a reference to the other parts of the patent, the rights of the patentee are not impaired thereby. *Kendrick v. Emmons*, 2 Bann. & Ard. 208.—SHEPLEY, 1875.

121. The persons to whom the specification of the patent is presumed by law to be addressed are presumed to have a knowledge of the prior art. *Ives et al. v. Hamilton*, 92 U. S. 426.—SUP. CT. 1875.

122. "The omission to mention in the specification something which contributes only to the

degree of benefit, providing the apparatus would work beneficially and be worth adopting without it, is not fatal, while the omission of what is known to be necessary to the enjoyment of the invention is fatal." *Sewell v. Jones et al.*, 91 U. S. 171.—SUP. CT. 1875.

123. "Exact description of the invention is required to accomplish three great ends: 1. That the Government may know what they have granted and what will become public property when the term of the monopoly expires; 2. That licensed persons desiring to practise the invention may know, during the term, how to make, construct, and use the invention; 3. That other inventors may know what part of the field of invention is occupied." *Tucker v. Tucker M'fg Co.*, 4 Clifford, 397.—CLIFFORD, 1876.

124. It is not necessary for the patentee to be able to state the laws and principles which underlie the operation of his improvement. *Pearl et al. v. Ocean Mills et al.*, 2 Bann. & Ard. 469.—SHEPLEY, 1877.

125. "The claim must be for something described in the specification, so that any person of ordinary mechanical skill or skill in the art covered by the patent can, from the specification, make a mechanism which will contain the claim." *Vogler v. Semple*, 7 Bissell, 382.—BLODGETT, 1877.

126. "Accurate description of the invention is required by the law for several important purposes: [1] That the Government may know what is granted and what will become public property when the term of monopoly expires; [2] That the licensed persons desiring to practise the invention may know, during the term, how to make, construct, and use the invention; [3] That other inventors may know what part of the field of invention is unoccupied." *Bates et al. v. Coe*, 98 U. S. 31.—SUP. CT. 1878.

127. "The patent law does not describe how patented articles shall be named." *Badische Anilin & Soda Fabrik v. Higgin et al.*, 15 Blatch. 290.—WHEELER, 1878.

128. The patent act requires a sufficient specification for important purposes, as follows: "That the Government may know what they have granted and what will become public property when the term of monopoly expires. That licensed persons desiring to practise the invention may know, during the term, how to make, construct, and use the invention. That other inventors may know what part of the field of the invention is occupied." *Henry v. The Providence Tool Co.*, 3 Bann. & Ard. 501.—CLIFFORD, 1878.

129. The defence of insufficiency of specifica-



tion, not set up in the answer, is not open to defendants. *Jennings v. Pierce et al.*, 15 Blatch. 42.—SHIPMAN, 1878.

130. Although a patent states the quantity of an ingredient to be used no more definitely than by the use of the words "small quantity," yet if the permissible range of the use of the article is quite large, the description will be held sufficient. *Bowker v. Dows*, 3 Bann. & Ard. 518.—LOWELL, 1878.

131. Where a patent covers a product, the process of making that product need not be described in the patent. *McClosky, J., in re*, 3 MacArthur, 14.—MCARTHUR, 1879.

132. Complainant's patent pertained to a loom. In order to construct the loom and make it work, the times of the motions of the parts were to be calculated and the machinery to accomplish the motions at the proper time was to be contrived and constructed. The court held the specification insufficient. *Webster Loom Co. v. Higgins et al.*, 15 Blatch. 446.—WHEELER, 1879.

133. It "often occurs with regard to patents, that some person not skilled in chemistry and not very well learned in mathematics will invent a process in one instance or a mathematical contrivance in another, without being able to state the chemical or mathematical rules with accuracy, in the light of which learned men would solve the underlying problem scientifically considered. It is sufficient if his description will enable one skilled in the business to accomplish the desired result. Whether the inventor could stand a successful examination as to the speculative ideas involved is immaterial." *St. Louis Stamping Co. v. Quinby et al.*, 4 Bann. & Ard. 193.—GREAT, 1879.

134. A specification is not directed to the general reader, but to him skilled in the art; and it is no objection to a specification that it is incomprehensible to the former; nor need a specification describe any more of a machine than suffices to show the application thereto of the improvement in question. The inventor "may begin at the point where his invention begins, and describe what he has made that it is new, and what it replaces of the old." *Webster Loom Co. v. Higgins et al.*, 105 U. S. 580.—SUP. CT. 1882.

135. *Query*. May defendants avail themselves of insufficiency of complainant's specification without setting up such defence in the answer?—*Ib.*

136. A citizen of the United States having a patent is not required to put the invention into practical use before bringing suit for infringe-

ment. *Broadnax v. Central Stock Yard & Transit Co.*, 4 Fed. Rep. 214.—NIXON, 1880.

137. To suggest that a new article can be made, without disclosing how to make it, does not warrant the issue of a patent for such article. *Rood et al. v. Lamb*, 7 Fed. Rep. 222.—LOWELL, 1881.

138. Where a specification "sets forth the process or mode of operation which ends in the result, and the means for working out the process or mode of operation," it is not requisite that the "scientific principle" involved be set forth or stated. *Andrews et al. v. Cross*, 19 Blatch. 294.—BLATCHFORD, 1881.

139. The defence that the device described in a patent is not operative must be set up in defendant's answer, in order to be available. *McKesson et al. v. Carnrick*, 19 Blatch. 158.—BLATCHFORD, 1881.

140. A patent being on a machine for making pills, it was objected that "glycerine," one of the coating materials mentioned, would not answer. The fact was held immaterial, and "glycerine" was rejected as surplusage.—*Ib.*

141. In the drawings of a patent on a grain separator, the deflector was shown so near the shaker that it could not operate, if so made in practice. The court held the device to be "inoperative and without value." *Royer v. Russell & Co.*, 9 Fed. Rep. 696.—WALKER, 1881.

142. It seems that where the shape and size of parts are material to the production of a good effect, and those details are not specified, the specification is bad for insufficiency. *Schneider v. Lovell et al.*, 20 Blatch. 311.—BLATCHFORD, 1882.

143. For example of insufficient description in a specification, see —. *Sprague v. Smith & Griggs M'fg Co.*, 12 Fed. Rep. 721.—SHIPMAN, 1882.

144. For a *query* as to the sufficiency of a specification, see —. *Lamb v. Hamblen et al.*, 11 Fed. Rep. 722.—LOWELL, 1882.

145. The device of complainant's patent does not need to be described with absolute technical correctness, if what is meant to be described is clearly understood from the description and drawings. *Foye v. Nichols*, 8 Sawyer, 201.—SAWYER, 1882.

146. Insufficient and imperfect description in a specification may be cured by a reissue. *Schneider v. Geo. F. Bassett & Co.*, 13 Fed. Rep. 351.—NIXON, 1882.

147. Where complainants' claim was broad enough to cover a fire-pot having vertical openings of any length, the court refused to construe the claim as limited only to that length of open-

ing shown in the drawing, and held that a prior structure having longer openings was an anticipation. *Hailes et al. v. Albany Stove Co.*, 21 Blatch. 271.—WALLACE, 1883.

148. By the court: "It is not necessary that the inventor, to be entitled to a patent, should himself understand the abstract principle which his invention brings into use. It is sufficient if he is the inventor of the means whereby a new and useful application of the abstract principle is brought about." *Andrews et al. v. Hovey*, 5 McCrary, 181.—SHIRAS, 1883.

149. If a machine described in a patent will actually do the work it is designed for, although it will not work satisfactorily in a commercial sense, the specification is not void for insufficiency of description. *Fifield v. Whittemore*, 17 Fed. Rep. 513.—LOWELL, 1883.

150. If the novelty of an invention depends upon a peculiarity which the apparatus, as described in the specification, may or may not have, such a specification cannot be held to disclose the invention. *Andrews et al. v. Hovey*, 5 McCrary, 181.—SHIRAS, 1883.

151. "It is not necessary that the inventor, to be entitled to a patent, should himself understand the abstract principle which his invention brings into use. It is sufficient that he is the inventor of a means whereby a new and useful application of the abstract principle is brought about. Still, . . . it is necessary that in the patent and specification the new and useful application of the principle must be described, either setting forth the result obtained, with the means of its accomplishment, or else by such a description of the means employed as will, if followed, necessarily produce a result which embodies the practical application of the principle involved."—*Id.*

152. The patent of complainant was for an apparatus for applying a plate of glass to a grinding wheel, and one defence was insufficiency of description in the specification, as to which the court said: "The drawing shows a grinding wheel properly arranged for doing some, but rare kinds of work. None arranged for the usual work or in the best manner is shown. Still, it appears that a person skilled in the art would readily apply the patented apparatus to any kind of wheel. This would seem to be sufficient." *Vogele v. Noel et al.*, 18 Fed. Rep. 827.—WHEELER, 1884.

153. By the court: "In drawing the claims for a combination patent, we do not understand it to be necessary to include any elements except such as are essential to the peculiar combination and are effected by the invention." *Hancock*

*Inspirator Co. v. Jenks*, 21 Fed. Rep. 911.—BROWN, 1884.

154. The actual language of a specification was: "The crushing cone is suspended on an oscillating arbor rigidly connected with a rotating eccentric," etc. The court construed this passage as if it read: "The crushing cone is rigidly suspended on an oscillating arbor connected with a rotating eccentric box," etc. *Frazer et al. v. Gates & Scoville Iron Works*, 22 Fed. Rep. 439.—BLODGETT, 1884.

155. While the model appurtenant to the application for the patent in question is not to be resorted to for the purpose of construing the patent, except in cases where the specification is ambiguous or uncertain, still, where there is doubt as to what the patentee meant by the language used, the court may resort to an inspection of such model for ascertaining the patentee's meaning.—*Id.*

156. Such a casual misuse of words in a specification as could not mislead any one who should read the claim in connection with the specification and drawing of the patent is not a material mistake. *Reed v. Street*, 34 O. G. 339.—NIXON, 1885.

156. Although a patentee of an improvement may entitle his device as for use in unloading wagons or cars, such suggestion would not invalidate the patent as a wagon unloader, even if it should require inventive genius to adapt it to the unloading of cars. *Phillips v. Risser et al.*, 26 Fed. Rep. 308.—BLODGETT, 1885.

158. The patent in suit was for: "A rubber eraser, having the soft finished erasive surfaces produced by tumbling the erasers." The tumbling of various articles, including rubber, was old. The degree of tumbling seemed to be an essential matter, and the court doubted whether the specification was sufficiently descriptive in that particular. *Lockwood v. Faber*, 27 Fed. Rep. 63.—WALLACE, 1886.

159. A claim in complainants' patent was: "As a baking powder, a compound composed of exsiccated ammonia, alum, bicarbonate of soda, and corn-starch, substantially in the proportion and for the purpose specified." In the specification the alum was referred to as "ammoniated potash alum," a thing unknown to commerce or chemistry. This was held to create a fatal uncertainty in the description. *Smith et al. v. Murray et al.*, 27 Fed. Rep. 69.—BLODGETT, 1886.

160. It is to be doubted whether a claim can be treated as part of the description required by law.—*Id.*

161. Where the description of an improve-

ment is the matter under consideration, and the specification and claim are repugnant in this regard, the whole description, in order to be a valid one, must be found either in the specification or in the claim; *both* cannot be considered together for this purpose.—*Id.*

162. To build a machine *exactly* in accordance with the drawings of a patent therefor, and then to find it will not work, does not prove insufficiency of specification. *Royer et al. v. Coupe*, 29 Fed. Rep. 358.—CARPENTER, 1886.

163. Complainant's patent for making parti-colored glass mentioned that amber glass was to be made in the first place by the use of a "gold ruby compound." This "gold ruby compound" being known in the art, this was held a sufficient description. *Libbey v. Mt. Washington Glass Co. et al.*, 26 Fed. Rep. 757.—COLT, 1886.

164. "An imperfect written description will be aided by correct drawings, but when the written description is not only silent in regard to the feature of the invention, but places the novelty upon a different and described feature, the drawings will not help an entire omission, because the necessity of a written description is made absolute by the statute. Doubtful or ambiguous specifications can be aided and made plain by drawings, but they cannot supply an entire absence of description in the specification." *Gunn et al. v. Savage et al.*, 30 Fed. Rep. 366.—SHIPMAN, 1887.

165. "The drawings will not aid the non-description, because, although they may show to an expert the new feature, they do not show that the patentee claimed to be the inventor of that part of the die, when in his specification he had distinctly placed his invention upon another part."—*Id.*

166. In a patent for a rubber pump bucket, the rubber button was described as concave-convex in form. The court held that a general concavity and convexity was sufficiently described by the use of this language. *Temple Pump Co. v. Goss Pump & Rubber Bucket M'fg Co.*, 30 Fed. Rep. 440.—BLODGETT, 1887.

## STAMPING PATENTED ARTICLES.

### "STAMPING PATENTED ARTICLES" IN THE PATENT ACTS.

Act approved August 28th, 1842.

SECTION 6. *And be it further enacted*, That all patentees and assignees of patents hereafter granted are hereby required to stamp, engrave, or cause to be stamped or engraved, on each article vended or offered for sale, the date of the pat-

ent; and if any person or persons, patentees, assignees, shall neglect to do so, he, she, or they shall be liable to the same penalty, to be recovered and disposed of in the manner specified in the foregoing fifth section of this act. [Repealed March 2d, 1861.]

Act approved March 2d, 1861.

SEC. 13. *And be it further enacted*, That in all cases where an article is made or vended by any person under the protection of letters-patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word "patented," together with the day and year the patent was granted, or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label on which a notice, with the date, is printed; on failure of which, in any suit for the infringement of letters-patent by the party failing so to mark the article, the right to which is infringed upon, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement and continued after such notice to make or vend the article patented. And the sixth section of this act, entitled "An act in addition to an act to promote the progress of the useful arts," and so forth, approved the twenty-ninth day of August, eighteen hundred and forty-two, be, and the same is, hereby repealed. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 38. *And be it further enacted*, That it shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented, either by fixing to it or the package wherein one or more of them is enclosed, a label containing like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4900. It shall be the duty of all patentees, and their assignees and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented, either by fixing thereon the word "pat-

ented," together with the day and year the patent was granted, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is enclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented.

#### CASES.

1. There is no obligation upon a patentee to stamp his goods as patented before his patent issues. *Root v. Ball et al.*, 4 McLean, 177.—McLEAN, 1846.

2. "The penalty imposed by the statute for a failure to mark patented articles is only the taking away of the right to recover damages in the suit. It does not affect the right to an injunction, either perpetual or provisional, as a remedy." *Goodyear et al. v. Allyn et al.*, 6 Blatch. 33.—BLATCHFORD, 1868.

3. It is questionable whether Section 13 of the act of March 2d, 1861, concerning marking patented articles, applies to a suit in equity or to any other suit except an action on the cases for damages brought under Section 14 of the act of July 4th, 1836.—*Id.*

4. It is not necessary for the complainants in an infringement suit to allege that they properly stamp the date of the patent on the goods sold.—*Id.*

5. Where the pleadings raise no question whether complainant duly marked its patented articles, that question cannot afterward be considered. *Rubber Co. v. Goodyear*, 9 Wall. 788.—SUP. CT. 1869.

6. "The act of Congress, approved July 8th, 1870, Section 38, requires that every patented article sold shall be stamped with the word 'patented,' and the day and the year the patent was granted; and in any suits for infringement by the party failing so to mark, no damages shall be recovered by plaintiff, except on proof that the defendant was duly notified of such infringement, and continued, after such notice, to make, use, and vend the articles patented. So that, if defendant has neglected to prove that his patented articles were stamped, or that he gave the notice required by the statute, you cannot award him more than nominal damages." *McComb et al. v. Brodie*, 1 Woods, 153.—WOODS, 1871.

7. "The law exacts . . . marking or stamping, unless, from the character of the article, it

cannot be done. The impossibility or impracticability is not made dependent on the question of pecuniary loss or gain to the patentee. The object is, in all possible cases, to give proper notice to the world that the specified product or machine is patented." *Putnam v. Sudhoff et al.*, 1 Bann. & Ard. 198.—TREAT, 1874.

8. "It is not very far from clear that the provisions of Section 38 are not designed to cover profits, as well as technical damages; yet . . . Section 55 seemingly maintains the distinction between them." (Said in A.D. 1874.)—*Id.*

9. In a case where complainant had failed to stamp his articles with the date of his patent, the decree was for the "actual profits of the plaintiff, to be ascertained by the master, said profits to be confined to the difference between the prices paid by defendants and those at which plaintiff sold the genuine fasteners."—*Id.*

10. Defendants contended that complainants were not entitled to recover damages, because defendants had not marked their infringing machine with the date of complainants' patent. The contention was held to be immaterial. *Herring et al. v. Gage et al.*, 15 Blatch. 124.—WALLACE, 1878.

11. By the court: "As this sufficient notice prescribed includes a specification of the time when the patent was granted, it is reasonable to conclude that any notice, verbal or written, that includes this information will suffice." *N. Y. Pharmaceutical Ass'n v. Tilden et al.*, 21 Blatch. 190.—WALLACE, 1883.

12. Where a patentee does not stamp the patented articles he sells with the date of his patent, as required by law, but gives an infringer notice, the patentee cannot recover damages or profits arising prior to the time of the notice. *Allen v. Deacon*, 21 Fed. Rep. 122.—SAWYER, 1884.

13. Where the patented article is small, and it is difficult to put the patent stamp on the article itself, it is sufficient to place the patent stamp on a label upon a package of the articles. *Sessions v. Romadka et al.*, 21 Fed. Rep. 124.—DYER, 1884.

14. It is doubtful if the defence, that a patentee has not properly stamped his articles with the date of his patent, can be made available, unless it is set up in the answer.—*Id.*

#### STAMPING AS "PATENTED" FRAUDULENTLY.

"STAMPING AS 'PATENTED' FRAUDULENTLY"  
IN THE PATENT ACTS.

Act approved August 29th, 1842.

SECTION 5. And be it further enacted, That if

any person or persons shall paint or print or mould, cast, carve, or engrave, or stamp upon anything made, used, or sold by him, for the sole making or selling which he hath not or shall not have obtained letters-patent, the name or any imitation of the name of any other person who hath or shall have obtained letters-patent for the sole making and vending of such thing, without consent of such patentee, or his assigns or legal representatives; or if any person, upon any such thing, not having been purchased from the patentee, or some person who hath purchased it from or under such patentee, or not having the license or consent of such patentee, his assigns or legal representatives, shall write, paint, print, mould, cast, carve, engrave, stamp, or otherwise make or affix the word "patent," or the words "letters-patent," or the word "patentee," or any word or words of the like kind, meaning, or import, with the view or intent of imitating or counterfeiting the stamp, mark, or other device of the patentee, or shall affix the same, or any word, stamp, or device, of like import, on any unpatented article, for the purpose of deceiving the public, he, she, or they, so offending, shall be liable for such offence to a penalty of not less than one hundred dollars, with costs, to be recovered by action in any of the circuit courts of the United States, or in any of the district courts of the United States having the powers and jurisdiction of a circuit court; one half of which penalty, as recovered, shall be paid to the patent fund, and the other half to any person or persons who shall sue for the same. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 39. *And be it further enacted*, That if any person shall, in any manner, mark upon anything made, used, or sold by him, for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor, without the consent of such patentee, or his assigns or legal representatives; or shall in any manner mark upon or affix to any such patented article the word "patent," or "patentee," or the words "letters-patent," or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee, or his assigns or legal representatives; or shall in any manner mark upon or affix to any unpatented article the word "patent," or any word importing that the same is patented, for the purpose of deceiving the public, he shall be liable for every such offence to a penalty of not less than one hundred dollars, with costs; one moiety of said penalty to the

persons who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offence may have been committed. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4901. Every person who, in any manner, marks upon anything made, used, or sold by him, for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor, without the consent of such patentee, or his assigns or legal representatives; or

Who, in any manner, marks upon or affixes to any such patented article the word "patent," or "patentee," or the words "letters-patent," or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee, or his assigns or legal representatives; or

Who, in any manner, marks upon or affixes to any unpatented article the word "patent," or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable, for every such offence, to a penalty of not less than one hundred dollars, with costs; one half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offence may have been committed.

#### CASES.

1. In a *qui tam* action for the recovery of a penalty for improperly marking articles as patented, the burden of proof is upon the plaintiff to satisfy the tribunal beyond a reasonable doubt of such facts as are necessary to constitute the offence. *Nichols v. Newall et al.*, 1 Fish. P. C. 647.—SPRAGUE, 1853.

2. In the action just referred to, the burden of proof is upon the plaintiff to prove beyond a reasonable doubt, *first*, that the defendants affixed the word "patent" to their articles; *second*, that the defendants had no patent; *third*, that the defendants thus affixed the word "patent" with the intent to deceive the public.—*Id.*

3. In the action last referred to, "the affixing words 'Newell's patent, 1852,' comes within the description of 'affixing the word patent.'"—*Id.*

4. In the action last referred to, putting the stamp upon the cap of a lamp was held to be the same as putting it upon the lamp itself.—*Id.*

5. In the action last referred to, the offence was held to have been committed by putting on

the word "patent," whatever disposition of the article might have subsequently been made.—*Ib.*

6. "The general rule is, that a man is to be held to intend that which is the necessary consequence of his acts, or what he infers will be the consequence of his acts."—*Ib.*

7. "If, taking all the evidence together, it can be reasonably and fairly reconciled with the defendants' innocence, then they are not proved to be guilty, although it may be fairly and easily reconciled with the supposition that they committed the acts charged. It is for the plaintiff to make out the case; and if all the evidence taken together does not establish the charge, and the whole is fairly reconcilable with the supposition that the acts were innocently done, then the defendants are to be found not guilty."—*Ib.*

8. "If there was a purpose at the time these words were affixed to deceive the public, although the party may have expected a patent shortly, or within any time [if in the meantime they intended to put forth the articles, and thereby deceive the public], then the offence would be committed. If they intended to deceive the public for a short time, and believed that they should then have their patent, still the offence is committed, because the statute forbids deceiving the public at any time."—*Ib.*

9. The crimes act of April 30th, 1790, limited suits for penalties to two years after the final forfeiture occurred. This limitation was repealed by implication in the act of August 9th, 1842, to recover penalties for marking the word "patented" on an unpatented article, leaving the limitation of time at five years. *Stimson v. Pond*, 2 Curtis's C. C. 502.—CURTIS, 1855.

10. The act of 1842 imposed a penalty for wrongfully marking articles as patented, specifying the same as "a penalty not less than one hundred dollars." This was held to mean just one hundred dollars, and to be recoverable in an action of debt.—*Ib.*

11. An action to recover a penalty for improperly stamping articles as patented, under Section 5 of the act of August 29th, 1842, must be prosecuted in the name of an informer, and not in the name of the United States. *United States v. Morris et al.*, 2 Bond, 23.—LEAVITT, 1866.

12. "To justify a judgment for a penalty for putting the word *patent* on an article, the declaration must allege, and there must be a proof on the trial, that it was legally the subject of a patent."—*Ib.*

13. Where a defendant is charged with fraudulently stamping his goods as patented, "if the defendant used the marks, knowing he had no

right to, and with the intention of deceiving the public, then he was liable. But if he used them, supposing he had a right to, and with no intention of deceiving the public, then he was not liable." *Walker v. Hawchurst*, 5 Blatchford, 494.—NELSON, 1867.

14. "If . . . a person marks an unpatented article with the word 'patent,' the public are thereby liable to be deceived as to the character and value of the article. The act is a species of counterfeiting. This, being so, the presumption is, until the contrary appears, that the mark was placed on the article with the intention to deceive. The falsehood is a badge of fraud." *Oliphant v. Salem Flouring Mills Co.*, 5 Sawyer, 128.—DEADY, 1878.

15. "Upon the reason of the thing and the plain words of the statute . . . the penalty is incurred by marking an unpatented article with the word 'patent,' whether the same is patentable or not. . . . But it must also appear that the article was so falsely marked with the intent to deceive the public."—*Ib.*

16. "In all ordinary cases, or cases in which there can be any doubt about it, the question of fraudulent intent or purpose to deceive is one for the jury. In passing upon it, the probability or improbability of the public being deceived by the alleged false marking will be taken into consideration by them."—*Ib.*

17. Complainant's patent in suit was for a barbed wire fence. Defendant, a manufacturer of barbed wire fence, put upon his manufacture the dates of complainant's patent. Injunction was granted against defendant. *Washburn & Moen M'fg Co. v. Haish*, 9 Bissell, 141.—BLODGETT, 1879.

18. It is not unlawful after a patent has expired to maintain on the once patented article the date of the patent. *Wilson v. Singer M'fg Co.*, 9 Bissell, 173.—BLODGETT, 1879.

19. The statute against fraudulent patent stamps is highly penal, and its scope will not be extended by implication; it must be strictly construed.—*Ib.*

20. "The second subdivision of Section 4901 . . . imposes a penalty of one hundred dollars for each offence upon every person 'who, in any manner, marks or affixes to *any such patented article* the word "patent," or "patentee," or the word "letters-patent," or any word of like import, with *intent* to imitate or counterfeit the mark or device of the *patentee*, without having the license or consent of such patentee, or his assigns or legal representatives.' " Defendant's pens bore the stamp of two different legal patents. It was found that one of these stamps

was rightfully affixed. It was held, as to the stamp of the other patent, that if the pen did not come within such other patent, the penalty had not been incurred. *French v. Foley*, 11 Fed. Rep. 801.—BROWN, 1882.

21. The statute which affixes a penalty for wrongfully stamping an article as patented is highly penal, and is to be strictly construed.—*Ib.*

22. In the case above referred to, it was held that defendant did not come under third subdivision of Section 4901, because the pens in question were patented in a patent other than the one in question.—*Ib.*

23. In an action to recover penalties for wrongfully stamping an article as patented, evidence which goes to show the intent in affixing the patent stamp is admissible.—*Ib.*

24. Maintaining upon articles a stamp denoting a patent and its date after the expiration of the patent, does not make the party thus acting liable to the statutory penalty which attaches to a party who marks an unpatented article as patented, with the intent to deceive the public. *Wilson v. Singer M'fg Co.*, 11 Bissell, 298.—DRUMMOND, 1882.

25. Where defendant stamped his unpatented goods as patented in one district, and brought them into another, it was held that the statute punishing wrongful patent marks does not authorize the prosecution of the wrongdoer in such other district, and that the statute, being highly penal, must be strictly construed. *Pentlarge v. Kirby*, 19 Fed. Rep. 501.—BROWN, 1884.

26. In a *qui tam* action to recover the penalty given by the statute which forbids the stamping of an unpatented article as patented, it is proper for the plaintiff to aver that he sues "for himself as well as the United States." *Winne v. Snow*, 19 Fed. Rep. 507.—BROWN, 1884.

27. Where the plaintiff brought an action for the United States as well as for himself, to recover the penalty given by the statute which forbids the stamping of unpatented articles as patented, and pleaded some special damage, such pleading was held to be irrelevant and subject to be stricken out on motion, under the New York code of procedure, which regulated the practice in common law actions in the district where the suit was brought; this pleading was not, however, held objectionable on demurrer.—*Ib.*

28. In actions based upon the statute forbidding the stamping of unpatented articles as patented, the citizenship of the parties is immaterial; the action must be brought in the district where the offence is committed.—*Ib.*

29. In an action on the statute which forbids

the stamping of unpatented articles as patented, the complainant need not allege that the articles are patentable.—*Ib.*

30. Where it is sought to recover a penalty for improperly stamping an article as patented, the proceeding is in the nature of a criminal proceeding, and the offence must be proved by evidence that leaves upon the minds of the jury no reasonable doubt that the penalty has been incurred. *Tompkins v. Butterfield et al.*, 33 O. G. 758.—NELSON, 1885.

31. Where it is sought to recover a penalty for improperly stamping an article as patented, it must be proved that the marks were affixed for the purpose of deceiving the public. The acts and beliefs of the officers of a corporation are the acts and beliefs of the corporation.—*Ib.*

32. Where it is sought to recover a penalty for improperly stamping an article as patented, the penalty is incurred if he who affixes the stamp does so in entire ignorance of whether the article is patented or not.—*Ib.*

33. In an action for the recovery of a penalty for unlawfully stamping goods as patented, "it requires no interest in the person who brings the action other than that he is one of the general public." *Kass v. Haulowetz*, 33 O. G. 1135.—BROWN, 1885.

34. In an action for the recovery of a penalty for unlawfully stamping goods as patented, is for the court to say whether the goods come within the scope of a particular patent.—*Ib.*

35. In an action for the recovery of a penalty for unlawfully stamping articles as patented, where defendant claims under a patent, it is not a pertinent question whether the patent is valid.—*Ib.*

36. In an action for the recovery of a penalty for unlawfully stamping goods as patented, "where a man is carrying on a manufacture, and necessarily employs various persons, the acts of the persons that he employs, if done according to his directions, or under his supervision, or with his knowledge or with his sanction, are in law his acts."—*Ib.*

37. In an action for the recovery of a penalty for unlawfully stamping goods as patented, the action will not go against the defendants if they believed truly and honestly that their goods were within their patent.—*Ib.*

38. In an action for the recovery of a penalty for unlawfully stamping goods as patented, intent to deceive the public is a necessary ingredient for the defence. "An intent to deceive the public necessarily follows, if there was anything done tending to mislead and intended to mislead the public."—*Ib.*

39. In an action for the recovery of a penalty for unlawfully stamping goods as patented, it is the duty of the plaintiff to satisfy the jury on the whole evidence that the defendant's goods were an unpatented article. "It is not the duty of the defendant, in order to prevent a recovery against him, to prove that the articles in question were patented."—*Ib.*

40. In an action for the recovery of a penalty for unlawfully stamping goods as patented, it is not necessary that the marking should have been done within the jurisdiction of the court.—*Ib.*

41. In an action for the recovery of a penalty for unlawfully stamping goods as patented, the plaintiff need not prove his case with the same particularity and exactness as on a trial of indictment. The jury must be reasonably satisfied upon all the necessary points, and that is all. The defendants are entitled to the benefit of every doubt.—*Ib.*

42. In an action for the recovery of a penalty for unlawfully stamping goods as patented, the penalty cannot be imposed for goods sold prior to the date stated in the complaint.—*Ib.*

43. In an action for the recovery of a penalty for unlawfully stamping goods as patented, where the law imposes a penalty of "not less than one dollar," it gives no discretion to the jury to impose more.—*Ib.*

44. In an action for the recovery of a penalty for unlawfully stamping goods as patented, it is not necessary that the plaintiff shall prove his case with the same particularity and exactness as on the trial of an indictment. *Hawlowetz v. Kass*, 33 O. G. 1499.—WALLACE, 1885.

45. In an action for the recovery of a penalty for unlawfully stamping goods as patented, it is the province of the court to construe defendant's patent and determine its scope and effect.—*Ib.*

46. The offence of wrongfully stamping articles as patented "is not made criminal by statute, although penal. . . . The sufficiency of the complaint is to be determined according to the rules applicable to civil actions, and according to the state practice in similar or analogous actions at common law, and not according to the analogies of criminal procedure." *Fish v. Manning et al.*, 31 Fed. Rep. 340.—BROWN, 1887.

47. In an action for wrongfully stamping articles as patented, an allegation in the complaint that the stamping was done "on or about June, 1886," is sufficiently definite.—*Ib.*

48. "In an action upon a penalty, the statute imposing it, and the section thereof, must be pleaded with certainty. . . . It is therefore im-

proper and insufficient to refer to different statutes without specifying which is relied on."—*Ib.*

49. A complaint in an action to recover penalties for wrongfully stamping articles as patented was held defective in not alleging "[a] that the defendant had no patent for the article stamped; [b] that the article stamped contained the patented improvement; [c] that the stamping was done without the consent of the plaintiff's assigns or representatives."—*Ib.*

50. In an action for the recovery of penalties for wrongfully stamping articles as patented, an "averment that the sales were made for the purpose of deceiving the public is not pertinent to the plaintiff's cause of action, which is founded upon the stamping of patented articles, while the averment is pertinent to the stamping of unpatented articles only."—*Ib.*

51. Actions for the recovery of penalties for wrongfully stamping articles as patented are required to be brought in the district within whose jurisdiction such offences may have been committed. *Hat-Sweat M'fg Co. v. Davis Sewing Mach. Co.*, 31 Fed. Rep. 294.—BROWN, 1887.

52. In an action brought against a Connecticut corporation for wrongfully stamping its goods as patented, service was made upon Alvin B. Felt, in New York City, as agent of the defendant corporation. The company appeared for the purpose of setting aside the summons as a service upon the company, on the ground that Felt was neither an agent nor a managing officer within the meaning of Section 432 of the New York Code of Civil Procedure. It appeared that the business of which Felt had charge in New York City was the stitching of hat-sweats, and doing binding, cording, or braiding work on various articles. The court held that the alleged unlawful stamping of articles was done by Felt in the city of New York in the course of manufacturing for the joint account of himself and the defendant company.—*Ib.*

53. "Where the statute restricts suits to the districts in which the acts are committed, a consistent and reasonable interpretation of the statute requires it to be held that a corporation, for the purposes of such suits, has a 'managing agent,' and is sufficiently 'found' within the district, in the person of the individual who has the direction, management, and control of its business therein, out of which the acts complained of have arisen, and who so far represents the corporation as to make his acts incurring penalties in that business the acts of the corporation."—*Ib.*



## STATES' RIGHTS OVER PATENTS.

"STATES' RIGHTS OVER PATENTS" IN THE  
PATENT ACTS.

Act approved February 21st, 1793.

SECTION 7. *And be it further enacted*, That where any state, before its adoption of the present form of government, shall have granted an exclusive right to any invention, the party claiming that right shall not be capable of obtaining an exclusive right under this act, but on relinquishing his right under such particular state; and of such relinquishment, his obtaining an exclusive right under this act shall be sufficient evidence. [Repealed July 4th, 1836.]

## CASES.

1. A state has the right to grant an exclusive privilege, such as for navigation by aid of steam. Such a grant must give way if it comes in conflict with a proper national law or grant. *Livingston et al. v. Van Ingen et al.*, 9 John. 507.—YATES, 1812.

2. Where a person practises as a physician, in contravention of state law, he cannot recover for his services or medicine, even though he has a patent for it. *Smith v. Tracy*, 2 Hall, 465.—OAKLEY, 1829.

3. A grant of a patent for a medicine does not give the patentee a right to sell the patented article in opposition to state laws. *Jordan v. Overseers of Dayton*, 4 Hammond, 295.—LANE, 1831.

4. A patentee has not necessarily the right to practise his patented invention (as, for instance, a mode of conducting lotteries) in a state (such state having laws regulating such matters). *Vannani v. Paine*, 1 Harrington, 65.—ROBINSON, 1833.

5. A man cannot practise medicine in defiance of a state law simply because he has a patent for his medicine. *Thompson v. Staats*, 15 Wendall, 395.—NELSON, 1836.

6. "The Constitution of the United States has given to the National Government exclusive control of the whole subject-matter of patent rights for new and useful inventions. No state, therefore, can pass any valid law concerning them." *Read et al. v. Miller et al.*, 2 Bissell, 12.—MCDONALD, 1867.

7. "Properly, an invention exists by virtue of the laws of Congress, and no state has a right to interfere with its enjoyment or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property.

If this were not so, it is easy to see that a state could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer and destroy the power conferred upon Congress by the Constitution." *Robinson, ex parte*, 2 Bissell, 309.—DAVIS, 1870.

8. A state statute annexing any special conditions to the sale of patent rights is unconstitutional and void. *Hollida et al. v. Hunt*, 70 Ill. 109.—SCHOLFIELD, 1873.

9. A state law to the effect that a promissory note given for an interest in a patent shall state that fact is unconstitutional and void. *Helm v. First National Bank of Huntington*, 43 Indiana, 167.—BUSKIRK, 1873.

10. The practice of a patented improvement is subject to the ordinary police regulations of a state. *Patterson v. Commonwealth, Kentucky*, 11 Bush. Ky. 311.—PRYOR, 1875.

11. A state statute annexing conditions or formalities to the sale of patents is unconstitutional and void. *Crittenden v. White*, 23 Minn. 24.—GILFILLAN, 1876.

12. A law of the state relating to foreign corporations doing business therein cannot be construed so as to annex conditions to the exercise of rights under a patent. *Grover & Baker Sewing Machine Co. v. Butler*, 53 Ind. 454.—HOWK, 1876.

13. A state law requiring a peculiarity in a note given for a patent right is unconstitutional and void. *Woolen v. Banker*, 2 Flippin, 33.—SWAYNE, 1877.

14. A state statute providing that a note given for a patent right shall state that fact upon its face is unconstitutional and void. *Cranson v. Smith*, 37 Mich. 309.—CAMPBELL, 1877.

15. A foreign corporation, although working under a patent, may have transactions in a state not connected with the patent; in such case the state laws are as applicable to that as to any other foreign corporation. *Domestic Sewing Machine Co. v. Hatfield*, 58 Ind. 187.—WORDEN, 1877.

16. "The right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the state has established." *Patterson v. Kentucky*, 97 U. S. 501.—SUP. CT. 1878.

17. "A state cannot exempt counties from liability for infringement of letters-patent, because exclusive jurisdiction over that subject-matter has been vested in the Federal Govern-

ment. By Section 4919 . . . suits at law have been authorized in the form of case for the infringement of letters-patent. No exception has been made by act of Congress in favor of any wrongdoer. The provision is general in its terms, and may as well include counties as other corporations or individuals." *May v. County of Balls*, 31 Fed. Rep. 473.—THAYER, 1887.

18. "The laws of New York [Sec. 1104, ch. 410, Laws 1882] respecting the presentation of claims against the city of New York to the comptroller for adjustment before bringing suit, only apply to such claims as can be prosecuted in the state courts by the actions or proceedings mentioned in Section 1103; and [2] if this enactment were intended to apply to actions at law brought in the federal courts, it would not apply to suits in equity. The equity jurisdiction of the courts of the United States is subject to neither limitation nor restraint by the state authorities, and is uniform throughout the different states of the Union." *Gamewell Fire-Alarm Tel. Co. v. New York*, 31 Fed. Rep. 312.—WALLACE, 1887.

#### SUFFICIENCY OF INVENTION.

See "Invention—Sufficiency of."

#### TERM OF PATENT.

##### "TERM OF PATENT" IN THE PATENT ACTS.

Act approved April 10th, 1790.

SECTION 1. Provides for patents "for any term not exceeding fourteen years." [Repealed February 21st, 1793.]

Act approved February 21st, 1793.

SEC. 1. Provides for patents "for a term not exceeding fourteen years." [Repealed July 4th, 1836.]

Act approved July 4th, 1836.

SEC. 5. Provides for patents "for a term not exceeding fourteen years." [Repealed July 8th, 1870.]

Act approved March 3d, 1839.

SEC. 6. *And be it further enacted*, That no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act approved on the fourth day of July, one thousand eight hundred and thirty-six, to which this is additional, by reason of the same having been patented in a foreign country more than six months prior to his application; *Provided* that the same shall not have been introduced into public and common use in the United States prior to the application for such patent;

*and provided also*, That in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters patent. [Repealed July 8th, 1870.]

Act approved March 2d, 1861.

SEC. 16. *And be it further enacted*, That all patents hereafter granted shall remain in force for the term of seventeen years from the date of the issue; and all extension of such patents is hereby prohibited. [Repealed July 8th, 1870.]

Act approved July 8th, 1870.

SEC. 22. *And be it further enacted*, That every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the said invention or discovery throughout the United States and the Territories thereof, referring to the specification for the particulars thereof; and a copy of said specification and of the drawings shall be annexed to the patent and be a part thereof.

SEC. 25. *And be it further enacted*, That no person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country; *Provided*, The same shall not have been introduced into public use in the United States for more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in form more than seventeen years. [Repealed June 22d, 1874.]

Act approved June 22d, 1874.

SEC. 4884. Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the Territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

SEC. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall patent be declared invalid, by reason of its having been first patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which had

been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term; and in no case shall it be more than seventeen years.

## CASES.

(Nearly all the cases under the title "Foreign Patent" are equally pertinent to this title.)

1. "The act of July 4th, 1836, Section 5, provides for patents for inventions or discoveries 'for a term not exceeding fourteen years.' He may . . . waive his claim to a part of the term in favor of the public by antedating it, or he may take a patent for a term less than fourteen years, or he may seek protection against strangers . . . for the time intermediate between the antedate and the date of issue—six months previous to the issue—if in that time he has made application, and is seeking in good faith and with reasonable diligence to perfect his specifications," etc. *Cushman, William M. C., in re, 1 MacArthur's P. C. 577.—DUNLOP, 1858.*

## THREAT OF INFRINGEMENT SUIT.

## CASES.

1. Threatening to bring suit for infringement, with no basis for the same, gives a right of action; a state court has jurisdiction thereof. *Snow et al. v. Judson, 38 Barbour, 210.—JOHNSON, 1862.*

2. A owned a patent of a certain date. B went into interference in the Patent Office with A, and took a patent for the same invention of later date. B then threatened A's customers with suit. A then sought to have B enjoined from bringing said suit until the termination of an interference upon the same matter between A and B in court. Injunction refused. *Asbestos Felting Co. v. U. S. & Foreign Salamander Felting Co., 13 Blatch. 453.—BLATCHFORD, 1876.*

3. No action at law or in equity can be maintained against a patentee who publishes circulars threatening to bring suit for infringement, unless it is established that the publication is malicious and for the purpose of injuring another party. *Celluloid Mfg Co. v. Goodyear Dental Vulcanite Co., 13 Blatch. 375.—HUNT, 1876.*

4. Where a patent owner had a suit pending against a manufacturer, the patent owner was enjoined from suing, or threatening to sue, dealers who were supplied by the alleged infringing manufacturer. *Birdsall v. Hagerstown*

*Agricultural Implement Co., 1 Hughes, 64.—BOND, 1877.*

5. A court of equity may enjoin against the threatening of a patent suit and against the libelling of the title to a patent. *Bell v. Singer Mfg Co., 65 Ga. 452.—HAWKINS, 1880.*

6. Complainant brought an equity suit against defendant, setting up as his cause of action "written representations to dealers in hammocks that hammocks made by the orator infringe a patent of the defendant, and threats of suit for the infringement contained in letters from the defendant's attorneys addressed to such dealers." The bill did not allege that defendant threatened, nor that the orator believed he intends to continue such representations or threats, nor even that the orator feared he would. And the proof did not go in this respect beyond the bill. The court said: "Courts of equity have no jurisdiction of libel or slander, affecting title to property or property rights, or any other slander or libel, unless threatened or apprehended repetition makes preventive relief appear necessary. The remedy for past injuries of that nature is understood to be wholly at law." Bill of complaint dismissed with costs. *Palmer v. Travers, 20 Fed. Rep. 501.—WHEELER, 1884.*

7. Where a party owns a patent, believes that it is infringed, brings suit for the infringement, and issues circulars warning all dealers that if the suit is won the dealers will be held liable, such party is not to be enjoined from issuing such warnings. *Chase et al. v. Tuttle et al., 27 Fed. Rep. 110.—COXE, 1886.*

8. "There is no jurisdiction in a court of equity to enjoin libel on the rights or title" of a patentee, or to prevent a lawful patentee from publishing statements that he is about to bring suit for infringement. *Baltimore Car-Wheel Co. et al. v. Bemis et al., 29 Fed. Rep. 95.—CARPENTER, 1886.*

9. "It would certainly be the exercise of an extraordinary power for a court, after it has heard a cause in the usual open and public manner, and has openly and publicly declared its judgment upon the matter at issue, to then attempt to restrain the parties, or either of them, from making known the results of the hearing, especially touching a matter in which third parties may become interested. Even if the court should make the order asked, it would be futile, for the fact of the granting of the injunction has already been made public." *Westinghouse Air-Brake Co. v. Carpenter, 32 Fed. Rep. 545.—SHIRAS, 1887.*

10. Where a patent owner has sued a manu-

facturer of the alleged infringing articles for infringement of such patent, such patent owner may be restrained from suing mere users of such articles until the suit against the manufacturer is determined. *Ide v. Ball Engine Co. et al.*, 31 Fed. Rep. 901.—ALLEN, 1887.

## UTILITY.

### CASES.

1. Whether the objection of want of utility can be put in evidence under the general issue may well be doubted. *Gray et al. v. James et al.*, 1 Peters's C. C. 394.—WASH. 1817.

2. The defence of lack of utility is totally irreconcilable with the use of the invention by the defendants.—*Ib.*

3. It seems that damages may be recovered for the use of an invention which only becomes of value through the subsequent additional invention of another.—*Ib.*

4. As to utility, "all that the law requires is that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society." Its utility as compared with existing devices is not material. *Lowell v. Lewis*, 1 Mason, 182.—STORY, 1817.

5. Where defendant has used the patented device, it does not lie in his mouth to dispute its utility.—*Ib.*

6. Though plaintiffs' invention had practical defects which prevent it from going into use, yet the curing of those defects by defendants, while they retain the principle of plaintiffs' invention, demonstrates the utility and value of plaintiffs' invention. *Gray et al. v. James et al.*, 1 Peters's C. C. 476.—WASH. 1817.

7. The law regards not the degree of utility. If the invention is capable of use, though limited, and is not mischievous or immoral in tendency, that suffices. Its utility need not be such as to supersede existing devices. *Bedford v. Hunt et al.*, 1 Mason, 302.—STORY, 1817.

8. The defendant who uses the plaintiff's invention cannot deny its (statutory) utility. *Kneass v. Schuylkill Bank*, 4 Wash. 9.—WASH. 1820.

9. What degree of utility an invention must possess depends upon the particular circumstances of each case. *Langdon v. De Groot et al.*, 1 Paine, 203.—LIVINGSTON, 1822.

10. When the utility is a matter of doubt, it may perhaps be left to the jury.—*Ib.*

11. When the lack of utility appears on plaintiff's own showing, the court may declare it.—*Ib.*

12. An invention must be useful—that is, not noxious or mischievous, not absolutely frivolous, but capable of being applied to good purposes. The degree of positive utility is not important. *Earle v. Sawyer*, 4 Mason, 1.—STORY, 1825.

13. "The word 'useful' in the law is well settled to be used in contradistinction to frivolous improvements . . . or such as are injurious to the public." *Whitney et al. v. Emmett et al.*, 1 Bald. 303.—HOPKINSON & BALDWIN, 1831.

14. "The want of utility may be a good reason for not issuing a patent, but it is not cause for avoiding it."—*Ib.*

15. Doubted that the patentee of a machine which proves worthless can sustain any damages though the use thereof by another who makes the machine of value by his subsequent improvements.—*Ib.*

16. "It was wholly unnecessary for the plaintiff to introduce any evidence to prove that" (utility) "which the defendant so repeatedly and publicly admitted" in his advertisements of the article. *Stanley v. Whipple*, 2 McLean, 35.—MCLEAN, 1839.

17. Evidence that the defendants' structure is better than the plaintiffs' is inadmissible, and not to be considered except so far as it goes to show substantial difference. *Alden et al. v. Dewey et al.*, 1 Story, 336.—STORY, 1840.

18. Statutory utility is present if the device be not merely frivolous or essentially pernicious. *Knight v. Garit*, Pat. Of. Mir. 131.—KANE, 1846.

19. "The comparative value of any invention, so far as the exclusive right is concerned, is not material." *Hotchkiss v. Greenwood et al.*, 4 McLean, 456.—MCLEAN, 1848.

20. A patentable improvement "must not be a frivolous object, like the invention of an improvement in making playing cards." *Adams et al. v. Edwards et al.*, 1 Fish. P. C. 1.—WOODBURY, 1848.

21. Extensive introduction into use of an invention is conclusive of its utility.—*Ib.*

22. Although a specification of a patent may state generally that a certain result may be obtained, the patent is not invalid because that result can only be obtained to a certain degree. *Blanchard's Gunstock Turning Factory v. Warner*, 1 Blatch. 258.—NELSON, 1848.

23. "It is not necessary to maintain a patent, or the right of the inventor, that the thing invented should be the very best article for the use to which it can be applied. Indeed, the objection generally comes with bad grace from a person charged with an infringement, because

if the invention was of no utility, then he ought not to use it, and the very fact of his using it, if he is using it, shows that his practice and professions as regards the utility of the instrument are very much at variance." *Many v. Jagger et al.*, 1 Blatch. 372.—NELSON, 1848.

24. In ascertaining the usefulness of an invention, "it is not important that it should be more valuable than other modes of accomplishing the same result; but it must be a practical method of doing the thing designed, in which its utility will more or less consist." *Roberts et al. v. Ward et al.*, 4 McLean, 565.—MCLEAN, 1849.

25. "The statute requires the invention to be useful. The law does not say that it must be highly useful, or more useful than others; it must have some degree of utility, and that is all that is required." *Many v. Sizer et al.*, 1 Fish. P. C. 17.—SPRAGUE, 1849.

26. The superior utility of defendants' device "may rise to so high a degree as to become conclusive" of substantial difference. "From our inability to penetrate the secrets of nature, we may not be able to detect the new principle or power otherwise than by its effects. But this utility must be derived from the changes introduced—not from the use of better material or greater skill or care in the manufacture."—*Id.*

27. If the changes made by the defendants have rendered their device "one of greater utility than the plaintiff's, such utility is evidence that some new principle, or mechanical power, or new mode of operation, producing a new kind of result, has been introduced. And the greater such utility, the stronger is such evidence. And if a manifest and very high degree of utility is obtained by such changes, it becomes full proof, and conclusive, that a new principle or mechanical power, or new mode of operation, producing a new kind of result, has been introduced, and that the defendants' device 'is no infringement.'"—*Id.*

28. The issue of a patent is presumptive proof of novelty and utility in the patented thing, and the burden of proof is on defendant to overcome this presumption. *Parker v. Stiles*, 5 McLean, 44.—LEAVITT, 1849.

29. "In the absence of proof by the defendant that the thing patented is absolutely frivolous and worthless, the presumption of utility raised by the patent itself would be sufficient, so far as this point is concerned, to sustain the patent."—*Id.*

30. "The degree of usefulness or importance is not described or limited by the statute, nor is it material if it interferes with no prior right or claim and is in itself innocent." *Aiken, Herrick,*

*in re*, 1 MacArthur's P. C. 130.—CRANCH, 1850.

31. "It is not necessary in any improvement that the application to the new and useful purpose should be made by the very best apparatus that can be devised. The question does not depend on the degree of usefulness. If the application that was made of the principle operated successfully, so as to be practically useful, although it might not have been the very best, yet it was not a failure." *Foot v. Silsby et al.*, 2 Blatchford, 260.—NELSON, 1851.

32. "The question is not whether the machine invented is the best one known to the community, not whether it does its work better or faster than any other machine in the same department of labor. But if it be to a certain degree useful, and be original with the patentee, it belongs to him alone, whether it does less or more work." *Wilbur v. Beecher*, 2 Blatch. 182.—NELSON, 1850.

33. When defendants' device as compared with the patented device differs favorably and considerably in its results, "it is considered that there must be an improvement involved in it over and beyond the other, or this could not happen. So when this mode of operation is unlike the other in material respects, the author of it is not culpable." *Smith v. Downing et al.*, 1 Fish. P. C. 64.—WOODBURY, 1850.

34. "Many of the patents or inventions which have been upheld are such slight changes from former modes or machines as to be tested in their material diversity chiefly by their better results, such as the flame of gas rather than oil, the hot blast rather than the cold, charcoal used in making sugar, hot water in place of cold in making cloth," etc.—*Id.*

35. "A patent for a discovery which is manifestly frivolous cannot be sustained, and . . . it is competent for the court to declare a patent to be inoperative for such cause, when that is apparent upon the face of the specification." *Wilson v. Jones et al.*, 3 Blatchford, 227.—BETTS, 1854.

36. In "the case of a machine, the law as stated in the books is, that it is not essential to the validity of the claim that the success of the means made use of should be complete, or that the thing invented should supersede anything else used for the same purpose." *Burrows v. Wetherill*, 1 MacArthur's P. C. 315.—MORSELL, 1854.

37. The use of a patented improvement by an infringer sufficiently proves its utility as to such infringer. *Simpson v. Mad River Railroad Co.*, 6 McLean, 603.—MCLEAN, 1855.

38. A patented machine "need not be a very useful or profitable machine, but it must be capable of some use not mischievous, injurious, or immoral." *Pitts v. Wemple*, 1 Bissell, 87.—DRUMMOND, 1855.

39. The superior utility of defendant's device is not, of itself, a certain test upon the question of infringement, because defendant's device may contain the whole substance of plaintiff's and something in addition.—*Ib.*

40. "The law does not require the patentees to prove their discovery to be useful to any eminent or large degree. It is sufficient if it produces an improved article, at less than cost, or with more expedition, than other known methods; that renders the discovery useful, within the meaning of the patent laws." *Carr v. Rice*, 1 Fish. P. C. 198.—BETTS, 1856.

41. The word useful in the patent act "is used merely in contradistinction to what is frivolous or mischievous to the public." *Wintermute v. Redington*, 1 Fish. P. C. 239.—WILSON, 1856.

42. "The utility of the invention is an essential requisite to the validity of the patent. A useless invention, even if patented, is not, and never will be, of any profit to the public. But the law prescribes a rule, in applying this test to the invention. . . . It is this: Is it frivolous? Is it mischievous? Is it of any use? A general utility is not prescribed by the statute as the test of the sufficiency of the invention. The word is used in contradistinction to what is frivolous or what is mischievous to the public. New inventions in regard to some trifling article of dress, such as hoops, or crinolines, or, in the language of Judge Story, 'a new invention to poison people,' are not patentable. The one is frivolous, the other mischievous. An invention not obnoxious to these objections, whether more or less useful, if it be of *any* use, is embraced within the spirit of the law. A slight improvement of an old machine is a useful improvement. But if the alleged invention should be absolutely hurtful or injurious, it is, no improvement—it is not 'a useful invention.'" *Page v. Ferry*, 1 Fish. P. C. 298.—WILKINS, 1857.

43. "Any degree of utility appreciable by a jury is sufficient, upon the question of utility, to sustain a patent." *Conover v. Roach et al.*, 4 Fish. P. C. 12.—HALL, 1857.

44. Although a patented improvement may have utility only in rare instances, it yet has sufficient utility to support a patent. *Chandler v. Ladd*, 1 MacArthur's P. C. 493.—MORSELL, 1857.

45. An artificial but healthy compound hav-

ing the taste and appearance of honey is patentable. *Corbin, Z., & Martlett, in re*, 1 MacArthur's P. C. 521.—MORSELL, 1857.

46. "If one machine which is alleged to be an infringement of another produces a different result, or, in other words, is of greater utility than the preceding machine, it may be some evidence of a difference, a substantial difference between them; and the utility of one over the other may be so great as to be satisfactory evidence that some new principle is involved, and that it is not substantially the same. This is sometimes coupled, too, in considering the evidence with the mechanical difference. The mechanical difference may be sufficient to show that the two machines are not substantially the same. The difference of result and utility may be so great as to be satisfactory to the jury. They may be authorized to receive it as satisfactory, it is of so very high a nature. And it may be that neither of these alone would be satisfactory, yet the mechanical difference and the difference of utility taken together may be sufficient to satisfy the mind." *Johnson v. Root*, 1 Fish. P. C. 351.—SPRAGUE, 1858.

47. A use of the patented thing by defendant goes strongly to prove its utility. *Poppenhusen v. N. Y. Gutta-Percha Comb Co.*, 2 Fish. P. C. 62.—INGERSOLL, 1858.

48. If the invention was useful to some degree at the time the patent issued, that is sufficient on the point of utility. "If it has become useless since by the discovery of some other method which dispenses with it, . . . that would give no right to the defendants to use it."—*Ib.*

49. It is within the province of the Commissioner of Patents to refuse a patent for lack of utility. *Cushman, S. D., in re*, 1 MacArthur's P. C. 569.—MORSELL, 1858.

50. "There is no question but an invention must be of some utility; a patent cannot be granted for a thing altogether frivolous; but the presumption on the face of the patent is that it is of some utility, for the applicant is obliged to swear that the invention is useful before the emanation of the patent." *Hayes et al. v. Sulzor et al.*, 1 Bond, 279.—LEAVITT, 1859.

51. "If the jury are satisfied that the defendants have used the invention itself, or something substantially like it, they are estopped from denying its utility, for use implies utility, and it would be fair to presume that the party would not use it if he thought it of no utility."—*Ib.*

52. Exertions by the defendants to get possession of a patent are good evidence of the utility of the patented thing. *Livingston et al. v. Jones et al.*, 1 Fish. P. C. 521.—GRIER, 1859.

53. "The statute undoubtedly makes utility essential to the validity of a patent, and whether it exists in a particular case is to be decided by the jury upon the evidence, subject to the decision of the court upon the law. It is very familiar law that the patent itself affords *prima facie* evidence of utility. The patentee is obliged to accompany his application with his oath to the usefulness of his invention, and every patent granted is based upon the hypothesis that there is some utility. Still, it is competent for the defendant to rebut the presumption by evidence, and if he makes it appear the invention is utterly worthless, it is a good defence. In regard to this matter, however, it is very well settled that the courts will not be very rigid as to the degree of utility. It will not inquire into the precise quantum of value; but if the invention be useful in any degree, and not absolutely worthless, the patent will be sustained." *Vance v. Campbell et al.*, 1 Fish. P. C. 483.—LEAVITT, 1859.

54. "A greater degree of utility being achieved by one machine is evidence, and sometimes conclusive evidence, of novelty in the means or instrumentalities which are used." *Eames v. Cook*, 2 Fish. P. C. 146.—SPRAGUE, 1860.

55. "If an invention be both new and useful, it cannot be impeached because it does not accomplish all that a sanguine inventor has claimed for it."—*Id.*

56. "Frequent it is that the practical utility of a new invention is increased by new improvements, or by the use of old instrumentalities or appliances which the inventor has not mentioned, either because it did not occur to him or because he deemed it wholly unnecessary to point out what must be plain to every operator."—*Id.*

57. "If the jury find a substantial identity, it does not lie in the mouths of the defendants to say that the machine they use is of no utility—that is, upon the hypothesis that if there is identity, it does not become them to say that what they have appropriated is of no utility, as the mere fact that they have appropriated it is evidence that they regarded it as of utility." *Lee et al. v. Blandy et al.*, 1 Bond, 361.—LEAVITT, 1860.

58. If a tribunal is satisfied "that the invention patented produces a result decidedly and clearly different from any which had been produced by the action of any prior valve, and that it was decidedly superior to any other in its operation, it would certainly afford a ground for the presumption that the thing itself had not

been known before." *Judson v. Cope et al.*, 1 Bond, 327.—LEAVITT, 1860.

59. If the mechanism used by defendant is of greatly superior utility to that patented to the plaintiffs, it is evidence to be considered on the question of substantial identity. *Singer et al. v. Walmsley*, 1 Fish. P. C. 558.—GILES, 1860.

60. The evidence of the success and practical results of an invention goes more directly to the question of utility, but it may be taken into consideration in deciding on the novelty and originality of the invention. Practical results are more to be regarded than theory, and may be taken into consideration in a question of originality. *Judson v. Moore et al.*, 1 Bond, 285.—LEAVITT, 1860.

61. "'Useful' in the patent law is in contradistinction to 'mischievous;' the invention should be of some benefit." *Coxe v. Griggs et al.*, 1 Bissell, 362.—DRUMMOND, 1861.

62. "A presumption of the utility of an invention arises from the grant of the patent; and this presumption can only be repelled by clear proof that it is utterly worthless." *Tilghman v. Werk*, 1 Bond, 511.—LEAVITT, 1862.

63. "A small degree of utility is sufficient to support a patent." *Clark Patent Steam & Fire Regulator Co. v. Copeland*, 2 Fish. P. C. 221.—SHIPMAN, 1862.

64. A patent was granted which was afterward reissued. The court held both patents void because the alleged invention was not practically operative, and the evidence on which this finding was made was contained in the evidence presented to Congress in procuring an extension of the patent. *Union M'f'g Co. v. Lounsbury et al.*, 2 Fish. P. C. 339.—SHIPMAN, 1863.

65. "The beauty of an ornament is one great test of its utility." *Magic Ruffle Co. v. Douglas et al.*, 2 Fish. P. C. 330.—SHIPMAN, 1863.

66. Where an improvement is introduced into factories properly having a call for such improvements, and generally abandoned as useless, a patent therefor is void for lack of utility. *Dyson v. Danforth et al.*, 4 Fish. P. C. 133.—GRIER, 1865.

67. It is not material whether or not the utility of a patentee's invention is as great as he states it to be in his patent. *Chase et al. v. Walker et al.*, 3 Fish. P. C. 120.—CADWALLADER, 1866.

68. "All that the law requires is, that the invention shall not be frivolous or dangerous. It does not require any *degree* of utility; it does not exact that the subject of the patent shall be better than anything invented before, or that shall come after. The invention shall not be

frivolous ; if it is useful at all, that suffices." *Hoffheins et al. v. Brandt*, 3 Fish. P. C. 218.—GILES, 1867.

69. "The want of utility in a patented invention is a valid objection to the patent ; but it is well settled that courts will not inquire astutely into the degree or measure of its utility, and unless it appears that the invention is wholly worthless or frivolous, the patent will be sustained. It may also be pertinent to remark on this question, that the presumption of utility arising from the grant of the original patent, its extension by the Commissioner of Patents, and the long and successful use of the patented process, as in the case of novelty, requires clear and explicit proof of its inutility to justify a judgment declaring the patent void." *Whitney v. Mowry*, 2 Bond, 45.—LEAVITT, 1867.

70. The struggle of the parties in a suit, the complainant for an exclusive, and the respondents for an unrestrained right, to manufacture the patented thing in issue, "is ample evidence that it is of some utility." *Middletown Tool Co. v. Judd et al.*, 3 Fish. P. C. 141.—SHIPMAN, 1867.

71. "To warrant a patent, the invention must be useful—that is, capable of some beneficial use, in contradistinction to what is pernicious, or frivolous, or worthless." *Crompton v. Belknap Mills et al.*, 3 Fish. P. C. 536.—CLARK, 1869.

72. "Improvements for which a patent may be granted must be new and useful within the meaning of the patent law, or the patent will be void ; but the requirement of the patent act in that respect is satisfied if the combination is new and the machine is capable of being beneficially used for the purpose for which it was designed, as the law does not require that it should be of such general utility as to supersede all other inventions in practice to accomplish the same object." *Seymour v. Osborne*, 11 Wall. 516.—SUP. CT. 1870.

73. "If the patent . . . is of more or less importance, so long as it is useful, and so long as it is secured to the patentee by the laws of the United States, he is to be protected. If the patent is of small importance he is not so fortunate as the man who has made an invention of greater importance. But they are alike to be protected." *Hawes v. Gage*, 5 O. G. 494.—WOODRUFF, 1871.

74. "There are many cases in which the materiality of an invention, whether it be a machine or process, can be judged of only by its effect on the result, and this effect is tested by the actual improvement in the process of producing an article, or in the article itself introduced by

the alleged invention." *Roberts v. Dickey*, 4 Brews. 260.—STRONG, 1871.

75. The use of the patented thing by the defendant is conclusive against the defendant, on the question of utility. *Bliss v. City of Brooklyn*, 8 Blatch. 533.—BENEDICT, 1871.

76. Where an invention has proved successful in practice, it will not be adjudged to lack utility on a mere argumentative trial. *Parham v. American B. H. O. & Sewing Mach. Co. et al.*, 1 Pa. Leg. G. Rep. 145.—MCKENNAN, 1871.

77. "Utility is not an infallible test of originality. The patent law requires a thing to be new as well as useful, in order to entitle it to the protection of the statute. To be new in the sense of the act, it must be the product of original thought or inventive skill, and not a mere formal and mechanical change of what was old and well known. But the effect produced by a change is often an appropriate, though not a controlling, consideration in determining the character of the change itself." *Stanley Works v. Sargent & Co.*, 8 Blatch. 344.—SHIPMAN, 1871.

78. "The greater usefulness of a machine, the jury is entitled to consider, as a circumstance tending to show a different construction, but not conclusive, and whether the new machine is substantially different from the old must be determined upon all the evidence bearing upon the point." *Carter et al. v. Baker et al.*, 1 Sawyer, 512.—SAWYER, 1871.

79. "The patentability of an alleged invention is, in many cases, most satisfactorily shown by its utility." *Penn. Salt Mfg Co. v. Thomas*, 8 Phil. 144.—MCKENNAN, 1871.

80. "That a machine, when first applied in practice, does not perfectly accomplish the work for which it was designed, or does not accomplish all that its inventor supposed it would, is not enough to secure its rejection as a patentable invention. Correction of defects, arising from imperfect material, and not involving reorganization of the machine, will not change its fundamental character and subject it to condemnation as impracticable in its original condition. Taken as a whole, in its construction and operation, if it is an advance upon the state of the art to which it appertains, furnishing a better, though still imperfect method of performing a useful function, than was before available, it is not to be discarded as destitute of patentable merit." *Seymour et al. v. Marsh et al.*, 9 Phil. 380.—MCKENNAN, 1872.

81. Where a patented device has utility, it is not essential to the validity of the patent that the device should be useful in precisely the way



described in the patent. *Stuart et al. v. Shantz et al.*, 6 Fish. P. C. 35.—McKENNAN, 1872.

82. After issue of patent, the patentee is not bound to work under his patent in order to preserve it. *Wheeler, Jr. v. Clipper, Mower & Reaper Co.*, 10 Blatch. 181.—WOODRUFF, 1872.

83. If a machine or device cannot be reduced to practical operation and use without the aid of further invention, it is not patentable.—*Ib.*

84. A device is patentable although it may need to be applied to other known devices or instrumentalities in order to be utilized.—*Ib.*

85. "Patents for simple devices and patents for parts of machines are almost numberless, of which it may be truly said that it is only by connection with other devices or instrumentalities, to which they are intended to be applied, that they can be made to produce any result whatever. True, the patentee is bound to disclose a mode in which they may be rendered practically useful, and it may be one of many modes, and it may necessarily involve the use of many other known devices which are required in order to the useful result."—*Ib.*

86. "It is one of the embarrassments to which early inventors are constantly subjected, that other persons, availing themselves of the substance of the invention, make improvements thereon which measurably hide the merit of the original; and if the right of a patentee to protection were to be tested by the question, whether in the present state of the arts his invention [without improvement] would be deemed of any value, or be salable for use, very many authors of most important inventions would be turned out of court."—*Ib.*

87. "A machine cannot be pronounced useless or impracticable because it is susceptible of improvement which will obviate or prevent embarrassments to its most perfect operation. If it could, then it would be the duty of the courts to pronounce the patent of any machine void so soon as ordinary mechanical judgment, or even ingenuity, had suggested an improvement which made it perform its desired office more rapidly or more perfectly."—*Ib.*

88. "All the law requires as to utility is that the invention shall not be frivolous or dangerous. It does not require any degree of utility. It does not exact that the subject of the patent shall be better than anything invented before or that shall come after. If the invention is useful at all, that suffices." *Cook et al. v. Ernest et al.*, 5 Fish. P. C. 396.—WOODS, 1872.

89. "If the defendant has used the patented improvement, or something substantially like it, he is estopped from denying its utility."—*Ib.*

90. "Exaggerated statements of the utility and general capacity of the machine described in the reissues do not expose the reissues to this objection, so long as the specifications correctly describe the construction and manner of operation of the thing invented, and a practical mode of applying it." *Aultman v. Holley et al.*, 11 Blatch. 317.—WOODRUFF, 1873.

91. "If the invention is not frivolous or prejudicial to the public, and has any degree of usefulness—no matter how slight the practical utility—then, within the meaning of the law, it is useful, and consequently not void for lack of utility." *Westlake v. Cartter et al.*, 6 Fish. P. C. 519.—TREAT, 1873.

92. "When a party has patented a combination, and that combination turns out to be useless, of no practical utility, and another party adds to that combination another element, and thereby makes the whole practically useful where there was no utility before, the party who thus adds another element to the combination, which was necessary to make the proper combination of any practical utility, is not an infringer, and . . . he is not entitled merely to use his improvements, requiring first a license to use the former combination, but . . . he may use the whole of it." *Robertson v. Hill*, 6 Fish. P. C. 465.—SHEPLEY, 1873.

93. Where complainant's patent on hand-stamp mentioned generally the use of an inking-pad, and the more common inking pad would not answer, while an inking ribbon would, and such inking ribbon was known to the prior art, a sufficiency of utility was held to be present.—*Ib.*

94. "The law upon the subject of utility is not in doubt. No particular amount of utility is required to render an invention patentable, but there must be some. When an invention is shown to be worthless the patent must fail." *Bliss v. City of Brooklyn*, 10 Blatch. 521.—BENEDICT, 1873.

95. "An added element which increases the efficiency of a combination, of itself effective, is of the nature of an improvement; but when the added element is essential to the production of any useful result, such an addition is not an improvement, but its use gives birth to the only patentable, because the first useful, combination."—*Ib.*

96. It is of no avail to attack complainant's patent on the ground of lack of utility, when defendants use the same device extensively. *Robertson v. Garrett et al.*, 10 Blatch. 490.—BLATCHFORD, 1873.

97. The utility, and hence the patentability of

a new combination, is shown by extensive demand, for use, thereof. *Robertson v. Secombe Mfg Co.*, 10 Blatch. 481. — BLATCHFORD, 1873.

98. "Utility in most cases is a question of fact, as it usually depends upon the evidence resulting from actual experiment. There are two modes . . . in which the utility of an invention may be impeached, the second of which is where it appears that it is not capable of being used to effect the object proposed." *Mitchell v. Tighman*, 19 Wall. 287.—SUP. CT. 1873.

99. Neither an invention which will not enable the operator to accomplish the desired result, nor one which constantly exposes the operator to the loss of his life, or to great bodily harm, can be regarded as useful within the meaning of the patent law.—*Id.*

100. The utility of a patented process is not proved by proving the completeness and utility of a different process.—*Id.*

101. "Slight differences in degree cannot be regarded as of weight in determining the question of substantial similarity or substantial difference, but in all cases the question whether the difference in degree is sufficient or insufficient to prove the alleged infringement is a question of fact, to be determined by the jury in an action at law, or by the court in a suit in equity."—*Id.*

102. "The fact that defendant prefers to use the mechanism patented to complainant is evidence that there is sufficient utility in the invention to support a patent." *Smith v. Glendale Elastic Fabrics Co.*, 1 Holmes, 340.—SHEPLEY, 1874.

103. The question as to whether an improvement "is useful, in the sense of the law, is not whether it is not mischievous, or hurtful, or frivolous, or insignificant, but whether it is capable of use for a purpose from which some advantage can be derived. If it be useful in this sense, the degree or extent of its usefulness is altogether unimportant! It is not necessary, in other words, that it should be the best means of producing a desirable result, but a means, although inferior to others, of producing it." *Crouch v. Speer et al.*, 1 Bann. & Ard. 145.—NIXON, 1874.

104. "The superiority of an alleged invention in utility and effect over what has gone before it is proof tending to establish the fact of novelty." *Birdsall v. McDonald et al.*, 1 Bann. & Ard. 165.—SWAYNE & WELKER, 1874.

105. A large volume of litigation with reference to a patent is perhaps the best evidence that can be had of the value of the patented im-

provement. *Wells v. Jacques et al.*, 1 Bann. & Ard. 60.—MCKENNAN & NIXON, 1874.

106. "Useless inventions are not ordinarily infringed; or, if they are, not enough interest is involved in them to induce the owners to spend their money and time in protecting them against the infringement."—*Id.*

107. "An improvement, in order that it may be patentable, must be new and useful; but if it be useful, even in a small degree, it is not usual for the court to reverse the decision of the Patent Office in that regard." *Doherty v. Haynes*, 4 Cliff. 291.—CLIFFORD, 1874.

108. When an improvement produces a great change in the art to which it appertains, that goes far to prove patentable novelty. *Andrews et al. v. Carman*, 13 Blatch. 307.—BENEDICT, 1876.

109. "The popular demand for an article is, in the long run, the best test of utility." *Turrel v. Spaeth*, 3 Bann. & Ard. 458.—NIXON, 1878.

110. "Chewing gum may have its use, in the social economy, as a substitute for a greater evil or folly. The degree of utility is not a question. The law only requires that it shall be capable of some use, and that the use is not prohibited by sound morals or public policy." *Adams v. Loft*, 4 Bann. & Ard. 495.—NIXON, 1879.

111. "While the value and utility of a device, and the fact that it has superseded others previously employed for analogous uses, is undoubtedly entitled to weight in considering the question of patentability, it is, after all, a somewhat uncertain criterion. If the device be, in fact, novel, it furnishes an additional reason why the inventor should receive the reward of his ingenuity; but if it involved no exercise of the inventive faculty, its very utility is an aggravation of the wrong done by the patentees in seizing and appropriating that which properly belongs to the public." *Phillips et al. v. City of Detroit*, 4 Bann. & Ard. 347.—BROWN, 1879.

112. In the drawings of a patent on grain separator, the deflector was shown so near the shaker that it could not operate if so made in practice. The court held the device to be "inoperative and without value." *Royer v. Russell & Co.*, 9 Fed. Rep. 696.—WHEELER, 1881.

113. "The statutes do not require inventions to be superior to or better than all other things known to be patentable. It is sufficient if they are useful in themselves, if they are also new." *Shaw v. Colwell Lead Co.*, 20 Blatch. 417.—WHEELER, 1882.

114. It is useless for defendants to maintain that complainant's device is not useful, so long

as he makes use of it. *Foye v. Nichols et al.*, 8 Sawyer, 201.—SAWYER, 1882.

115. By the court: "Was the invention useful within the meaning of the statute? In order to answer the question in favor of the defendant, it must be determined that it possessed no utility whatever. If it was useful in any degree, no matter how infinitesimal, the court would not be justified in declaring the patent void." This is true even if older processes be better than the patented process. *Gibbs v. Hoefner et al.*, 22 Blatch. 36.—COXE, 1884.

116. The utility of an invention cannot be attacked by him who has used it. *Palmer v. United States*, 19 Nott & Hopkins's C. C. 669.—NOTT, 1884.

117. It is not fatal to a patent that the inventor in it may, perhaps, have overrated the importance of some of the elements of his method and underrated others. *Graham Adm'r et al. v. Johnston et al.*, 21 Fed. Rep. 40.—MORRIS, 1884.

118. Where a patented improvement is apparently obvious, but its utility is positive, and the thing was not devised until after a very considerable length of time and trial, that fact is conclusive of the exercise of inventive genius. *Phillips et al. v. Carroll et al.*, 23 Fed. Rep. 249.—ARCHISON, 1885.

119. An alleged lack of utility in a patented device, made by defendants who use it, cannot find much favor with the courts.—*Id.*

120. "Increased utility beyond what had been attained by devices previously in use, in cases of doubt, is usually regarded as determining the question of invention." *Hollister, Collector v. Benedict & Burnham Mfg Co.*, 113 U. S. 59.—SUP. CT. 1884.

121. Where it is doubtful whether an alleged improvement embodies invention, the fact that it is of great utility is fair matter for consideration in determining the fact of patentability. And where the comparison of the improvement with its predecessors shows it to have been the

successful thing, that is conclusive evidence of patentability. *Washburn & Moen Mfg Co. et al. v. Grinnell Wire Co. et al.*, 24 Fed. Rep. 23.—BREWER, 1885.

122. Complainant's patented machine never came into the market. Defendants contended that the patent was void for want of utility. In view of the fact that the patented machine was shown to be practically operative, the patent was sustained. *Nat'l Hat Pouncing Mach. Co. v. Thom. et al.*, 25 Fed. Rep. 496.—COLT, 1885.

123. So long as defendants appreciate complainant's invention, it does not lie in their mouths to dispute the utility thereof. *Adams & Westlake Mfg Co. v. Rathbone et al.*, 26 Fed. Rep. 262.—BLDGGETT, 1886.

124. "While it is true that the utility of a machine, instrument, or contrivance, as shown by the general public demand for it when made known, is not conclusive evidence of novelty and invention, it is, nevertheless, highly persuasive in that direction, and, in the absence of pretty conclusive evidence to the contrary, will generally exercise controlling influence." *Hill v. Biddle et al.*, 27 Fed. Rep. 560.—BUTLER, 1886.

125. "A thing which is useless can have no utility whatever. A patent is never declared invalid upon this ground at the instance of one who is deriving benefit by infringing upon its claims." *La Rue v. Western Electric Co.*, 31 Fed. Rep. 80.—COXE, 1887.

126. "The first question which presents itself when the defendants attack the utility of the patent in suit is, 'Then why did you use it?' This mode of attacking a patent can never succeed, without showing, by the clearest evidence, that the invention claimed is utterly frivolous and worthless, and the fact that the defendant has used it, and infringed the patent, is always a strong *argumentum ad hominem* against him." *Kearney et al. v. Lehigh Valley R. R. Co.*, 32 Fed. Rep. 320.—BRADLEY, 1887.

## WRIT OF ERROR.

(COMPRISED UNDER "APPEAL.")



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